Trade Practices Act
Review Committee

Report to The Minister for
Business and Consumer Affairs

August 1976

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DEPARTMENT OF BUSINESS AND CONSUMER AFFAIRS

TRADE PRACTICES ACT REVIEW COMMITTEE

CANBERRA. A.C.T. 2600
TELEPHONE:
Reply to 'The Secretary'

Quote

20th August, 1976

Dear Mr. Howard,

We have the honour to present our report and recommendations.

The Committee wishes to mention particularly the thoughtful and well researched nature of the submissions we received. The wealth of this material, combined with the very strict time limits within which we had to work, made our task very difficult. We do not suggest however that a longer study would have changed our recommendations.

We express our thanks to all who assisted in the preparation of the report.

Yours faithfully,

T.B. Swanson,
Chairman.

J.A. Davidson,
Member.

A.M. Kerr,
Member.

A.G. Hartnell,
Member.

H.S. Schreiber,
Member.

The Hon. John Howard, M.P.
Minister for Business and Consumer Affairs,
Parliament House,
CANBERRA A.C.T. 2600

CHAPTER 1

INTRODUCTION

1.1 On 1 April 1976, the Minister for Business and Consumer Affairs, the Honourable John Howard, M.P., announced in Parliament the establishment, terms of reference and composition of this Committee.

Terms of Reference

1.2 The terms of reference of the Committee were as follows:

1. The Committee shall consider the operation and effect of the Act, not including Part X, and report to the Minister for Business and Consumer Affairs, on
   (a) whether the Act is achieving its intended purpose of the development and maintenance of a free and fair market, and whether Australian consumers are benefiting from the Act;
   (b) whether the Act is causing unintended difficulties or unnecessary costs to the Australian public, including Australian business;
   (c) whether in the current economic circumstances of Australia the operation of any part of the Act inhibits, or is likely to inhibit, economic recovery, contrary to the economic objectives of the Government; and
   (d) the measures open to the Government, by way of amendment of the Act or otherwise, to improve the operation of the Act in the light of (a), (b) and (c) above.
2. The Committee should pay particular attention to the need to ensure that the Trade Practices Act is sufficiently certain in its language to enable persons affected by it to understand its operation and effect so as to be reasonably able to comply with its obligations in the ordinary course of business.
3. The Committee is asked to report on the effect of the Act on small businesses and to assess whether small businesses could and should be accorded special treatment by the Act.
4. In considering the operation of the substantive prohibitions of the Act relating to restrictive trade practices, the Committee is asked to give close attention to the sections dealing with exclusive dealing, price discrimination and mergers, and particularly—
   (a) whether it is desirable for the Act to contain a prohibition relating to anti-competitive mergers and, if it is, what form that prohibition should take; further, if there is to be such a prohibition, whether it would be appropriate to make special provision for mergers involving failing companies and whether it would be appropriate and practicable to exclude mergers involving small companies, possibly by a threshold test; and
   (b) whether, in relation to price discrimination, it is appropriate for the Act to have regard to anti-competitive effects in the market of the buyers subject to a discrimination in price, or in any other markets other than the market of the seller.
5. The Committee is requested to give particular attention to the application of the Act to anti-competitive conduct by employees, and employee or employer organisations.
6. In its consideration of the provisions of the Act dealing with consumer protection, the Committee is asked to give attention to any particular problems arising from the inter-relationship with State laws.
7. The Committee is requested to report by 30 June 1976.

The Review Committee—Membership and Staff

1.3 The Review Committee was comprised of:

Mr T. B. Swanson (Chairman)—formerly Deputy Chairman of Imperial Chemical Industries of Australia and New Zealand, formerly Chairman, Commission on Advanced Education;

Mr J. A. Davidson—Managing Director, The Commonwealth Industrial Gases Ltd.;

Mr A. G. Hartnell—Senior Assistant Secretary, Department of Business and Consumer Affairs;

Professor A. Kerr—Professor of Economics, Murdoch University, Perth—until recently Chairman of the Consumer Affairs Council of Western Australia;

Mr H. S. Schreiber—Solicitor, Sydney;

1.4 In addition, the Government appointed *Mr J. V. McKeown*, First Assistant Commissioner in the Trade Practices Commission, as a Consultant to the Committee. The Committee wishes to acknowledge the very substantial assistance afforded us by our Consultant.

1.5 The Department of Business and Consumer Affairs also made available the following professional staff to assist the Committee: Miss Dorothy Davies (who was Secretary of the Committee), Mr Derek Lambert, Mr Peter McGonigal, Mr Allan Ross and Mr Stephen Skehill. Each is qualified in either or both economics and law. The Committee would like to express its gratitude to these persons for their invaluable assistance in the preparation of this report, and also to the persons who provided assistance with essential clerical, typing and photocopying support work for the Committee.

Method Adopted by Committee

1.6 The Committee sought to obtain information and views on the Act and its operation from as wide a cross-section of persons and organisations as possible. We advertised to that effect in major daily newspapers in all States of Australia. We also wrote to 138 organisations seeking submissions to the Review Committee, including organisations representing all aspects of industry and commerce, employer and employee organisations, professional organisations, consumer organisations, Commonwealth and State Governments, universities and colleges of advanced education.

1.7 We gave assurances to all persons and organisations submitting information and views to the Committee that their submissions would be confidential to the Committee. We felt this assurance was necessary to ensure that full and frank views were put to the Committee. For this reason we do not identify specifically in this report the views of any particular person or organisation, nor do we list anywhere in the report the names of persons or organisations who made submissions to us.

1.8 We should note however that the Committee received a total of 212 submissions, many of them long and detailed. They were received from all sectors of the community ranging from large manufacturing, financial and trading corporations to very small business enterprises; from the major consumer organisations to the individual consumer. Submissions also came from employer and employee organisations, trade and professional associations, State and Federal Government departments and instrumentalities, and tertiary institutions.

1.9 The contents of submissions, other than those received very late, were thoroughly canvassed in our deliberations. Two detailed procedures were adopted to ensure that all points of view expressed to the Committee were considered. The first involved the recording of the viewpoint expressed on each specific topic or section, from every submission. The other involved the extracting from submissions of all technical amendments suggested therein. In this way all information relevant for discussion and decision making on each topic was readily accessible to the Committee when the various topics were being considered. We wish to assure the Minister that although all points raised in the submissions may not be canvassed in the report, they were the subject of consideration by the Committee.

1.10 As will be reflected in this report, the Committee obtained a great deal of information and ideas from the submissions put to us. We wish to take this opportunity to thank all who took the trouble to contribute to the Committee's deliberations in this manner.

1.11 The Committee also sought information and views relevant to the review from a number of other sources, in particular:

(1) the Committee studied relevant articles and other material on the present and previous Australian trade practices legislation, and material on trade practices and consumer protection legislation in other countries;
(2) the Committee attended, as observers, a seminar on the Trade Practices Act, sponsored by the law faculty of Monash University, in Ballarat from 14 to 17 May 1976, which brought together many leading Australian commentators on the Act from business, government, the legal profession and the law and economics faculties of universities;
(3) both Mr R. M. Bannerman, the Chairman of the Trade Practices Commission and Professor Glen Weston, a visiting expert on the anti-trust laws of the United States, met the Committee at its request;
(4) two members of the Committee had discussions with representatives of a Committee on Consumer Credit Law, which is working under the aegis of the Standing Committee of Attorneys-General, on areas of mutual interest relevant to consumer protection; and
(5) a member of the Committee had discussions with representatives of the Commonwealth Small Business Bureau.

Timing of the Report

1.12 Our terms of reference requested us to report to the Minister by 30 June 1976. We found this an impossible task in the light of the voluminous submissions made to us on the Act. We discussed this problem with the Minister as soon as it became apparent and he granted the Committee an appropriate extension of time.

CHAPTER 2

TERMS OF REFERENCE

2.1 The Committee discusses the detail of the Act and its operation, subject by subject, in Chapters 4 to 11 of this report. In this chapter we address ourselves specifically to the terms of reference of the Committee.

2.2 *Term of Reference 1(a)*

> Whether the Act is achieving its intended purpose of the development and maintenance of a free and fair market, and whether Australian consumers are benefiting from the Act.

2.3 Of the submissions that directed attention to the first part of this term of reference, the majority felt that the Act is achieving, at least in part, the development and maintenance of a free and fair market in Australia. However, it must be stated that only a few submissions discussed this question. Most comments tended to direct attention to those Parts and/or sections of the Act which the authors found objectionable and in need of revocation, revision or more clarity of expression.

2.4 The Committee is aware that the Act has been in operation only since October 1974 and has since then affected a great many practices previously held, by the businesses concerned, to be legitimate and appropriate to the Australian market. The relevant confusion, upset and in some cases resentment, has tended to direct attention to particular problems of the Act rather than its broad effect.

2.5 In the context of the first part of this term of reference, one section of the Act should be particularly mentioned, namely section 49 (price discrimination). The majority of submissions which discussed the point considered that section 49 was operating contrary to the intended purpose of the Act, was resulting in increased prices, and was in fact, contrary to design, harmful to small business and the consumer. The Committee discusses section 49 in Chapter 7 of this report, where we recommend repeal of the present section.

2.6 The second part of this term of reference—whether Australian consumers are benefiting from the Act—was the subject of more comment in submissions than the first part, particularly from consumers and consumer organisations. From these submissions there is little doubt that consumers feel they have gained substantial benefit from the Act, particularly from Part V.

2.7 *Term of Reference 1(b)*

> Whether the Act is causing unintended difficulties or unnecessary cost to the Australian public, including Australian business.

2.8 Many submissions felt that unnecessary costs flowed from the alleged uncertainty as to the meaning of the Act in key respects. The Committee has considered, in the following chapters, major areas of uncertainty in the Act, and has made recommendations which we consider will alleviate many of these problems. We consider that some criticism of the Act, as to the uncertainty of its meaning in certain respects, was fair criticism. However, we believe that to search for absolute certainty in a statute of this nature can be counter-productive.

2.9 In addition, we feel that there have been both unintended difficulties and unnecessary costs flowing from the present procedures for clearance and authorisation. In Chapter 11, we discuss these matters in detail. There we recommend total

abolition of the clearance procedure except for merger clearance, and substantial restructuring of the test for authorisation.

2.10 Finally we should note our belief that many but not all of the costs to which we have been referred have been costs of a "once only" nature—usually legal professional costs—associated with the process of becoming familiar with the legislation and ordering affairs to fit with its rules. These costs will, of course, tend to fall, the longer the Act is in operation and more fully understood.

2.11 *Term of Reference 1(c)*

> Whether in the current economic circumstances of Australia the operation of any part of the Act inhibits or is likely to inhibit, economic recovery, contrary to the economic objectives of the Government.

2.12 This term of reference probably posed the most difficult question on which to form an opinion. A main purpose of an Act such as the Trade Practices Act is to bring about a competitive approach to methods of conducting business. This is an objective which relates more to long-term economic and social goals and should be examined in that context.

2.13 We have concluded that, in relation to the short-term economic objectives of the Government, as we understand them, the Act is not a significant factor inhibiting economic recovery. However we believe that uncertainties of interpretation are causing some difficulties that may reinforce hesitancy in market innovation. We hope that our recommendations in the following chapters will overcome much of these uncertainties. Further, it will be seen in the following chapters that in certain respects we consider the Act should be given a different direction.

2.14 *Term of Reference 1(d)*

> The measures open to the Government, by way of amendment to the Act or otherwise, to improve the operation of the Act in the light of (a), (b) and (c) above.

2.15 The Committee has, in Chapters 3 to 11 following, made numerous recommendations for amendment to the Act, in the context of a discussion on particular sections of the Act and related topics. In addition, we have included a Finding Guide to Certain Recommendations as an Appendix.

2.16 *Term of Reference 2*

> The Committee should pay particular attention to the need to ensure that the Trade Practices Act is sufficiently certain in its language to enable persons affected by it to understand its operation and effect so as to be reasonably able to comply with its obligations in the ordinary course of business.

2.17 As has already been indicated, the alleged lack of certainty in the legislation, or key parts thereof, was often put to the Committee. We have spent a significant part of our time examining all such problems put to us and have sought to deal with them in the following chapters. This has perhaps required the Committee to deal with questions of legal interpretation of the present Act more than it otherwise may have done but we felt, in light of term of reference 2, that this was a matter to which the Government wished us to give close attention in addition to broader issues raised by the legislation.

2.18 *Term of Reference 3*

> The Committee is asked to report on the effect of the Act on small businesses and to assess whether small business could and should be awarded special treatment by the Act.

2.19 We discuss the general question of the application of the Act to small business in Chapter 10 (see paragraphs 10.36 to 10.57). We there state our view that while the Act

in most respects has probably operated to assist small business, we can see room for improvement in certain areas. We do not, however, favour suggestions that small business be given broad exemptions from the Act in so far as it affects their own marketing arrangements. Important areas where we have recommended important changes which we believe will further assist small business are in relation to the competition test for recommended prices (Chapter 4), to termination of franchise agreements (Chapter 5) and to threshold tests for mergers (Chapter 8).

2.20 *Term of Reference 4(a)*

> Whether it is desirable for the Act to contain a prohibition relating to anti-competitive mergers and, if it is, what form that prohibition should take; further, if there is to be such a prohibition, whether it would be appropriate to make special provision for mergers involving failing companies and whether it would be appropriate and practicable to exclude mergers involving small companies, possibly by a threshold test.

2.21 We consider that it is desirable for the Act to deal with anti-competitive mergers. This question, and the form any prohibition should take, is discussed in Chapter 8 (paragraphs 8.5 to 8.12). We also recommend special provision for mergers involving failing companies (paragraphs 8.21 to 8.24) and a threshold test for mergers involving small companies (paragraphs 8.25 to 8.34).

2.22 *Term of Reference 4(b)*

> Whether, in relation to price dscrimination, it is appropriate for the Act to have regard to anti-competitive effects in the market of the buyers subject to a dscrimination in price, or in any other markets other than the market of the seller.

2.23 The Committee discusses the issue of a law against price discrimination, such as is currently provided by section 49 of the Act, in Chapter 7. We there conclude that it is desirable to repeal section 49 in its entirety.

2.24 *Term of Reference 5*

> The Committee is requested to give particular attention to the application of the Act to anti-competitive conduct by employees, and employee or employer organisations.

2.25 We discuss this issue in Chapter 10, paragraphs 10.7 to 10.22. In our view, the Act should continue to apply as at present to anti-competitive conduct by employer organisations. With respect to such conduct by employees and employee organisations (which at present have a much wider exception than is afforded employer organisations) we recommend that the Government take steps to deal with certain problems raised by the action of secondary boycotts (see paragraphs 10.14 to 10.20), and with collusion between organisations of employees and any other person (being engaged in trade or commerce) which results in a substantial lessening of competition.

2.26 *Term of Reference 6*

> In its consideration of the provisions of the Act dealing with consumer protection, the Committee is asked to give attention to any particular problems arising from the inter-relationship with State laws.

2.27 The Committee considers that the inter-relationship of Part V of the Act with State laws is a major question which is potentially a significant source of confusion in the law on consumer protection. We discuss this matter in Chapter 9, paragraphs 9.8 to 9.37. We do not favour the Commonwealth vacating this legislation in favour of the States. With respect to the laws on conditions and warranties to be implied into consumer transactions, we consider the Commonwealth should generally seek to cover the field so far as it is able. With respect to other consumer laws, we recommend Commonwealth/State co-operation on the substance of these laws. Further we recommend that State authorities and courts be given authority to deal with matters arising under the Commonwealth Trade Practices Act.

CHAPTER 3

HISTORY OF AUSTRALIAN TRADE PRACTICES REGULATION

The History of the Legislation

3.1 The Commonwealth has had legislation dealing with restrictive trade practices almost since the time of federation. The following is a brief outline of the history of that legislation. No attempt has been made to examine the detail of the legislation nor to trace developments in relation to restrictive trade practices in the field of overseas cargo shipping, a matter which is outside the terms of reference of this Committee. Finally, no attempt has been made to deal with the history of State legislation in this area.

Australian Industries Preservation Act 1906

3.2 The Commonwealth Government entered the field of restrictive trade practices in 1906 with the enactment of the Australian Industries Preservation Act. That Act, being influenced largely by the U.S. Sherman Act of 1890, adopted a proscriptive approach. Sections 4 and 7 prohibited combinations and monopolies relating to trade or commerce with other countries and among the States. Sections 5 and 8 prohibited combinations in restraint of trade or commerce engaged in by foreign corporations or trading or financial corporations formed within the limits of the Commonwealth.

3.3 As the Australian Constitution does not give the Commonwealth Parliament an express head of power relating to restrictive trade practices, the Act relied for the most part upon the trade and commerce power (section 51(1)) and the corporations power (section 51(XX)).

3.4 In 1909, sections 5 and 8 of the Act were declared invalid by the High Court of Australia, as being beyond the constitutional power of the Commonwealth—*Huddart Parker & Co. Pty. Ltd.* v. *Moorehead* (1909) 8 CLR 330.

3.5 In 1913, the Privy Council, in the case of *Attorney-General of the Commonwealth* v. *The Adelaide Steamship Co. Ltd.* (1913) 18 CLR 30, held that in order for an offence to be committed under the Act, it was necessary to establish a specific intent to injure the public. As the necessary intent was not proved in that case, the action by the Commonwealth failed.

3.6 The Act was amended in 1906, 1907, 1909, 1910 and 1930. The Act was repealed in 1965 after a relatively ineffectual lifespan of 60 years.

Trade Practices Act 1965

3.7 Moves towards a new approach for dealing with restrictive trade practices gained momentum in the early sixties. Apart from conducting a review of comparative overseas legislation (notably U.S.A. and U.K.) the Commonwealth Government considered the findings of various bodies of enquiry including the then Tariff Board, the Royal Commission on Restrictive Trade Practices (W.A.) 1958 and the Royal Commissioner on Prices and Restrictive Trade Practices (Tasmania) 1965.

3.8 In 1965, the proscriptive approach of the Australian Industries Preservation Act was replaced by a prescriptive formula along the lines of the U.K. Restrictive Trade Practices Act 1956. The preamble to the Australian *Trade Practices Act* 1965 read as follows: "To preserve Competition in Australian Trade and Commerce to the extent required by the Public Interest".

3.9 Apart from collusive tendering and bidding, and later resale price maintenance, there were no absolute prohibitions in the *Trade Practices Act* 1965, as in the earlier legislation. The Act made five categories of agreements and four types of practices examinable. The agreements, but not the practices, were to be registered with a Commissioner of Trade Practices. Non-registration constituted an offence. The Register of Trade Agreements was not open for public inspection.

3.10 Agreements made examinable by section 35 of the Act were those between competing businesses where at least one of the parties accepted a restriction on his freedom to compete, the restriction being one or more of five specified in section 35 which covered:

- terms and conditions of trade (including prices);
- concessions or benefits including allowances, discounts, rebates and credit given or allowed in the course of trade;
- restrictions as to quantity or quality of output or stocks;
- market zoning arrangements;
- restrictions as to the persons or classes of persons to be dealt with.

3.11 Practices made examinable by sections 36 and 37 of the Act were:

- obtaining, or attempting to obtain, by threats or promises terms as to price, or other matters or conditions, a discrimination or more favourable treatment in connection with the supply of goods;
- requiring, as a condition of supply of goods or services to another person that the purchaser deal with a third person;
- a trade association or other group of persons acting in concert to induce a person carrying on a business to refuse to deal with a third person;
- monopolisation.

3.12 The Commissioner of Trade Practices was empowered to examine such agreements and practices to ascertain whether they were, in his opinion, contrary to the public interest.

3.13 If the Commissioner concluded that the agreement or practice was contrary to the public interest, he was required to consult with the relevant parties with a view to obviating the need for further proceedings. If the consultative process failed to achieve its objective the Commissioner could refer the matter to the Trade Practices Tribunal. The Tribunal was then required to consider whether or not the agreement or practice was "examinable" within the context of the Act and, if so, whether or not it was contrary to the public interest. In such a case the Tribunal was empowered to make an appropriate restraining order.

3.14 Only the Commissioner could bring matters before the Tribunal. However, the Attorney-General could direct the Commissioner to investigate examinable agreements and practices in order to ascertain whether there were any grounds for bringing the matter before the Tribunal, but he had no power to order the institution or non-institution of proceedings by the Commissioner, nor could he himself institute proceedings.

3.15 The Commonwealth Industrial Court settled questions of law referred to it by the Tribunal. It also dealt with prosecutions for offences under the Act and proceedings for contempt of the Tribunal, neither of which could be brought without the consent of the Attorney-General. Jurisdiction was also conferred upon the Court to hear actions for damages brought by private individuals.

3.16 Collusive tendering and bidding were prohibited, except where such conduct was engaged in pursuant to an agreement of which full particulars were contained in the register and in respect of which no restraining order had issued from the Tribunal.

3.17 By amendment to the Act in 1971 the practice of resale price maintenance was prohibited. However, it was possible to obtain an exemption from this prohibition, for particular goods, if the Tribunal determined that such an exemption was appropriate, having regard to factors enumerated by the Act.

3.18 The Act did not control mergers at all nor did it deal generally with price discrimination or exclusive dealing. Neither were there any consumer protection provisions.

3.19 In 1970, in *R* v. *Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd*, (1970) 123 CLR 361, the High Court held that, in the exercise of its functions under the Act, the Tribunal did not exercise the judicial power of the Commonwealth and accordingly the activities of the Tribunal could not be challenged on the constitutional argument that the Tribunal improperly discharged the judicial powers of the Commonwealth.

3.20 In 1971, the Act was again before the High Court in *Strickland* v. *Rocla Concrete Pipes Ltd* (1971) 124 CLR 468. This case involved a further consideration of the constitutional basis of the legislation. Section 7 had attempted to relate the substantive requirements of the Act to a number of constitutional heads of power. That section was widely drafted and the High Court declined to read the section distributively by reference to section 15A of the *Acts Interpretation Act* 1901. In the course of its judgment however, the Court confirmed the power of the Commonwealth to legislate with respect to foreign corporations and trading or financial corporations formed within the limits of the Commonwealth, whether engaged in interstate or intrastate trade.

Restrictive Trade Practices Act 1971

3.21 As a result of the decision in *Strickland* v. *Rocla Concrete Pipes Ltd* the substance of the legislation was re-enacted in reliance upon the corporations head of power as the *Restrictive Trade Practices Act* 1971.

3.22 In October 1972 the Government introduced two bills into Parliament; the Restrictive Trade Practices Bill (No. 2) 1972, which proposed a number of amendments to the existing legislation, and the Monopolies Commission Bill 1972 which proposed a separate authority to deal with monopoly. Following the change in government in December 1972 these bills lapsed.

Trade Practices Act 1974

3.23 A major public criticism of the Trade Practices Act 1965 and its related successors was that it was inefficient; its procedures were slow and costly and, until the appropriate restraining order was issued by the Tribunal, the examinable agreement or practice remained operative.

3.24 In September 1973 the Government introduced the Trade Practices Bill 1973 which adopted a general proscriptive approach to restrictive trade agreements and practices, thus moving away from the case-by-case approach.

3.25 The Trade Practices Bill 1973, following significant amendment, formed the basis of the present Act, the *Trade Practices Act* 1974, which was enacted in August 1974. That Act came into operation in large part on 1 October 1974 and, with one

exception, the remaining provisions came into operation on 1 February 1975. The exception, section 55, came into operation on 27 September 1975.

3.26 The Constitutional basis of the Act is chiefly the corporations power (section 51(XX)). However, the Act also relies on the trade and commerce, territories, postal and telegraphic services, banking, insurance, external affairs and incidental powers as well as the power with respect to dealings with the Commonwealth.

3.27 Part IV of the Act deals with restrictive trade practices; Part V deals with consumer protection.

3.28 Part IV of the Act covers the following:

- contracts, arrangements and understandings in restraint of trade or commerce; (section 45)
- monopolisation; (section 46)
- exclusive dealing; (section 47)
- resale price maintenance; (section 48)
- price discrimination; (section 49)
- mergers (section 50).

3.29 Part V of the Act dealing with consumer protection is divided into two divisions. Division 1 prohibits the following practices:

- misleading or deceptive conduct; (section 52)
- false representations; (section 53)
- deceptive offering of prizes in connection with the promotion of goods or services; (section 54)
- misleading conduct in respect of matters to which the Industrial Property Convention applies; (section 55)
- bait advertising; (section 56)
- referral selling; (section 57)
- accepting payment without intending to supply as ordered; (section 58)
- misleading statements about home operated businesses; (section 59)
- coercion at place of residence; (section 60)
- pyramid selling; (section 61)
- supplying products which do not conform with a safety standard promulgated under the Act; (section 62)
- supplying products without disclosing the information required by a product information standard promulgated under the Act; (section 63)
- inertia selling (section 64).

3.30 Division 2 of Part V relates to conditions and warranties which apply to and are incapable of exclusion from consumer transactions, namely:

- implied conditions and warranties relating to title encumbrances and quiet possession; (section 69)
- implied condition that goods correspond with the description by which they are sold. This applies even where goods are sold by sample as well as by description; (section 70)
- implied condition as to merchantable quality and fitness for purpose; (section 71)
- implied condition that goods supplied by sample correspond with the sample in quality; (section 72)
- a warranty that specified services will be rendered with due care and skill (section 74).

3.31 Jurisdiction in respect of offences under the Act is again conferred upon the Australian Industrial Court, but in addition that Court also has a wide civil jurisdiction in relation to matters arising under the Act. Contraventions of Part IV are subject to pecuniary penalties up to $50 000 for individuals and up to $250 000 for corporations. Additionally, in relation to section 50 (mergers) the Court may order divestiture of shares and assets. Contraventions of Part V, other than offences against section 52, are punishable by fines up to $10 000 or six months imprisonment for individuals and fines up to $50 000 for corporations. The Court also has the general power to issue injunctions and order damages in appropriate cases.

3.32 The Act established an independent statutory authority, the Trade Practices Commission, which currently comprises a Chairman and five other members. The Commission replaces the former office of the Commissioner of Trade Practices. The Commission has a responsibility for the general administration of the legislation including the determination of applications for authorisation and clearance, and proceedings in respect of contraventions of Part IV and Division 1 of Part V. The Minister responsible for the Act, and in many cases affected persons also, have the power to commence proceedings under the Act. However, no prosecution for an offence under the Act may be instituted without the consent of the Minister. Other powers of the Commission include:

- the issuing of guidelines;
- advising the Minister on federal consumer protection laws;
- researching consumer protection matters;
- the dissemination of information;
- advising consumers of their rights and obligations under the Act.

3.33 The Trade Practices Tribunal remains in existence with the function of hearing appeals in relation to authorisation decisions of the Commission.

3.34 The Act provides for clearance and authorisation of certain restrictive trade practices. A grant of a clearance or authorisation provides immunity from liability under the Act. Clearance is available when the effect on competition of the relevant conduct falls below the threshold levels adopted by the Act. Authorisation is available where the Commission is satisfied that the relevant conduct results, or is likely to result, in a substantial benefit to the public not otherwise available and that in all the circumstances the granting of the authorisation is justified. Types of conduct in respect of which clearance and authorisation may be available are:

- contracts, arrangements or understandings in restraint of trade (except certain price fixing arrangements); (section 45)
- exclusive dealing; (section 47) and
- mergers (section 50).

The Commission also has power to issue an interim authorisation.

3.35 Section 170 of the Act provides for legal aid to be granted to a person in connection with proceedings before the Commission, the Tribunal or the Australian Industrial Court. The application must be approved by the Attorney-General and such approval will be given only where the Attorney-General is satisfied that it would involve hardship to the applicant to refuse legal aid and that, in all the circumstances, it is reasonable that the application should be granted.

Amendments to the Trade Practices Act 1974

3.36 In 1975, the Trade Practices Act was amended in certain technical respects but importantly also to prohibit the sending of unsolicited credit cards.

3.37 In 1976, the Government introduced into Parliament legislation to amend the Act further. That Bill, the Trade Practices Amendment Bill 1976, is still before Parliament. The major amendment to be made by that Bill is to allow the Australian Industrial Court to make declaratory judgments and issue prerogative writs in matters arising under the Act.

CHAPTER 4

SECTIONS 45 AND 47 AGREEMENTS IN RESTRAINT OF TRADE AND CERTAIN VERTICAL PRACTICES

Preface—'Competition' in Part IV

4.0 A basic feature of the philosophy underlying Part IV of this Act (sections 45 to 50) is the concept of 'competition'. The Act does not define 'competition' nor do we consider that it could be successfully defined within a set of strict legal rules without substantial loss of many of the dynamic features of the concept. However, the concept is so central to our consideration that we should give an explanation of what we feel 'competition' means in a modern economy. We believe that the following recent statement by the Trade Practices Tribunal appropriately analyses the concept.

> . . . 'competition' is such a very rich concept (containing within it numbers of ideas) that we should not wish to attempt any final definition which might, in some market settings, prove misleading or which might, in respect of some future application, be unduly restrictive. Instead we explore some of the connotations of the term.
>
> Competition may be valued for many reasons as serving economic, social and political goals. But in identifying the existence of competition in particular industries or markets, we must focus upon its economic role as a device for controlling the disposition of society's resources. Thus we think of competition as a mechanism for discovery of market information and for enforcement of business decisions in the light of this information. It is a mechnism, first, for firms discovering the kinds of goods and services the community wants and the manner in which these may be supplied in the cheapest possible way. Prices and profits are the signals which register the play of these forces of demand and supply. At the same time, competition is a mechanism of enforcement: firms disregard these signals at their peril, being fully aware that there are other firms, either currently in existence or as yet unborn, which would be only too willing to encroach upon their market share and ultimately supplant them.
>
> This does not mean that we view competition as a series of passive, mechanical responses to 'impersonal market forces'. There is of course a creative role for firms in devising the new product, the new technology, the more effective service or improved cost efficiency. And there are opportunities and rewards as well as punishments. Competition is a dynamic process; but that process is generated by market pressure from alternative sources of supply and the desire to keep ahead.
>
> As was said by the U.S. Attorney-General's National Committee to Study the Antitrust Laws in its Report of 1955 (at p. 320):
>
> > 'The basic characteristic of effective competition in the economic sense is that no one seller, and no group of sellers acting in concert, has the power to choose its level of profits by giving less and charging more. Where there is workable competition, rival sellers, whether existing competitors or new potential entrants into the field, would keep this power in check by offering or threatening to offer effective inducements . . .'
>
> Or again, as is often said in U.S. antitrust cases, the antithesis of competition is undue market power, in the sense of the power to raise price and exclude entry. That power may or may not be exercised. Rather, where there is significant market power the firm (or group of firms acting in concert) is sufficiently free from market pressures to 'administer' its own production and selling policies at its discretion. Firms may be public spirited in their motivation; but if their business conduct is not subject to severe market constraints this is not competition. In such a case there is substituted the values, incentives and penalties of management for the values, incentives and penalties of the market place.
>
> Competition expresses itself as rivalrous market behaviour. In the course of these proceedings, two rather different emphases were placed upon the most useful form such rivalry can take. On the one hand it was put to us that price competition is the most valuable and desirable form of competition. On the other hand it was said that if there is rivalry in other dimensions of business conduct—in service, in technology, in quality and consistency of product—an absence of price competition need not be of great concern.
>
> In our view effective competition requires both that prices should be flexible, reflecting the forces of demand and supply, and that there should be independent rivalry in all dimensions of the price-product-service packages offered to consumers and customers.
>
> Competition is a process rather than a situation. Nevertheless, whether firms compete is very much a matter of the structure of the markets in which they operate. The elements of market structure which we would stress as needing to be scanned in any case are these:

(1) the number and size distribution of independent sellers, especially the degree of market concentration;
(2) the heights of barriers to entry, that is the ease with which new firms may enter and secure a viable market;
(3) the extent to which the products of the industry are characterised by extreme product differentiation and sales promotion;
(4) the character of 'vertical relationships' with customers and with suppliers and the extent of vertical integration; and
(5) the nature of any formal, stable and fundamental arrangements between firms which restrict their ability to function as independent entities.

Of all these elements of market structure, no doubt the most important is (2), the condition of entry. For it is the ease with which firms may enter which establishes the possibilities of market concentration over time; and it is the threat of the entry of a new firm or a new plant into a market which operates as the ultimate regulator of competitive conduct.'

(*Re Queensland Co-operative Milling Association Ltd, Defiance Holdings Ltd.* Proposed merger with Barnes Milling Ltd. (1976) (CCH) ATPR 40-012)

Sections 45 and 47—Introduction

4.1 Section 45 deals with agreements 'in restraint of trade or commerce' and section 47 deals with agreements, or potential agreements, for the supply of goods or services involving the vertical practices of exclusive dealing, product forcing and territorial or customer restrictions. The Committee decided to consider these sections together, because of their close relationship. Section 47, for the most part, deals with restraints that may otherwise fall within the general prohibition contained in section 45.

4.2 These sections are the heart of that part of the Act which regulates restrictive trade practices. Thus, as might be expected, the Committee received a large number of submissions in relation to their operation. Central to many of these submissions was the question of the certainty of the language of the sections. That is, of course, a matter to which the Committee must give particular attention—having regard to paragraph 2 of its terms of reference.

Restraint of Trade or Commerce

4.3 The language of section 45 was most under attack, largely as to the meaning of the phrase 'in restraint of trade or commerce'. Many submissions saw that phrase as a technical 'in-house' legal expression, unfamiliar to the business community. However, even submissions from members of the legal profession suggested that the meaning of that phrase was extremely unclear, and that amendment was appropriate to give more certainty.

4.4 In this regard our attention was drawn to a recent judgment of the Australian High Court in *Quadramain Pty Ltd* v. *Sevastapol Investments Pty Ltd and another* (1976) 50 ALJR 475; 8 ALR 555; (1976) (CCH) ATPR 40-013. Most observers interpreted that judgment to mean not only that the common law concept of 'restraint of trade' would be applied by the courts in the interpretation of the phrase as used in the Trade Practices Act, but also that the scope of the concept at common law was now to be regarded as narrower than had previously been thought.

4.5 Prior to the *Quadramain* decision, it had commonly been believed by Australian lawyers that if the courts did adopt the common law approach to 'restraint of trade' in the interpretation of section 45 they would use the definition of Diplock L.J. in *Petrofina (Great Britain) Ltd* y. *Martin* (1966) Ch. 146 at 180–

A contract in restraint of trade is one in which a party (the covenantor) agrees with any other party (the covenantee) to restrict his liberty in the future to carry on trade with other parties not parties to the contract in such manner as he chooses.

4.6 However, the Australian High Court approached the matter differently, arguably in a more limiting manner. It seemed to adopt the view that there is a restraint of trade only where a covenantor cuts down an *existing* freedom to trade, and not where he gains by the covenant some new right to trade, albeit in a restricted form—the test adopted by the majority of the House of Lords in *Esso Petroleum Co. Ltd* v. *Harper's Garage (Stourport) Ltd* (1968) AC 269 to determine the applicability of the restraint of trade doctrine.

4.7 The Committee here notes a concern expressed to us by many persons—and with which we fully agree—that in the *Quadramain* decision the High Court seems to have taken an unduly legalistic approach to the interpretation of this economic legislation.

4.8 While it would not be wise to attempt to draw from the *Quadramain* decision too many general conclusions as to the future approach likely to be adopted by Australian courts in the interpretation of section 45, we feel that the decision has the potentiality for the introduction of undesirable technical distinctions into the interpretation of section 45—based largely on matters of form, not substance. The Committee, therefore, recommends that the phrase 'restraint of trade' should be eliminated from the Act, and be replaced by a notion or notions more closely related to the concept of competition without the limiting common law connotations. Our precise recommendations on this matter are set out later in this chapter.

Effects upon Competition

4.9 Criticism of sections 45 and 47 also went to the rules relating to the necessary effect upon competition, which is currently an ingredient of the prohibitions. Many of the submissions received by the Committee were critical of the differing threshold competition tests currently employed by the Act, namely the tests of sub-sections 45(3), 45(4), 47(5) and 92(2). Submissions in this area urged that the tests could be standardised to a much greater degree, eliminating much of the confusion flowing from a multiplicity of 'competitive effect' tests.

4.10 The criticism mentioned in the last paragraph gives three major issues of concern, (i) quantum of effect, (ii) area of effect, and (iii) effect on non-parties.

4.11 As to the first issue—the tests of quantum of effect upon competition—the tests are at present different between sections 45 and 47. In the former there must be a 'significant' effect; in the latter there must be a 'substantial lessening'. Doubts were expressed as to the precise differences between those terms and the necessity for having those differences. Related to this point is the suggested confusion arising from the different effects upon competition described by sub-section 45(3) and sub-section 45(4). Sub-section 45(3) adopts the approach that the price agreements therein described are prohibited unless there is an 'insignificant' effect upon competition. Sub-section 45(4) provides that the prohibition there described does not take effect unless a 'significant' effect is shown. Doubts were expressed as to the difference between 'insignificant' and 'significant'; particularly whether those two concepts together were exhaustive of all possibilities and further whether they were mutually exclusive.

4.12 The Committee agrees with submissions put to it that the use of different tests to measure quantum of effect upon competition, as currently adopted by the Act, is confusing and unnecessarily complex. Accordingly, the Committee recommends the adoption of a single test of effect upon competition wherever there is a competitive test in Part IV of the Act, namely the test of '. . . *a substantial adverse effect on competi-*

tion . . .' We also recommend the total repeal of sub-section 45(3) (see later in this chapter where this is discussed in the context of the substantive prohibitions).

4.13 As to the second issue—the tests of area of competitive effect—the competition affected by section 45 is described by sub-section 45(4) as competition between parties, not competition in a 'market' as is the test in sub-section 47(5). Some submissions felt this difference of approach to the delineation of the area of competition affected was undesirable.

4.14 In our view, the competitive effects of most agreements and practices should be tested by reference to a market for goods or services (the present test of sub-section 47(5)). However, we do not consider that adopting a *single* definition of area, for all purposes, would be an improvement to the Act. We consider that there are certain agreements in respect of which competitive effects will basically be felt between parties to the agreement, or particular competitors thereof (e.g. collective boycotts, which often affect small business). These latter-mentioned competitive effects should, in our view, be tested according to effect on competition between the parties and other persons (the present test of sub-section 45(4)). We consider that unless the Trade Practices Act recognises these distinctions it will be ineffectual and discredited in many circumstances in which it should have force.

4.15 As to the third issue—competitive impact upon non-parties—the test in sub-section 45(4), because it is related solely to the 'parties' and persons with whom they are in competition, does not have regard to effects upon competition of persons in a market in which the parties to the agreement, or any of them, are not competitors. Thus the competitive effect upon the parties, or the parties and other persons, may not be significant, yet there may be an extremely significant effect on persons who are not parties and with whom none of the parties is competitive. It was put to us that this result is anomalous.

4.16 We explored this matter in great detail and finally came to the conclusion that to amend the Act to deal with this matter would result in substantial uncertainty as to the operation of the law, and could cause a great deal of contentious litigation. We felt, as obviously also did the framers of the 1974 Act, that it was going too far to hold persons liable for the anti-competitive effects of their agreements, where those anti-competitive effects were felt *only* in a market in which none of the parties, or their competitors, operated. This conclusion is subject to one minor exception; we felt that agreements between holding companies as to the actions of their subsidiaries should properly be covered by the Act. This is discussed in more detail later in this chapter.

4.17 Our general views expressed above are given more precise form in the discussion of particular agreements and practices later in this chapter.

Market—Interpretation

4.18 A number of submissions suggested that the meaning of the term 'market' should be more fully explained by legislative guidelines.

4.19 Market definition is always of considerable importance. If the market is too widely defined it may be that the requisite effect upon competition cannot ever be shown, to the detriment of those seeking relief from a restrictive agreement or practice. Alternatively, if the market is too narrowly defined it may result in hardship to and unnecessary limitations upon business actions, such as inhibitions on exploiting novelty.

4.20 The concept of market involves the performance of a function in relation to a

product, being goods or services, within a geographical area. Markets within the chain of distribution, from manufacturing to wholesaling and retailing, depend upon factors internal to the industry concerned, and distinction may in particular cases be blurred or non-existent. Product and geographic markets, on the other hand, depend upon factors extraneous to the industry. Their boundaries are determined by the relationship between such factors as price, product substitutability, desired use and distance from supply, to name some. Because of the variable nature of such factors, the boundaries of product and geographic markets are necessarily flexible.

4.21 The Committee considers that no advantage would be gained by attempting to define exhaustively the term 'market'. No definition could produce a formula capable of certainty, having regard to the variable nature of the factors discussed in the paragraph above. Importantly also, the Committee has regard to the fact that persons involved with particular cases wish the matters in dispute to be judged on the particular facts, as they may present them, and not by artificial rules designed to achieve what we would suggest is an illusory certainty.

4.22 There is, however, one aspect of the definition of 'market' about which we consider the Act should give useful legislative guidance; namely, in relation to product substitution. The Committee therefore recommends that the Act should require that, in the determination of a 'market' for particular purposes, regard shall be had to substitute products, being products which have a reasonable interchangeability of use and which have high cross-elasticity of demand, i.e. where a small decrease in the price of a particular product would cause a significant quantum of demand for a similar product to switch to the product in question.

4.23 The Committee acknowledges, in making this recommendation, the view of some legal authorities that the provision of the guideline above for use in the determination of a market may cause the costs of litigation under this Act to rise due to the alleged need to adduce proof of matters which, under the present Act, it might not have been necessary to prove. Despite this, we felt that the great concern expressed to us about the need for more certainty on this aspect of the definition of 'market' outweighed the disadvantage of increased litigation cost which may flow from the recommendation.

Market—Thresholds

4.24 Submissions also raised the question of the introduction of threshold tests, the purpose of which would be to exclude from the ambit of the Act either markets, or market participants, falling below the threshold so set. The reason for such threshold tests, at least in regard to sections 45 and 47, was commonly stated to be the reduction of uncertainty.

4.25 In considering this matter, the Committee distinguished between threshold tests for restrictive agreements and practices generally and threshold tests for anti-competitive mergers. In our view different considerations apply to each. Whereas a merger occurs at a particular point of time and a threshold test is applicable at that time, in the case of a restriction of competition which continues in time, changing conditions would require a regular review of the operation of the threshold.

4.26 We consider that, in relation to sections 45 and 47 of the Act, a threshold test would not alleviate uncertainty of application of the Act. Rather, such uncertainty as may currently exist would merely be transferred from questions related to effect upon competition and desirability with respect to the public interest, to the question of whether or not the particular market or its participants would, in fact, be exempted by

the threshold test. Such a diversion of attention would be highly undesirable as it is, at the very least, beneficial that persons who might otherwise not be subject to the Act should continue to have regard to the competitive nature of their operations.

4.27 Further, the Trade Practices Act is primarily designed to be and should remain as a largely self-enforcing measure. It is a principle of the Act that there should only be such governmental intrusion into the affairs of business as is warranted in the public interest. To establish a threshold test would not necessarily reduce intrusion, for questions of whether or not the threshold was applicable would still need to be explored.

Examination Prior to Prohibition; Public Interest as Part of Prohibition; 'Rule of Reason'

4.28 A few submissions asked the Committee to consider a recommendation that the total basis of Part IV of the Act be changed from a prohibition-based law to 'an examination and cease and desist order thereafter' type of law, such as the 1965 Act. As a general rule, we felt it would be inappropriate to revert fully to the approach of the 1965 Act. We feel that experience of administration of the present type of law in Australia now enables a more positive stance to be adopted in relation to many matters. Nevertheless, in certain of our recommendations, we have embraced some of the techniques used in the 1965 Act.

4.29 With slightly different form but essentially the same thrust as the previous paragraph, one submission recommended that the Act should adopt a general prohibition approach but include in the prohibition a reference to 'the public interest'. Thus, the prohibition would be formed along these lines—'a corporation shall not make an anti-competitive agreement in restraint of trade that is contrary to the public interest'. In the view of the Committee, a reference to 'the public interest' in this context would promote a major degree of uncertainty in the law, and not of itself give sufficient weight to the place of competition in the free enterprise system. We consider that the only manner in which 'the public interest' should be referred to in this context is in relation to an examination procedure, being a condition precedent either to an order of prohibition or to an order of approval (such as the present authorisation procedure in the Act).

4.30 Several submissions suggested that section 45 should relate only to 'unreasonable' restraints, and that that word 'unreasonable' should be specifically written into the legislation. The use of reasonableness as a notion in this area is based upon an attempt to limit the potential for unintended effects flowing from a prohibition of a general nature. The Committee can understand the concern which led to this suggestion but, nevertheless, we do not support the suggestion. We believe that our recommendations on this part of the Act should deal adequately with the question of excesses of general rules. In addition, we are concerned that the use of the concept of reasonableness would add another element of uncertainty to the law in this regard.

Severance

4.31 A number of submissions requested the Committee to recommend amendment of the Act to deal with the problem known as 'severance'. This problem relates to the enforceability of a contract which contains, as only a part of the contract, an unlawful term or condition, such as a term or condition that is prohibited by section 45 (or perhaps, section 47) of the Act. The issue is whether, assuming that the part of the contract that is in restraint of trade can be isolated from the rest of the contract, the rest of the contract is still legally enforceable. At common law, such severance is

permissible provided that it does not alter entirely the scope and intention of the contract. The question is whether the Trade Practices Act permits of the operation of this doctrine of severance.

4.32 The Committee agrees that there is, at least, a problem of uncertainty felt by the community at the present time, namely whether the common law rules of severance will be applied to contracts containing clauses made unlawful by section 45. We feel that it is too harsh a penalty for contracts to be made totally unenforceable in circumstances where the restraint of trade is merely ancillary to, and not the core of, the contract. Accordingly, we recommend that the Act should clearly provide an express power in the courts to apply the common law rules of severance in relation to such offensive clauses.

4.33 A further question arises, if there is to be amendment to the Act to make severance clearly available to the courts, as to whether the courts should have that power in relation to contracts made after 1 February 1975 (the date on which relevant provisions of the Act came into force) but before the coming into force of the amendment suggested above. It has been suggested to us that it would be inappropriate to give the courts an express power of severance in relation to contracts falling in that period of time. The basis for this suggestion is that retrospectivity or revival of obligations would prejudice those who have ordered their affairs in reliance of the present provisions. The Committee feels, that for the most part, people will have ordered their affairs in the belief that the common law rules of severance will be applicable to contracts entered into after 1 February 1975 containing a clause in restraint of trade which may be prohibited by section 45 (or section 47) of the Trade Practices Act. However, assuming that some persons would not have ordered their affairs it was felt to be inequitable to change the rules retrospectively. Accordingly, we would not recommend that the express power of severance apply to contracts entered into after 1 February 1975 but before the relevant amendment to the law.

Change of Circumstances

4.34 The prohibition in section 45 of the Act revolves around the notion of 'restraint of trade or commerce', which we have already discussed. It was put to the Committee that a contract may initially be otherwise than in restraint of trade or, if in restraint, may initially fall within sub-sections 45(3) or (4) and therefore no authorisation or clearance would have been sought or required. This requirement was supported by reference to the terms of sub-section 92(3), provisions which we elsewhere recommend be repealed. A particular problem is the circumstance where parties to a contract may originally have been related to each other, and thus excluded from the operation of section 45 by sub-section 45(7), and subsequently ceased to be so related.

4.35 In our view a law of this nature should operate on substance, not form. This is the basic reason why we have recommended that the effects of the *Quadramain* decision should be legislatively avoided. Thus, in the particular problem of change of circumstances we consider that the Act should have continuing application and apply to restraints whenever they arise. We believe this to be the present law. We consider that the law should operate in this manner for two reasons. First, to provide otherwise would be to open avenues for avoidance, such avenues being based on form rather than substance; second, to provide otherwise would be to deny the dynamic in favour of a static view of competition.

Agreements Between Holding Companies Concerning Subsidiaries

4.36 It was pointed out to the Committee that the competition test in sub-section

45(4) is too limited in its operation, in the circumstances where there is an agreement between holding companies to restrict the dealings of their subsidiaries. It was submitted that in this circumstance, if the holding companies take care that the subsidiaries are not themselves party to the contract, arrangement or understanding, the prohibitions of section 45 do not apply. Of course, that is an anomalous result; the Act should apply to this situation. The same considerations should apply to restrictions applicable to a subsidiary company, agreed between its holding company and a third party.

Restrictions Involving Land

4.37 There are two issues to be raised under this heading. First, there is the question of the use of restrictive covenants which run with the land to achieve restrictions on competition. This was a matter raised by the substance of the *Quadramain* case. Secondly, there is the question of leases and licences of interests in land.

4.38 The *Quadramain* case involved the question of the enforceability, or otherwise, of a covenant running with the land which restricted the rights of the owner of land in respect of the type of trade that could be conducted on that land. The covenant was created in a contract between vendor and purchaser, neither of which were, at the time the action arose, proprietors of relevant interests—those interests had passed to third parties. Three judges of the High Court considered that there was a difference between a 'contract, arrangement or understanding' and a covenant, binding against all proprietors of the relevant land. The distinction is drawn by His Honour Mr Justice Gibbs as follows:

> the covenant . . . created a contractual obligation between the original parties to the sale, but so far as *Quadramain* is concerned it is enforceable only as an interest in the land. Section 45(1) does not have any effect on equitable or other proprietory rights . . .

4.39 The Committee feels that this distinction is, as a matter of the policy of the law, an undesirable one since it focuses clearly on form and not substance. The Trade Practices Act should be concerned solely about the restriction, however created upon a proprietor of land to use that land for a particular trade. Of course it is different, and outside the scope of the Trade practices Act, if the restriction upon a person using his land to trade in a particular way is imposed by public authorities operating pursuant to law (such as town planning rules).

4.40 The Committee recommends that the Act should extend, as far as is constitutionally possible, to all covenants running with the land as to the uses to which the land itself may be put which have, or are likely to have, a substantial adverse effect on competition in a market for goods or services. To the extent that a covenant deals with any other matter, we consider it should be subject to the general rules referred to elsewhere in this report. This recommendation is designed to deal solely with substantial anti-competitive effects in a market. Accordingly, it will leave untouched the vast majority of restrictive covenants being those designed solely to protect lawful proprietary interests in land, unrelated to competition in trade and commerce. We recognise that it may seem anomalous that a covenant of the *Quadramain* type should be subject to a market test, whereas a similar condition of a commercial lease should be subject to the more stringent test of competition between persons. Nevertheless, as we later suggest, given that the primary rationale for the latter test is the protection of small businesses, the Committee believes that the distinction made is practical.

4.41 The second problem that must be dealt with is the question of commercial leases, including licences. Certain provisions of a lease may be clearly in restraint of trade and have a significant effect on competition, within the meaning of sub-section 45(4).

A great number of applications for clearances of commercial leasing developments have, accordingly, been lodged with the Trade Practices Commission.

4.42 Submissions received by the Committee in relation to commercial leases drew attention to three main issues.

4.43 The first issue went to the question of exempting from the application of the Act all commercial leases. The Committee does not accept that such exemption should be granted. Leases, being inherently necessary in the supply of a fundamental service in many areas of the economy, should be at least subject to examination to ensure that they do not contain terms and conditions substantially restrictive of competition.

4.44 The second issue raised in relation to commercial leases was their inclusion within the general prohibition contained in section 45 of the Act. In this respect it was argued that commercial leases should fall outside the scope of the general prohibition and be subjected to special provision.

4.45 The Committee sees some merit in making certain distinctions in relation to the operation of the Act on commercial leases. We feel that the present test provided by sub-section 45(4) (of competitive effect upon parties and persons) can operate too harshly in relation to some aspects of commercial leases. In our view many 'usual' lease restrictions should be tested by their effect upon competition in a market for goods and services, and not by the narrower test of effect upon parties and persons. However we consider that there are some types of restrictions, often contained in commercial leases, that should continue to be tested by reference to their effect upon competition between the parties thereto and the persons with whom they are competitive. In this category we place restrictions in commercial leases as to the commercial use to which the land can be put, restrictions on advertising by the lessee, and restrictions relating to merchants association membership and rules. We see this as being of considerable assistance to small businesses which we believe are most affected by the restrictions in these categories. All other restrictions contained in leases should, in our view, be subject to a 'market' test of competitive effect except, of course, where those restrictions would otherwise fall within a prohibition specifically stated elsewhere in the Act (e.g. price fixing).

4.46 The third issue which was raised by the submissions in relation to commercial leases was the question of whether or not a lease which required that the lessee should trade upon conditions of the types referred to in section 47 of the Act should itself be subject to section 47.

4.47 This question turns upon the interpretation of the words 'goods' or 'services' in sub-section 47(2) of the Act. It was put to the Committee that a lease which required the lessee to take all his requirements of a particular product from the lessor was arguably not within the prohibition contained in sub-section 47(2) as the lessor was not supplying goods or services upon a condition of the type covered by that sub-section. The Committee considers that since the Act is designed to regulate substance and not form, such a lease should be subject to the prohibition contained in section 47 of the Act. Accordingly, we recommend that the Act should specifically state that the leasing and licensing of land is a service for the purposes of sections 45 and 47 of the Act.

Relationship Between Sub-sections 45(3) and 45(4)

4.48 It was put to the Committee that the relationship between sub-sections 45(3) and (4) and sub-sections 45(1) and (2) is insufficiently clear in so far as it is impossible, as the Act now stands, to know whether a party attacking a contract has the obligation of disproving the applicability of sub-sections (3) and (4) or whether the person seeking to

uphold the contract must demonstrate that it comes within sub-sections (3) and (4). The Committee agrees that there is insufficient clarity in this respect in the present law. We believe our recommendations on the general framework of prohibitions in this area of the Act (see later in this chapter) will resolve this problem. In particular, we recommend the repeal of sub-section 45(3) which does not fit easily with our recommendations on the structure of prohibitions in this part of the Act.

Sub-section 45(6)—Relationship Between Sections 45 and 50

4.49 It was submitted to the Committee that sub-section 45(6) created an anomaly in that unless a clearance had been obtained in relation to a merger the sub-section allowed section 45, with its allegedly stricter competition test to apply to that acquisition, although the acquisition would not constitute a contravention of section 50. It appears to the Committee that this result does flow from the present wording of sub-section 45(6). We agree that this position is anomalous. We consider that mergers are most appropriately treated in the context of section 50. Those elements of transactions which involve mergers and which do not fall within the scope of section 50 should not then be subject to the provisions of section 45, irrespective of whether or not a clearance has been obtained. We recommend that the section be amended by deleting from sub-section 45(6) the words '. . . by reason that an authorisation is in force in respect of the acquisition or by reason of the operation of section 94'.

Sub-section 45(8)

4.50 Submissions in relation to this sub-section raised two points.

4.51 The Committee had the view expressed to it that sub-section 45(8) operated substantially to avoid the general thrust of the prohibitions of section 45 since, although the relevant restriction was not operative, the parties to the contract nevertheless acted on the basis that it would become operative (i.e. be granted clearance or authorisation) and did not engage in competitive behaviour which would jeopardise the position. Thus the sub-section did not perpetuate an actual restraint but, at the same time, it discouraged active pro-competitive behaviour.

4.52 The Committee can see the practical necessity for continuing the rule of sub-section 45(8) in relation to contracts. For example, we would not wish to prejudice the manner in which joint venture agreements are negotiated. Parties seeking to enter formal legal obligations should be able to entertain restrictions which they consider likely to be authorised, so as to make those restrictions enforceable immediately upon authorisation.

4.53 However, the Committee would not recommend extending the sub-section to situations where formal legal obligations were not in contemplation. To do so would, in our view, discourage active competitive behaviour, as described above.

4.54 However, sub-section 45(8) should be amended in one minor respect; we feel that the time limit of seven days currently provided by the sub-section is impracticable in many cases and we recommend that the time period be extended to fourteen days. In relation to other possible problems of interpretation of this sub-section, see our discussion in paragraph 8.20.

4.55 The second matter raised in respect of sub-section 45(8) was the effect which it might have upon a 'best endeavours' clause in a contract of the type referred to therein. The question raised was whether or not such a clause would require an applicant for clearance or authorisation, being a party to a contract entered into subject to the conditions set out in sub-section 45(8), to reapply for clearance or authorisation in a

situation where the Trade Practices Commission had dismissed a first application. For example, the Trade Practices Commission may have intimated that an amended application would meet with its approval (which now happens). The Committee considers that this question is purely a matter of interpretation of the relevant contract. The Act should not seek to deal with this situation. In any event this problem should become far less important if our recommendation contained in Chapter 11 (a recommended conference prior to the final decision) is adopted.

Price Agreements Between Competitors

4.56 At present it seems that an agreement between competitors, which has the purpose or effect of fixing, controlling or maintaining the price of goods or services supplied by a party to the agreement to persons not a party to the agreement, is prohibited unless there is a very slight effect on competition between those parties, or any of them, and other persons. Authorisation is generally not available for these agreements. However, authorisation is available when:

- the purpose or effect is strictly 'maintaining', and not 'fixing' or 'controlling';
- the agreement relates to services and not to goods;
- the agreement is in connection with joint supply of goods, or supply by parties to the agreement of goods, that have been produced, manufactured, mined or acquired by them on a joint basis.

4.57 The first matter we raise in this connection is the test of 'insignificant' effect upon competition. Most submissions suggested that this test was confusing. Some submissions suggested that the test should be eliminated entirely, thus creating an absolute prohibition of price fixing; others suggested that the test should be placed on a level consistent with sub-section 45(4) or some other level such as 'substantial lessening'.

4.58 The Committee agrees that this test is confusing and unnecessarily complex. However, we cannot agree to the suggestions either that all matters within sub-section 45(3) be absolutely prohibited or that all such matters should be subject to an easier test of competitive effects. We consider that the treatment of the items within sub-section 45(3) should be differentiated.

4.59 The Committee recommends that, subject to exceptions relating to joint venture and joint acquisition pricing (see paragraph 4.63), there should be an absolute prohibition of agreements between competitors, having the purpose or effect, or likely to have the effect, of *fixing or controlling*, or providing for the fixing or controlling of the price for, or any discount, allowance, or rebate, in relation to, any goods or services supplied by the parties, or any of them, in competition with each other, to persons not being parties to the agreement. They should be incapable of authorisation. The Committee considers that these price agreements between competitors are at the very heart of anti-competitive behaviour and should be clearly prohibited. It is our firm belief that such agreements will so rarely be in the public interest that the costs in time and money, both for industry and Government, involved in allowing attempts to justify such agreements far outweigh the social benefits which might flow from the possibility of an occasional successful justification in terms of the *de minimis* exception stated in the present sub-section 45(3).

4.60 The abovementioned prohibition should in our view be directed to substance, not form, and accordingly should apply to all agreements having the proscribed purpose or effect, regardless of what the parties themselves have called the agreement. Thus an agreement called a 'recommended price agreement', but which, in fact, has the purpose or effect of fixing or controlling prices would be prohibited.

4.61 It will be noted that our recommendation above would not allow authorisation of a price agreement relating to services, having the proscribed purpose or effect. This would be a departure from the present position. The Committee considers that in this area no valid distinction can be drawn between the supply of goods and the supply of services. However, as set out below, we would regard as capable of authorisation 'true' recommended price agreements for both goods and services. It will also be noted that the prohibition recommended above does not refer to agreements having the purpose or effect of *maintaining* prices—such agreements are essentially 'true' recommended price agreements, which we deal with below.

4.62 It will be recognised that these recommendations require that sub-section 45(3) be deleted from the Act.

4.63 Our views expressed above on the generality of the prohibition against agreements fixing or controlling prices are subject to important exceptions—joint venture pricing (see paragraph 4.81) and joint acquisition pricing (see paragraph 4.82). Paragraph 4.64 deals with a related issue.

4.64 The related issue goes to the use of the words in sub-section 45(3) 'supplied by the parties to the contract, arrangement or understanding, or by any of them, in competition with each other, to persons not being parties to the contract'. Accordingly, an agreement between a number of competitive sellers and a number of competitive buyers whereby the sellers agree to the prices at which they will sell goods or provide services to the buyers and the buyers agree that they will buy goods or services from the sellers at those agreed prices is not currently covered by sub-section 45(3). In any case we have already recommended in paragraph 4.62 the repeal of sub-section 45(3).

4.65 However, a similar distinction is made in sub-section 88(2), with the effect that such agreements can be the subject of a grant of authorisation. We consider that this latter position should be maintained, and the grant of authorisation continue to be available. Such agreements, because they can reflect the exercise of 'countervailing power', do not necessarily have the same undesirable effects on competition as an agreement purely between competitors although, at the same time, we can envisage situations where such multi-level collective pricing agreements can be abused. In this class of case, the effect of the agreement on competition will be taken into account in the authorisation context, and any adverse effects on competition weighed against the public benefits of such an agreement. A competition test is inappropriate.

4.66 A further type of agreement which we would regard as being a price agreement is one between a number of competitive suppliers whereby it is agreed that specific resale prices would be recommended by each of them to resellers of their products. The Committee considers that an agreement of this nature must, of necessity, have a substantial adverse effect on competition and, further, that by its very nature it is incapable of resulting in a benefit to the public. Accordingly, the Committee recommends that agreements of this nature should also be absolutely prohibited.

Price Recommendations Between Competitors

4.67 A number of submissions were received, particularly from trade associations, urging the Committee to recommend that the issuance of true recommended price lists by, or on behalf of, competitors (commonly by trade associations) should be totally exempted from the operation of the Act. Some submissions also suggested conditions upon which such exemptions would be available—such conditions related to matters such as the nature and structure of the industry.

4.68 We are of the opinion that it would not be appropriate for us to recommend such a total exemption. An agreement between competitors to recommend amongst themselves the prices which should be charged by them for goods sold or services provided may, depending upon the particular facts, achieve an effect very similar to that which would be achieved by an outright agreement as to prices.

4.69 Recommended prices, at present, appear to be encompassed by sub-section 45(3) either because they have the purpose or effect of fixing or controlling the price, or because they have the effect of maintaining the price. As mentioned above, it is the Committee's view that if a recommended price has the purpose or effect of fixing or controlling the price, that should be absolutely prohibited. However, if a recommended price has a lesser purpose and effect, the Committee considers it should be treated in a different manner.

4.70 The Committee accepts that there are circumstances in which the issuance of recommended price lists amongst competitors may achieve desirable effects in public interest terms, particularly where they are offering an advisory service for small businesses which operates simply in this manner. However the Committee is of the opinion that each recommended price agreement should be subject to authorisation prior to implementation, to ensure that public interest considerations (particularly in this context, the viability of small businesses) outweight possible anti-competitive effects such as insulation of parties from competitive forces which could otherwise affect prices.

Joint Ventures

4.71 Many submissions received by the Committee urged that joint ventures, particularly those directed towards the development of natural resources, should be afforded special and favourable treatment under the Act in the national interest. We note that many joint venture agreements involve no restrictions or only minimal restrictions on competition. Even where significant restrictions are present, the joint venture can be pro-competitive rather than anti-competitive. This may be the case where, but for the joint venture, the activity would not be undertaken in the first place.

4.72 The Committee has had some indication that joint venturers may decline to enter into joint negotiations on price where buyers or governments request negotiations in that form. The reason often given is that the law prohibits price fixing between competitors. The Committee notes, however, that a contract between joint venturers fixing or controlling prices is capable of authorisation by virtue of sub-section 88(2). Moreover, each joint venturer may, for his own reasons, wish to market his product separately. We also note that foreign law may be relevant too; e.g. section 1 of the United States Sherman Act prohibits price understandings between competitors, without exception, where such understandings affect the foreign commerce of that country.

4.73 Submissions directed to the question of joint ventures, while basically unanimous in general import, varied greatly in two respects, namely,

(a) the degree of special treatment suggested to be afforded; and
(b) the definitions of relevant terms, such as 'joint venture', 'national interest' and 'natural resource development'.

4.74 A joint venture may arise due to the desire or need for the additional size or complementary nature of plant and equipment, staff, finance, know-how or property which amalgamation may achieve. That desire or need may be in respect of a single project, or a continuing relationship. Joint ventures and natural resources develop-

ment are often regarded as synonymous, presumably because of the massive capital nature of such projects. However, joint ventures may also be important both in their occurrence and in their competition effects in all sections of the economy, from research and development to manufacture, retailing and services.

4.75 There is an initial question as to the meaning of a 'joint venture'. The problem here is that joint ventures, as referred to in common parlance, take so many legal forms. In the ensuing discussion the Committee has regarded a joint venture as being an association between two or more enterprises to carry on together a joint activity, but specifically excluding joint selling which does not involve further substantive processing of products acquired from the joint venturers. The joint activity need not require the creation of a separate corporation or partnership; there may merely be physical pooling of assets but retention of individual ownership. Alternatively, a separate joint organisation may be formed and it may, or may not, have a separate legal existence (e.g. company or partnership). We recognise that this definition of a joint venture, as a joint activity, includes joint acquisition schemes. This is discussed separately, at paragraphs 4.82 to 4.86 below.

4.76 The joint venture is often predicated upon agreement between the joint venturers that they will not, or will to a limited extent only, compete with the joint venture. The joint-venture agreement will, in the usual case, contain terms relating to:

- the exercise of control over the venture by the venturers;
- the transfer of assets from the venturers to the venture, the regulation of asset usage by the venture, or the acquisition of assets from external sources;
- the provision of finance to the venture and the sharing of its costs or profits, if any;
- terms upon which new venturers may be admitted or upon which existing venturers may withdraw;
- resource exploration or product research and development; and
- the exploitation of venture production, including the terms and conditions upon which, and prices at which, venture products are to be sold either by the venture or by the venturers.

4.77 Any or all of the above terms, and certainly the primary agreement not to compete, may at present involve the application of the present sections 45 and 47.

4.78 A joint venture may occur where, in the absence of the agreement, either:

(a) none of the joint venturers would have entered upon the scheme by itself;
(b) one of the joint venturers would have entered upon the scheme by itself while others remained as potential competitors; or
(c) each of the joint venturers would have entered upon the scheme as competitors.

Accordingly, since each of the above circumstances may have fundamentally different competitive effects, the Act must provide for a case-by-case examination of public interest and competitive effect.

4.79 The treatment of joint ventures was one of the most difficult problems which the Committee considered. Obviously, the Committee would not wish the law to frustrate the formation of joint ventures which provide the ability to embark on a project of development which may be desirable in the public interest and which would not otherwise be undertaken. But the question is how the legislation can differentiate such useful joint ventures from other joint-venture agreements which are, in substance, a substitute for agreements not to compete.

4.80 The Committee considered a scheme whereby joint-venture agreements would be lawful until, after examination, they were declared to be, in whole or in part, unlawful because of their net detriment to the public interest. The Committee finally concluded that such a scheme would be unworkable and joint ventures would always have 'the sword of Damocles' poised above them.

4.81 The Committee finally considered that the following approach was the best approach with regard to joint ventures:

> First, as to all restrictions in joint-venture agreements other than restrictions having the purpose or effect of fixing or controlling price, as referred to in the next sub-paragraph, the Committee considers that those restrictions should only be prohibited where there was a substantial adverse effect on competition in a market for goods or services. This is a very significant change from the law at the present time, in which sub-section 45(4) tests competitive effects, only as between the parties and other persons. In addition, the Act would permit authorisation of these restrictions.
>
> Secondly, as to restrictions in joint-venture agreements which have the purpose or effect of fixing or controlling the price at which the joint-venture product is sold, we consider that, in accordance with our general views on price agreements in paragraph 4.59 above, these restrictions should be prohibited except where they can reasonably be regarded as necessary if the parties are to agree that the joint production facilities are to be established and carried on by them or, in the case of existing joint production facilities, to continue to be carried on by them. Where the restrictions are reasonably necessary in the manner just described, the parties should be able to seek and be granted authorisation of the restriction when the agreement is in the public interest. It may be appropriate for the grant of authorisation in relation to price fixing to be made for a specified time period.
>
> Thirdly, we consider that a time limit should be imposed on the Trade Practices Commission in dealing with applications for authorisations relating to joint ventures. In our view that time limit should be four months from the date of the application, or such longer period as the parties may agree. We envisage that in a normal case the Trade Practices Commission would take a shorter period to deal with the matter, than now appears to be the case in relation to its consideration of merger applications (which have a similar time limit imposed upon them).

Joint Acquisitions, Including Buying Groups

4.82 Another type of joint conduct which needs special treatment arises where firms otherwise competitive, or potentially so, buy supplies on a joint basis. Under the present Act such joint-buying arrangements are unlawful only if they are likely to have 'a significant effect on the competition' of the parties. The Committee proposes that the test should be eased to become 'a substantial adverse effect upon competition in a market for goods or services'.

4.83 In respect of joint-buying arrangements between competitors, an opportunity is now afforded for authorisation. The Committee proposes that a similar opportunity be afforded in future, but on the new proposed authorisation test, which is less rigorous. Broadly, buying groups set up by small businesses to allow them to compete more effectively with chain retailers could expect favourable consideration while they have only a small share of the relevant market.

4.84 A special problem arises in relation to retailer buying groups. It is common for such groups to advertise jointly prices for 'special' lines. It may be thought that this involves illegal selling-price agreements among the retailers. In many cases, where

particular groups cover only a small part of the market, the present sub-section 45(3) *de minimis* test might operate to take the group-selling price arrangements outside the present prohibition of price agreements. With the removal of that test, such groups may be in greater jeopardy if their sales advertising is judged as being a prohibited price agreement.

4.85 The Committee considers that buying-group arrangements which also entail joint advertising of selling prices, should be judged in respect of their selling-price aspects in the same way as in respect of their purchasing aspects, i.e. as subject to prohibition only if the behaviour of the group members demonstrates a substantial adverse effect on competition in a market for goods or services. Also, as with their buying arrangements, they should have an opportunity for authorisation in respect of selling-price arrangements (not available in all cases at present). This should mean that buying groups of small businesses can in most cases lawfully continue to advertise some prices jointly. If the members of a particular group obtain such a share of the market that the benefits of their competition against larger sellers become outweighed by the restrictive effects of their conduct upon competition in a market, their arrangements may need to be revised.

4.86 We believe that such provisions will retain the competitive element in the relevant markets, for the benefit alike of consumers and the small businessmen involved in the buying group. At the same time these provisions should ensure that the forms of the law are not used to permit the development of joint acquisition and selling arrangements which in fact restrict competitive behaviour and are beyond authorisation.

Standard Conditions of Contract or Tender

4.87 A number of submissions put to the Committee the proposition that agreements relating to standard conditions of contract should be exempted from the Act. This has particular relevance to the building and construction industry. Essentially there were two points put to the Committee. First, there was the suggestion that conditions of contract which were agreed industry wide should not be caught by the Act at all. Secondly, there was the proposition that the exemption, presently provided by paragraph 52(2)(c) should be extended to cover standard contracts developed by the Standards Association of Australia (SAA) or other approved bodies.

4.88 The Committee disagrees with both of these suggestions. Conditions of dealing are most important aspects of competition, particularly in industries involving construction to specification. For example, 'rise and fall' clauses can have a major impact upon prices quoted for long-term contracts. To take such matters outside the Act would, in our view, deny an important aspect of competition for relevant industries. To allow suppliers to agree to make the use of such standard contracts mandatory, by exempting from Part IV agreements to comply with SAA (or other) standard forms, could merely defeat substance by reference to form. Moreover, it is always open to a purchaser calling for tenders to ask for the tenders to be submitted on the basis of terms and conditions which are to be the same as between potential tenderers. He may do this by referring to a particular standard form, e.g. the SAA form, if he finds that convenient. For other cases (except those standard terms and conditions which come within the category of agreement referred to in paragraph 4.59 above) authorisation should continue to be available in appropriate cases. We think that is the best method to deal with those standardised contracts which are in the public interest.

Section 47

4.89 Some submissions argued for the total deletion of section 47, on the basis that regulation of such vertical relationships operated in an unduly harsh manner. It was put to the Committee that suppliers, when they have undertaken considerable capital investment, should be able to secure for themselves a continuing demand for their products so as to protect such investment. On the other hand, the Committee received a number of submissions, particularly from medium to small business firms (or associations representing them), to the effect that the exclusive dealings provisions of the Act are an essential part of the legislative scheme and should not be deleted, or modified in their effectiveness.

4.90 The Committee believes that now to abandon regulation of such vertical restrictions as may have a substantial adverse effect on competition in a market would be a retrograde step. For trade practices legislation to concentrate solely upon horizontal restrictions of competition would be to ignore the structure inherent in many areas of the Australian economy. Where there are few market participants at primary distributional levels, the elimination of horizontal restraints may not, of itself, induce competitive behaviour. That will often only be achieved by competitive pressures stemming from levels further down the chain of distribution. For the law not to apply to vertical relationships within that chain would be to ignore this important element of competition in our economy.

4.91 It was also suggested to the Committee that the only vertical restriction that should be dealt with by the Act is restrictions imposed by a person in a position substantially to control the market (i.e. a monopoly supplier as described by section 46).

4.92 The Committee does not agree with this proposition because it does not place sufficient emphasis upon the dynamic character of competition in the market place. Important anti-competitive effects can flow from vertical restrictions even where no monopoly is involved.

4.93 However, in the Committee's view there are a number of difficulties in relation to the manner in which the Act presently deals with vertical relationships. These difficulties are discussed under appropriate headings in the rest of this chapter. One important matter should, however, be mentioned here. It was submitted to the Committee that the fact that vertical restrictions upon the supplier were dealt with in a manner different to similar restraints upon the acquirer was undesirable. We agree with those submissions and in our recommendations on the general structure of sections 45 and 47 we seek to deal with this problem (see paragraph 4.106).

Full-line Forcing

4.94 The practice of full-line forcing involves supply on the condition that the person to be supplied should acquire all, or a part of, his requirements of other goods or services directly or indirectly from the supplier.

4.95 This practice is currently dealt with in two ways by the Act. First, sub-section 47(2) extends to cover the practice in a general manner. Second, sub-section 47(3) covers the practice of full-line forcing in specific cases, namely where the leverage is exercised by virtue of the fact that the good or service to be supplied is of a kind that the supplier could not lawfully supply, but for the issue or grant to it of a licence, permit, authority or registration under a law of Australia. Where the practice of full-line forcing falls within sub-section 47(3) of the Act, it is assumed that that practice has an undesirable effect because no competition test is to be applied thereto.

4.96 A distinction is often drawn, when considering the practice of full-line forcing, between situations where the 'tying' product and the 'tied' product are related (such as spare parts, or different models of essentially the same product) and situations where the 'tying' and 'tied' products are completely unrelated. No such distinction is drawn by the Act at the present time. The Committee would have preferred to recommend that the Act take a stronger position in respect of the latter practice than in respect of the former practice, but found it was not able to devise a sufficiently precise line of demarcation between the two situations.

4.97 Although very few submissions received by the Committee commented upon sub-section 47(3), the Committee recommends its total deletion from section 47. It does so for two reasons. First, it would appear to apply to a very limited class of cases and upon deletion the practice would anyway fall within the generality of sub-section 47(2); second, we see no grounds upon which the assumption of detrimental effect which is made in respect of that practice can validly be supported (see further as to the treatment of these matters in paragraph 4.121).

Forcing Another Person's Product

4.98 The practice of forcing another person's product (goods or services) is covered solely by sub-section 47(4); it would, in the absence of sub-section 47(4), seldom be regulated by sub-section 47(2). The Act again assumes in respect of this practice that it will have a detrimental effect and accordingly no competition test is to be applied in respect thereto. The Committee accepts that the practice may be, for good reason, justifiable in certain circumstances. The question, however, is whether or not the practice should be justified upon grounds of competition or solely with respect to public benefit.

4.99 Submissions received by the Committee in respect of sub-section 47(4) reflected a number of different attitudes.

4.100 First, it was suggested that the practice of forcing another person's product should be regarded as being so undesirable that the present provisions should at least be retained as they are or alternatively the practice should be prohibited without the benefit of authorisation.

4.101 Second, a number of submissions suggested that while the present provisions could be retained the practice should be exempted when engaged in by certain specified persons, in particular building societies and mortgagees, on the basis that such are subject to specific regulatory state laws. The question of exemptions under the Act is covered fully in the chapter dealing with scope and exemptions but we here record our view that such persons should not be so exempted. In the opinion of the Committee, the law relating to forcing another person's product should have Australia-wide application.

4.102 The third class of submissions received by the Committee suggested that sub-section 47(4) should be retained but that the practice should be subject to a competition test.

4.103 In the opinion of the Committee the practice of forcing another person's product may be justifiable in certain cases. However, the Committee is of the opinion that the practice will, in virtually all cases, have an anti-competitive effect and that it should accordingly, continue to be capable of justification upon the ground only of public benefit. The Trade Practices Commission would, of course, continue to have the power to authorise lists or classes of persons whom the supplier may require to be dealt with.

4.104 In a related respect, one submission suggested that the definition of 'services' contained in section 4 of the Act should be clarified so that it was beyond doubt that lending money was a service, whether or not that loan was made by a banker. We agree.

Exclusive Dealing

4.105 We have already noted that we are of the opinion that a number of restrictions upon suppliers of goods, which are similar to the restrictions upon acquirers which currently fall within sub-section 47(2) of the Act, should be excised from section 45 and dealt with in the same manner as is to be adopted in respect of sub-section 47(2). Sections 45 and 47 at present create distinctions between certain types of agreements and conduct, distinctions which are illogical and operate harshly in many respects.

4.106 The most important of these matters currently dealt with under section 45 is the usual grant of an exclusive franchise. Just as restrictions may be placed upon an acquirer, so an exclusive franchise may place restrictions upon a supplier. Additionally, in some instances the supplier provides goods or services to a franchisee which the latter does not resell as such, but either consumes in the course of his business or resupplies after processing. In such cases, where the franchisee is restricted as to the other persons, or classes of persons, with whom he may deal or the places in which he will supply, or the other sources from which he may obtain goods or services, the Committee recommends that the appropriate way to deal with these restrictions is in the context of section 47.

4.107 The problems discussed above were seen by many submissions to be compounded by: the allegedly illogical distinction in procedural operation between a clearance for section 45 under section 92 and a clearance for section 47 under section 93; the harshness of the public interest test under sub-section 90(5); and the harshness of placing the onus upon the applicant in all cases for an application for clearance or authorisation. The Committee discusses these matters in greater detail later in the report but we note here that the Committee recommends: the abolition of the clearance procedure in this area; the deletion from sub-section 90(5) (the authorisation test) of the phrase 'being a benefit that would not otherwise be available'; and, as described more precisely below, a relief from the onus of proof on the applicant in certain circumstances.

Implied Conditions and Requirements Contracts

4.108 It was put to us that the reference in sub-section 47(2) to a 'condition' was only to an express condition. If this is the case, the Committee considers it to be an undesirable position. We have emphasised, time and again in this report, that in our view the Trade Practices Act should apply to substance, not form. There will be many cases where the condition referred to in sub-section 47(2) could be implied from the circumstances of the case but where there is no express condition. To give an example, it is known to a supplier that an acquirer needs, over a yearly period, a hundred units of the good in question. A supplier with some market power could frame the conditions of sale on the basis that the supplier will only supply in lots of 100 units, there being no economic or commercial reason for selling on that basis other than the 'tie-in' effect thereof. Therefore, the Committee recommends that the reference to a condition in sub-section 47(2) should be a reference to a condition that is either expressed or implied, achieving its effects directly or indirectly.

4.109 Further concern about the scope of sub-section 47(2) was expressed to us in relation to requirement contracts. A requirement contract is, typically a vertical contract between a seller and a buyer whereby the buyer undertakes to buy all, or a

substantial part, of his requirements of a particular commodity from the seller. It was put to us that any such sale must, necessarily, deny a competitor access to that sale and if that sale is large enough such supply contracts will substantially lessen competition.

4.110 The Committee recognises that such arrangements may be important to provide adequate commercial security both to the buyer and the seller, each of whose businesses might depend on the continuity of such supply contracts. We take the view that the sub-section should be concerned with such an arrangement only when the arrangement is imposed upon the buyer by the seller for the purpose of achieving (or where the seller thereby purposefully achieves) an exclusive dealing within the terms of paragraph (d) of sub-section 47(2). To avoid the application of the sub-section to an ordinary commercial requirements contract we recommend that the sub-section be amended by the deletion of the words 'or subject to a contract arrangement or understanding'.

4.111 Further, it was suggested to us that the section should cover the case of a refusal of supply on the ground that the acquirer will not agree to the relevant condition. This suggestion was made on the basis of a view that a refusal of supply for such non-agreement would not constitute an attempt to contravene Part IV, within the meaning of paragraph 76(b). If this view of section 76 is correct, upon which the Committee offers no comment, it would be the Committee's view that appropriate amendment should be made to section 47 or to section 76, to remedy that obvious defect.

General Prohibitions

4.112 The Committee has already stated that it agrees with the submissions put to it that sections 45 and 47 together are unnecessarily uncertain and complex. The notion of 'restraint of trade or commerce' has given rise to major uncertainty, due both to its unfamiliarity to the business community and to the legal difficulties raised by the *Quadramain* decision. The Committee has already expressed its view that the phrase 'restraint of trade or commerce' should be deleted from the Act.

4.113 The question now arises as to what should replace the phrase 'restraint of trade or commerce'. The options open to the Committee ranged between the adoption of general phrases, more familiar to business and without common law connotations, and the adoption of an exhaustive list of specific matters.

4.114 The Committee was initially quite attracted by the idea of an exhaustive list of specific matters, and spent a great deal of time examining lists of descriptions of types of agreements or practices for possible inclusion in the Act. Reluctantly we came to the conclusion that this approach was not feasible on an exhaustive basis. In our recommendations we have sought to be more specific about some agreements and practices which are at present solely encompassed by general tests of coverage in the Act. However, for other matters, the Committee has also recommended a range of general tests of coverage, although those tests are not to be built around the concept of 'restraint of trade or commerce'.

4.115 In the following paragraphs we outline our views on what should replace the general prohibition of agreements 'in restraint of trade or commerce'—as currently contained in section 45. It should be borne in mind that specific recommendations have already been made on the following matters: price agreements, including recommended price agreements, joint venture agreements, three aspects of commercial leases, and exclusive dealing as covered by section 47 enlarged by the addition of restrictions on suppliers. We now make recommendations on the balance of matters in the area of section 45.

4.116 We consider that a collective boycott, i.e. an agreement that has the purpose of or the effect of or is likely to have the effect of restricting the persons or classes of persons who may be dealt with, or the circumstances in which, or the conditions subject to which, persons or classes of persons may be dealt with by parties to the agreement, or any of them, or by persons under their control, should be prohibited if it has a substantial adverse effect on competition between the parties to the agreement or any of them or competition between those parties or any of them and other persons.

4.117 In our view such matters are appropriate to be tested by reference to their competitive effect between parties and other persons, and not by reference to a market.

4.118 Lastly, with respect to all other restrictions on competition which may be accepted by parties to an agreement, we consider that there should be a general prohibition upon an agreement which prevents or restricts or is likely to prevent or restrict, the engaging in of competitive conduct by all or any of the parties to the agreement, whether among themselves or with other persons, where that agreement has, or is likely to have, a substantial adverse effect on competition in the market or markets in which any of the parties to the agreement operate or, but for the existence of the agreement, would or would be likely to operate.

4.119 It will be seen from the recommendation of the preceding paragraph that for the remainder of matters presently within section 45, we consider that the test of effect on competition in a market is the appropriate test.

Matters Currently Prohibited by Sub-section 47(2)

4.120 At the present time, matters prohibited by sub-section 47(2) are unlawful, in the absence of clearance or authorisation, where the conduct is likely to have the effect of substantially lessening competition in a market for goods or services. As noted earlier, the Committee is of the view that this test should be altered to adopt the general form recommended by the Committee, 'has or is likely to have a substantial adverse effect on competition', in this case in a market for goods or services.

4.121 However, we consider that the approach to approving these matters should be different from the general approach to authorisation for conduct prohibited elsewhere in the Act. We recommend that there should be a procedure which would enable registration of such conduct with the Trade Practices Commission. Thereafter, the conduct would be lawful unless and until the Trade Practices Commission determined positively that there was or was likely to be a substantial adverse effect on competition in a market for goods or services, and that the agreement or practice did not result, or was not likely to result, in a net benefit to the public. By requiring the Commission to determine these matters positively, we believe that much of the present criticism relating to the problem of proof (sometimes put to us as 'guilty until innocence can be proved') is alleviated.

4.122 We recognise that adoption of this approach in relation to matters falling within sub-section 47(2) would necessitate changing to some extent the procedures for information gathering by the Trade Practices Commission. This matter is discussed more fully in our chapter on procedures.

Related and Subsidiary Companies

4.123 Very often, for reasons not at all related to trade practices law, companies make arrangements for business to be carried on not by the company itself but by another company within the same group. Whilst the Trade Practices Act should not allow this type of useful business arrangement to become a device for escaping the

consequences of the Act, it should not discourage adoption of the most efficient operational arrangements within a group by applying a law intended to deal with transactions between parties at arm's length to transactions which are really domestic to the group.

4.124 The present Act provides for related companies in the following ways:

(a) section 45 does not apply to a contract, arrangement or understanding where the *only* parties are related companies;
(b) section 47 does not apply to one company restricting the dealings of another if the companies are related;
(c) although section 50 is silent, its operation means that internal company reconstructions are not subject to the section if they do not affect markets in competition terms.

4.125 In any redrafting of the sections referred to in paragraphs (a) and (b), comparable provisions should be continued. The Committee suggests that in any such redrafting, the two principles set out in those paragraphs should be observed.

SUMMARY OF PROPOSALS RE SECTIONS 45–47
I. GENERAL CATEGORIES

Para.	*Description*	*Competition Element in Prohibition*	*Status re Authorisation*
	A. Section 45		
4.8	(a) 'restraint of trade' should be replaced	—	—
4.117	(b) Collective boycott	Between parties and other persons	Available (para. 11.15)
4.118	(c) other agreements likely to prevent or restrict all or any party from engaging in competitive conduct	Market test	Available (para. 11.15)
	B. Section 47		
4.120	(a) Dealer restrictions—present s.s. 47(2)	Market test	Registration procedure-suspends prohibition until adverse Commission decision (paras. 4.121 and 11.16)
4.93	(b) Restrictions on suppliers	Market test	

Para.	Description	Competition Element in Prohibition	Status re Authorisation
4.40	*C. Covenants* running with land (*Quadramain*)		
	(a) re use of land;	Market test	Available
	(b) other	Usual test for type of restriction	Available
4.45	*D. Commercial Leases*—restrictions as to—		
	(a) use of the land (b) advertising by lessees (c) through merchant association rules	Between parties and other persons	Available
	(d) other	Market test	Available
4.56	*E. Price Agreements* between competitors fixing or controlling prices of goods or services supplied—		
4.81	(a) essential to joint venture production	Nil	Available
4.82 & 4.83	(b) joint acquisition	Market test	Available
4.65	(c) between sellers and buyers	Nil	Available
4.66	(d) collective agreement to recommend specific resale prices	Nil	Not available
4.59	(e) others (the generality)	Nil	Not available
	F. Recommended Price Agreements between competitors		
4.61 & 4.69	(a) purpose or effect to fix or control price	Nil	Not available
4.61, 4.69 & 4.70	(b) maintaining price—'true' recommended price agreements	Nil	Available
	G. Joint Ventures		
4.81	(a) non-price restrictions	Market test	Available
4.63 & 4.81	(b) price of joint venture product—		
	(i) if reasonably necessary for joint production	Nil	Available (4 months' time limit for decision)
	(ii) other	Nil	Not available
	H. Joint Acquisitions (Buying Groups)		
4.82 & 4.83	(a) joint buying restrictions	Market test	Available
	(b) joint advertising of selling prices	Market test	Available
4.88	*I. Standard Conditions* of contract or tender	As appropriate when restrictions come within other categories	Available
4.94	*J. Full-Line Forcing* (Deal with under general prohibition in s.s. 47(2))	Market test	Registration procedure
4.103	*K. Forcing Another Person's Product*	Nil	Available
	L. Exclusive dealing		
4.120	(a) present s.s. 47(2)	Market test	Registration
4.93	(b) restrictions on supplier	As s.s 47(2)—Market test	Registration

CHAPTER 5

RIGHTS UPON TERMINATION OF FRANCHISE AGREEMENTS

5.1 A number of submissions brought to our attention some particular problems currently being felt by firms commonly described as 'franchisees'. Franchisees are in many cases small businessmen. In some industries small business franchisees comprise the majority of the firms at a particular functional level. The most serious problem put to us related to losses, not now recoverable at law, arising from the termination of the franchise by the franchisor.

5.2 For the purposes of discussion, the Committee notes that the term 'franchise' appears to be used to describe one of, or a combination of, three types of business arrangement:

- a *product franchise* is an arrangement whereby a distributor acts as an outlet, whether wholesale, retail or otherwise, for the product(s) of a manufacturer, often on terms that give the distributor the exclusive right to sell the product(s) within a specific market. Franchises of this nature are common, for example, in retailing motor vehicles and petrol.
- a *system franchise* is an arrangement whereby a franchisor develops a unique or individual manner of doing business and permits the franchisee to use that system, in controlled fashion, in the operation of the franchisee's independently owned business. Examples of industries where franchises of this nature are common are fast food outlets, laundries and dry cleaners and motels. Sometimes the franchisor provides only the trade name and the pattern or formula of the business. In other cases the franchisee is required to sell goods or services provided by the franchisor.
- a *processing or manufacturing franchise* is an arrangement whereby the franchisor provides an essential ingredient or know-how to a processor or manufacturer. Franchises of this nature are common, for example, in the soft-drink industry.

5.3 Commonly these forms of franchise require considerable investment by the franchisee, both in monetary terms and in development of the goodwill. Typically the goodwill of the business is inexorably associated with the franchise and, in the public mind, with the trade name or mark of the franchisor. In those circumstances, the security of the investment of the franchisee may be dependent on the actions of the franchisor who normally has the property in the name or mark. The terms of the contract relating to termination or non-renewal will often reflect a balance of power weighted heavily in favour of the franchisor.

5.4 Submissions on this topic have expressed concern at the possibility of termination of franchise agreements, or refusal to renew after expiration of a previous term, or an offer of renewal only on substantially disadvantageous terms, by a franchisor, without adequate regard for the investment of the franchisee in the business. That possibility arises when a franchisee having invested perhaps substantial sums and performed properly under the franchise agreement receives no, or inadequate, compensation for his investment at the end of the franchise period. Many small business franchisees have a genuine fear that that may occur.

5.5 This matter is not at present generally encompassed by the rules of Part IV of the Act, although in the eyes of many franchisees cancellation of their franchises is often regarded as a form of restrictive trade practice.

5.6 The Committee has examined both the representations made to it on this point and the way the matter is dealt with in other countries, particularly the U.S.A., where many of the franchising practices now found in Australia seem to have originated.

5.7 In our view an opportunity for redress should be provided to franchisees, of the types described in paragraph 5.11 below as a matter of private right, to secure fair compensation for their investment, including goodwill, upon termination of their franchises. Such a provision should be read into every relevant contract, and thus this law would operate on the same lines as Division 2 of Part V of the Act operates to incorporate conditions and warranties in consumer transactions. We discuss below the remedies that we recommend be introduced on termination or refusal to renew the franchise, or offer to renew only on substantially disadvantageous terms.

5.8 In so recommending we are not only influenced by a consideration of fairness in commercial activities, although we recognise that to be a substantial issue. We also see social and economic advantages in encouraging franchisees to develop their own businesses. This must also be conducive to competition generally. We see this recommendation as a positive and economically useful way of according special treatment to small businesses, since most franchisees are small businessmen.

5.9 The Committee stresses, in making our recommendations on this subject, that the law should not be designed to continue in existence franchises which the franchisor may wish to discontinue. The law should not act as an impediment to marketing changes. The sole purpose and effect of the law should be to provide some minimum, fair terms of settlement for terminated franchises. Moreover the Committee would hope that the release of funds from outmoded investments by franchisees would encourage franchisees to re-invest in other aspects of business and thus provide a competitive stimulus in other areas.

5.10 There is no relevant State or Commonwealth legislation in Australia at the present time. The recent Fourth Report of the Royal Commission on Petroleum highlighted the problem of franchisor/franchisee relationships in that industry, particularly in relation to the termination of arrangements between oil companies and resellers. Whatever may be the outcome of the Royal Commission's Report we believe, with the benefit of the submissions put to us, that any move towards legislation to deal with rights upon the termination of franchises should be quite general in incidence, and not designed solely for a particular industry. Further we believe that this type of legislation is best enacted at the Commonwealth level even if, as we state in paragraph 5.14, it is to be actionable in State courts. Much franchising has a multi-state character and a single law would be the most convenient, and least costly, for franchisors.

5.11 Before discussing the circumstances in which we recommend a remedy be available, and the nature of that remedy, we should describe with more precision the type of relationships between franchisor and franchisee which should be susceptible to this remedy. What we have in mind is that a franchise, for this purpose, is either:

(a) a contract whereby the franchisee is granted the right to engage in a business of offering, selling or distributing goods or services under a market plan or system prescribed in substantial part by the franchisor, and where the operation of the franchisee's business is to be substantially associated with the franchisor's trade mark, service mark, or trade name, or any other commercial symbol; or

(b) a contract whereby the franchisor grants to the franchisee the right to re-supply, either as principal or agent, goods supplied to the franchisee by the franchisor, but only where the substantial identity of the franchisee's business in fact depends predominantly upon the use of the trade mark, service mark, trade name, or other commercial symbol; or

(c) a contract whereby a franchisor grants to the franchisee the right to use the franchisor's trade mark, service mark, trade name or other commercial symbol in connection with the business of the franchisee, to manufacture goods in accordance with the contract, and where the substantial identity of the franchisee's business in fact depends primarily upon the use of the trade mark, service mark, or trade name, or other commercial symbol.

5.12 We do not suggest that a franchisee should be entitled to a right to compensation for termination of the franchise, or refusal to renew or offer to renew the franchise only on substantially disadvantageous terms where the termination or refusal has been caused by the failure of the franchisee either to act in good faith in carrying out the terms of the franchise, or failure to comply substantially with an essential and reasonable requirement imposed on him by the franchisor under the franchise.

5.13 We propose that the right to compensation should be that which the court considers just and equitable in all the circumstances, including attempts to mitigate the loss. But in no case should it exceed the net loss on realisation, actual or notional, of the investment of the franchisee, including relevant goodwill. No account should be taken for loss of future profits other than that implied in the goodwill. Nor should there be any element of punitive damages. The right to compensation should accrue as from the date of termination.

5.14 In determining compensation the courts should be free to look at all the circumstances of the franchise arrangement and its termination (or refusal to renew totally or only on substantially disadvantageous terms). The Committee considers that it would be appropriate for this type of action to be brought in any State or Territory Court, within the normal jurisdictional limits of those courts. However, in most cases we would expect that litigation would not be necessary for the franchisee to secure his rights.

5.15 The right proposed is intended to provide a minimum right for franchisees that cannot be excluded by contractual provisions. Thus the Committee would have in mind a provision along the lines of the present section 68, which operates for implied terms in consumer contracts, to the effect that a term of the contract purporting to exclude, restrict, or modify the proposed statutory right mentioned above should be void. Thus if a franchise contract contained provisions for compensation of the franchisee which did not purport to exclude, restrict, or modify the abovementioned right, by providing less generous terms, that contractual provision would continue in force.

CHAPTER 6

SECTION 46

MONOPOLISATION

6.1 The submissions generally reflected acceptance of the present position of dealing with monopoly power within the structure of the Trade Practices Act. The submissions also accepted the concept underlying the present provisions dealing with monopolies which go, not to the creation and continued existence of monopolies, but to the abuse by monopolies of their power in relation to competitors. The Committee considers that in Australian conditions, at the present time, this system of dealing with monopolies is the most suitable.

6.2 During the debates in the Senate on the Bill which became the present Act, the then Attorney-General said of this Section

> 'the provision is not directed at size as such. It is confined to the conduct by which a monopolist uses the market power he derives from his size against the competitive position of competitors or would-be competitors . . . A monopolist is not prevented from competing as well as he is able, e.g. by taking advantage of economies of scale, developing new products or otherwise making full use of such skills as he has . . . In doing these things he is not taking advantage of his market power'.
>
> (Hansard—Senate: 14 August 1974, p. 923).

6.3 The submissions dealt with five basic issues, namely:

(i) whether section 46 should require an element of intent;
(ii) whether, if intention is required, it should also be necessary to demonstrate that the action of the corporation did, in fact, achieve one of the results set out in paragraphs (a), (b) and (c) of sub-section 46(1);
(iii) whether some guidance should be given as to the meaning of 'market';
(iv) whether there is a need to incorporate in the section further or other guidance as to the meaning of 'being in a position substantially to control a market' appearing in sub-section 46(1), having regard to sub-section 46(3);
(v) whether the section should contain a specific list of prohibited practices.

6.4 In relation to the first basic issue, the majority of submissions requested the Committee to recommend that it be made clear that intent was a prerequisite to the operation of the section. The submissions pointed out that the section as presently drafted gave rise to ambiguity. That ambiguity arose from the words 'take advantage of' in line 2 and 'to' appearing as the first word of each of paragraphs (a), (b) and (c) of sub-section 46(1).

6.5 Views were expressed to the Committee that 'take advantage of' was capable of a double meaning. It could mean simply to use or it could mean to misuse. Similarly, the word 'to' could change its meaning according to whether one interpreted it as 'in order to' or 'with the result that'.

6.6 Some submissions felt that the section was contravened by a company whose actions involved no more than a use of power which consequentially brought about one of the effects proscribed in paragraphs 46(1)(a), (b) or (c), whilst other submissions felt that the section applied only to a misuse of power designed to achieve one of the proscribed effects.

6.7 It was put to the Committee that section 46 should be concerned only with abuses by a monopolist and should not limit 'proper' or 'competitive' behaviour. The concern was that the section could be interpreted by the Courts to prohibit 'normal competitive

behaviour'. Thus, the argument ran, every business is, for example, attempting to sell as much as possible and is consciously seeking sales at the expense of its competitors. Normal competitive behaviour of itself is clearly not what the Parliament intended to prohibit—nor, in our view, should this be prohibited. Moreover in the only judgment to date dealing with the interpretation of section 46, *Top Performance Motors Pty Limited* v. *Ira Berk (Queensland) Pty Limited* (1975) (CCH) ATPR 40-004 the Court (one Judge explicitly and the others implicitly) also took this position. The Court clearly had regard to whether the respondent's actions had the genuine purpose of protecting its legitimate trade and business interests. Having reached the conclusion that the respondent had such genuine purpose, the Court found there had been no contravention of section 46.

6.8 In light of this line of judicial interpretation, we do not feel it would be appropriate for the section to be changed other than in the respects we have elsewhere suggested in this chapter. However, we draw to the attention of the Government our understanding that there is concern by some (who believe that their normal and proper competitive conduct might be proscribed by the section) that the section may not always be interpreted in this way. Accordingly, we suggest to the Government that it keep close watch on the manner in which this section is interpreted in the future.

6.9 It has been put to the Committee that the word 'to' at the commencement of each of paragraphs (a), (b) and (c) does not make it clear that there is a necessity to prove intent to achieve one of the effects set out in those paragraphs. The Committee believes that the phrase 'take advantage of' when read with the word 'to' imports an element of intent. However, to place the matter beyond doubt, we recommend that the matter be clarified by replacing the above mentioned word 'to' by a reference to a purpose, or purposes which include a purpose. In our view it is not necessary that the purpose behind the particular course of conduct should be the sole or predominant purpose. *It is sufficient if it is one of the purposes, beyond normal competitive behaviour, underlying the conduct.* For this reason the Committee does not agree with the use of words and phrases suggested in the submissions (notably, but not exclusively, 'wilfully') which would or could lead to a narrower interpretation of the element of intent than the Committee considers desirable.

6.10 In relation to the second basic issue, the Committee considers that the rationale of the section would be largely negated if a contravention required proof that one of the matters in paragraphs (a), (b) or (c) had occurred. It is hardly appropriate to allow the conduct to be checked only after the damage has occurred. The Committee recommends that the section should apply when:

- the corporation is in a position substantially to control a market; and
- the corporation has used, otherwise than in normal competitive behaviour, the power it has by virtue of being in that position; and
- that use of power involved taking advantage of market power for the purpose of, or for purposes that include the purpose of, achieving any of the effects set out in paragraphs (a), (b) or (c).

It should be possible to halt such conduct of a monopolist without proof that the conduct has already achieved the object.

6.11 Concern was expressed in the submissions that a monopolist who invested in new capital plant and equipment might be regarded as contravening the section. Cases of predatory investment will inevitably be rare. However, we consider it desirable to ensure that the section is not used as an excuse for failure to invest. Accordingly, to remove any doubts, we believe the section should make it clear that monopolisation does not occur by reason only of investment in new capital plant and equipment.

6.12 In relation to the third basic issue, 'market', the relevant market as found in the particular case will, of course, be of fundamental importance in the determination whether a corporation is, in fact, in a position of substantial control. Some submissions requested that the Act be amended to ensure that the relevant market in any case be not determined by too narrow limits. We have discussed the question of market definition in Chapter 4, dealing with sections 45 and 47. We believe the principles there stated are applicable here.

6.13 In relation to the fourth basic issue, guidance as to the meaning of 'substantial control of a market', sub-section 46(3) already seeks to lay down some guidelines.

6.14 The Committee notes that sub-section 46(3) is an inclusive definition derived from the holding of the Commission of the European Communities in *Re Continental Can Co. Inc.* (1973) CMLR D11. The definition indicates some of the empirical factors which may be taken into account in determining whether the corporation is in a position substantially to control the market. In determining the market it may be necessary to go beyond those factors and to undertake a full and complete economic evaluation of the structure of the market and its functioning in order to determine whether, considering all factors, including the relative size and strength of competitors, freedom of entry, pricing terms and practices, profits, and consumer demand, the corporation has the requisite power.

6.15 A 'position substantially to control a market' appears to require that the corporation enjoy a real degree of independence of behaviour, other than from government controls, as to pricing, production and distribution. In this respect a distinction may be drawn between a corporation having a leading position in a market and a corporation in a position substantially to control that market. The presence of a corporation enjoying a leading position is not incompatible with the existence of effective competition in the market. However, the presence in the market of a corporation in a position substantially to control that market, assumes the absence of that degree of competitiveness in the market which could ordinarily be relied upon to have a material influence upon its activities. (See Bellamy and Child, *Common Market Law of Competition*, 1973, paragraph 705). The particular question is whether the existence of that corporation operates to prevent or restrict another corporation's ability to engage in significant competitive behaviour.

6.16 We do not recommend any amendment to the law, in this regard, by amendment to sub-section 46(3) or otherwise.

6.17 In relation to the fifth basic issue, a number of submissions requested that specific forms of conduct be included in the section as matters deemed to be conduct which has, or is likely to bring about, the effects referred to in paragraphs (a), (b) and (c). The Committee does not favour this approach, which is addressed principally to categorising conduct where the basic thrust of the prohibition is addressed to an intention on the part of the monopolist to bring about a proscribed effect. We believe it is immaterial what wrongful conduct is used for that purpose by the monopolist, provided that that conduct (whatever it was) involved the monopolist in taking advantage of his market power. We see no particular virtue in seeking to specify a list of specific acts or conduct.

Monopolies Commission

6.18 One submission urged the establishment of a Monopolies Commission. A Bill to establish such a Commission was presented to Parliament in 1972 but was not proceeded with. The Bill sought to establish an administrative body to investigate

monopoly conditions in the light of the public interest. The Committee believes the section 46 approach to monopolisation, taking into account our recommendations, is adequate and suitable for Australian conditions and, therefore, does not recommend the establishment of a Monopolies Commission, which would involve considerable and, in our view, excessive expenditures of time and money by Government and industry. Moreover, we are reluctant to recommend the creation of a further body in the field.

CHAPTER 7

SECTION 49

PRICE DISCRIMINATION

Submissions

7.1 This section of the present Act drew more criticism in submissions than any other. Only one submission defended the section in its present form. Most advocated its repeal, some wanted it strengthened. Many submissions suggested that it be retained only in specific circumstances, such as where the seller was so powerful as to be able to impose upon buyers discriminatory terms to which the buyers had no alternative, or where the buyer was so powerful that he could extract such terms. Many also emphasised that whatever the relevance of such a provision might be in the United States of America, it did not operate satisfactorily in the more limited Australian economy.

7.2 At the time of its introduction the section was widely regarded as being designed to advantage small business especially small retailers. Yet all submissions from small business interests, with two notable exceptions, thought the section had either worsened the relative position of small business or not assisted them in any way.

7.3 The criticisms tended to be of a general nature. Only a few submissions alluded to specific situations and sought to show how the section affected those situations, notwithstanding that problems which arise are clearly pragmatic marketplace difficulties. Many submissions said it has introduced an unsatisfactory price rigidity into the market-place in that it operated to prevent price flexibility, which is at the very heart of competitive behaviour.

Present Law

7.4 This section of Part IV has had the least exposure to litigation in the Courts or to investigation by the Trade Practices Commission. However the fact that criticisms are so wide-spread, and that they come from both sellers and buyers, has persuaded the Committee that the section may not be operating in a way which is conducive to the development and maintenance of a free and fair market in Australia.

7.5 This section has its origin in comparable law in the United States of America, particularly the Robinson-Patman Act of 1936. That Act was passed to look after the interest of small business buyers in response to the rise of large chain stores which exercised greater buying power.

7.6 Section 49 operates by way of prohibition on the seller who discriminates, in the manner provided in the section and on the buyer who induces a price discrimination, in the knowledge that the price discrimination is unlawful. In view of the complexity of the elements of an unlawful price discrimination (see paragraph 7.8 below) the section may be of dubious value in affording protection to a person suffering discrimination.

7.7 Price discrimination may, according to context, refer to:

(a) a simple difference in price charged to different customers for similar goods, irrespective of any cost difference in supplying those customers,
(b) a difference in prices charged which goes beyond reflecting the difference in cost of supplying the different customers.

7.8 Not all price discrimination is prohibited by section 49. Unlawful price discrimination requires that:

(a) the discrimination must apply only to goods, not services,
(b) the goods must be of like grade and quality,
(c) the discrimination must be of a recurring and systematic nature,
(d) the discrimination must have the effect of substantially lessening competition in a market,
(e) the market must be one in which either the supplier sells (primary market) or the customer sells (secondary market),
(f) the discrimination makes more than reasonable allowance for the difference in the cost of manufacture, distribution, sale or delivery, and
(g) the price discrimination must not be an act in good faith to meet a competitor's price.

Effect on Competition

7.9 We now consider the effect of section 49 in terms of competition. The section prohibits price discrimination only when it substantially lessens competition in either of two markets, the primary market or the secondary market.

7.10 The *primary market* is that of the supplier and his competitors. Price discrimination by a supplier may have an adverse effect on the ability of his competitors to compete. To affect prices in this way will usually require substantial market power. The purposeful use of market power in this way is dealt with in section 46.

7.11 The *secondary market* is that of the supplier's customers. If a supplier charges one customer substantially more than another customer for the same goods and both customers are competing in the same market, the price discrimination by the supplier may have a substantial effect on the competition between them, whilst not necessarily being likely to have a substantial effect on competition in the market as a whole. The section does not apply to price discrimination which does no more than reflect the approximate difference in cost of supplying the two customers, whether those cost differences arise from differences related to cost of production, distribution, selling or delivery.

Effect on Prices

7.12 After February 1975, when section 49 came into effect, some suppliers, either through ignorance or desire to do so, took the law to mean that they were required to charge similar prices to all customers or at least to competing customers. This led to price rigidity, which was the subject of comment by a number of submissions, and the reduction in or abolition of many discounts which in turn resulted in overall price increases. Some of the discounts which were abolished or reduced at that time were substantial. Apart from that initial round of increases of price, the Committee is unable to determine what the net effect has been since that time of the operation of this section on prices.

Is Price Discrimination Anti-Competitive?

7.13 It is a widely-accepted view that in a market where there are individual published price lists, or prices are well known to buyers, competitive behaviour may diminish because each seller is able to anticipate that his rival will react to an across-the-board price reduction. The seller will therefore limit across-the-board price reductions of his goods because he will fear price cutting by his competitors. In these circumstances price

discrimination which takes the form of price cuts to one or a few buyers will increase price competition. It is desirable in these circumstances that price discrimination be available. The Committee considers that this is a particularly relevant matter in the Australian situation since much of industry is oligopolistic because of the need to achieve economies of scale in a relatively small domestic market.

7.14 Another circumstance in which a supplier may contemplate making price discriminations by cutting his prices to one or a few buyers is where, during periods of slack economic activity, the particular supplier has surplus capacity. The ability of the supplier to offer low prices to selected customers at this time, even to the point of selling below his average cost, can be of national advantage in promoting improved consumption. However suppliers who engage in this form of pricing tactic can, of course, only do it on a selective basis, because they must arrange to recover at least their total overhead cost over the whole of their operation if they are to make profits at all.

7.15 An aggressive manufacturer who has surplus capacity can often expand his production and sales to the benefit of himself, his employees and customers by selling to at least part of his market at a price which is only slightly above the variable cost and below the average cost. If such a manufacturer is successful in increasing his share of the market in this way, the benefit of price reductions may become available to other customers by reason of a general reduction in the manufacturer's list prices, consequent on his reduction in level of overheads per unit of production. Thus price discrimination in these circumstances may not only be a trigger to more competitive pricing in the particular market segment but it may actually lead to an overall reduction of price levels in that market.

7.16 Section 49 provides an exception that allows price discrimination to the extent that it is necessary to meet a price offered by a rival supplier. In practice the narrowness of the interpretation that has been given to the exception has tended not to alleviate to any realistic extent the price rigidities which arise from the very existence of the section.

7.17 Laws such as section 49 are usually said to be necessary to protect the interest of small business, particularly small retailers. Certainly the Robinson-Patman Act (US) was historically based on this premise. However there has been much dissatisfaction with the operation of that law in the United States of America, to the point where substantial amendment (or possible repeal) is now seriously canvassed by many eminent authorities.

7.18 Price discrimination may adversely affect competition in the market of the buyers, if there is only one supplier. Where there is more than one supplier there may be opportunities for the buyer who is discriminated against to reduce the discrimination by changing his supplier. In some other cases, where there is a system of industry-wide quantity discounts, the system may be cost-justifiable by reference to variable cost differences.

7.19 It is open to question whether price discrimination is always the cause of the buyer's trouble rather than a symptom of it. For example, the fact that a seller can separate out a specific class of customer for unfavoured treatment may indicate that the class is already in a disadvantageous position, even in the absence of discrimination.

Conclusion

7.20 The Committee considers that in the Australian context the conduct of a large buyer who is endeavouring to secure price cutting in his favour, whether it be discriminatory or not, may be more pro-competitive than anti-competitive. Indeed

such price cuts as a large buyer is able to obtain can trigger off competition from rival suppliers or can trigger off competition in a market, where other forces are unlikely to produce active competition.

7.21. As discussed above, the prohibition on price discrimination in section 49 has, in our view, operated substantially to limit price flexibility. The Committee believes that in the Australian context, section 49 has produced such price inflexibility that the detriment to the economy as a whole from the operation of the section outweighs assistance which small business may have derived from it. It is price flexibility which is at the very heart of competitive behaviour. The Committee thus recommends that section 49 should be repealed.

CHAPTER 8

SECTION 50

MERGERS, INCLUDING ASSET ACQUISITIONS

The Present Law

8.1 The present provisions relating to mergers are to be found in section 50 of the Trade Practices Act and may be summarised as follows:

(a) mergers (including takeovers and acquisitions of assets) are prohibited between corporations if they are likely to substantially lessen competition in a market for goods or services;
(b) acquisitions of assets in the ordinary course of business are not prohibited;
(c) the prohibition applies only to corporate mergers, even if there be extended constitutional reach, e.g. because interstate trade is involved. Thus mergers, takeovers or acquisitions of assets where one business is not a corporation are not covered by the law;
(d) the provision extends to indirect mergers and acquisitions as well as direct mergers. Thus the use of intermediaries does not prevent the law from operating upon the substantial effects of the mergers.

Clearance and Authorisation under the Present Law

8.2 There are opportunities for clearance and/or authorisation on the application of the acquiring corporation.

8.3 There are strict time limits within which the Commission must decide applications for clearance or authorisation. These are:

Clearance—30 days

Authorisation—4 months

The time runs in each instance from the date of lodgment with the Commission. In the case of time for authorisation there is power for the applicant to extend the time limit.

8.4 If the Commission does not take a clearance decision and notify the applicant within the 30-day time limit the clearance is automatically granted and it is similar in the case of authorisation. In practice there have been few cases where the Commission has not notified the decision within that time. We return to consideration of procedural aspects later in this Chapter.

The General Issue

8.5 Most submissions expressly or impliedly regarded the continuation of merger provisions as necessary but sought substantial changes in the law and its operation. Others sought the abolition of this part of the law altogether. The first question which we consider is the need for any merger control as part of the Trade Practices Act.

8.6 In our view, there are two main reasons for including merger provisions in any competition policy law:

(a) merger provisions are necessary to prevent the possibility of achieving, by merger, anti-competitive results prohibited elsewhere in the same law;
(b) merger provisions ensure that the control of significant capital assets in the community does not change hands in circumstances that disregard any anti-competitive effects of the change.

8.7 Our view is that merger law is needed but that its application should not be as sweeping as that of the present law. In particular the law should not apply to the smaller acquisitions; damage to competition is much more likely to occur where larger companies are involved. We deal below with a proposal to have a monetary threshold. If our recommendations are adopted the law would not in future apply to the small business type mergers to which it now applies.

8.8 Given the conclusion that it is proper to have legislation dealing with merger activity as part of a competition policy law, there are two broad alternatives available as to the form of that law:

(a) it may take the form of a prohibition with exceptions;
(b) it may take the form of an obligation to register particulars of proposed mergers, coupled with a system of examination of the mergers against such criteria as is set out in the law for discouraging or prohibiting certain sorts of mergers.

The essential difference is that the first type of law is self-enforcing in the sense that if a merger falling within the prohibited category takes effect, proceedings can be taken either by the administering authority or by private litigants, if rights are given for private litigation. In the case of the second scheme the merger would become prohibited only after examination and upon an order that the merger should not be pursued.

8.9 As we have already noted, the present law takes the form of a prohibition against mergers which are likely to substantially lessen competition in a market for goods or services. The major exception to the prohibition, given that the particular merger has the anti-competitive effect contemplated by the law, is that such a merger can be authorised where the applicant is able to make out a case based on the authorisation criteria set out in sub-section 90(5) of the present Act.

8.10 The alternative form which the law could take is a system requiring merger activity to be registered with an authority—presumably the Trade Practices Commission—and an examination made by that body with a view to detecting the mergers which either do not meet a set of positive criteria to be specified in the law as the basis for allowing mergers to proceed, or alternatively do meet negative criteria set out in the law as the basis upon which the particular mergers should not be allowed to continue. The list of criteria in either case may go beyond criteria based on effects on competition. There are also a number of variants that could be incorporated in any such scheme including a minimum monetary threshold test based on turnover value of assets affected or consideration for the particular merger transaction.

8.11 In the view of the Committee it is preferable in this field to have a prohibition-type law rather than a registration plus examination-type law. A good reason for this is that, given the existence of a prohibition-type law and some experience of its workings, the business community can arrange its affairs in mergers (and for that matter in relation to other types of conduct) in a way which it believes complies with the law.

8.12 The present system of clearance and authorisation offers a reasonable opportunity for parties who believe that they have complied with the law, or are entitled to the benefit of the exception which the authorisation procedure provides, to obtain assurance of their position by application to the Commission. This is not to say that the Committee believes that the business community should apply for clearance or authorisation in respect of all mergers.

Conglomerate Mergers

8.13 It has been said in some submissions that one effect of the Act, and the Commission's decisions, is that large company groups which have been successful in their own field, and therefore have a substantial share of the market, are being discouraged from expanding further in the markets they know and are expert in, and as a result are seeking growth by making acquisitions in other markets, often not related at all to their existing business. This latter type of expansion is often referred to as conglomerate merger activity.

8.14 There has been debate overseas as to whether conglomerate merger activity should be discouraged or forbidden by laws imposing special tests going beyond the kind of test set out in section 50. The submissions to the Committee reflect this debate. A number of other submissions suggested that conglomerate-type mergers should be tested by exactly the same test as those not involving conglomerates i.e. whether they are likely to lead to a substantially lessening of competition in any particular market. Some other submissions suggested that the law should be extended to cover conglomerate-type mergers solely on the ground that they lead to overall concentration of industrial capacity in fewer hands within the community. The Committee is of the view that the present approach is to be preferred and should be retained.

8.15 The Committee notes the conclusion of the Report of the OECD Committee of Experts on Restrictive Business Practices on this topic:

> As the size of conglomerate mergers increases so does the likelihood that the merger will have anti-competitive effects such as increasing the opportunity for reciprocal dealing and the elimination of potential competition. Size can also present adverse political and social consequences. While a few very large firms may be necessary in some industries for reasons of international competition or high risk or high capital requirements and significant scale economies, an economy dominated by large firms may find that the market structure and performance which results from them may make the normal macro-economic policies either inoperative or very much more costly to implement. The penalty of neglect of the question of market structure then becomes political and social as well as economic. However no measurable or meaningful analysis of these political and social consequences is yet possible and the desirability of any particular conglomerate merger must therefore continue to be measured by economic analysis.

(Report of Committee of Experts on Restrictive Business Practices—OECD—1974, page 24).

8.16 The Committee considers that the force of the conclusion expressed above should apply perhaps even more so in Australia than in some of the larger OECD member countries. Accordingly it does not recommend any special treatment of conglomerate mergers, as has already been indicated above.

Acquisitions of Assets

8.17 The present law applies to acquisitions of assets as well as to acquisitions of shareholdings. Experience has indicated that it is easy to avoid the consequences of that law covering only acquisitions of shareholdings by arranging for sale of assets of companies. In Australia acquisitions of assets in the ordinary course of business are excepted by sub-section 50(2) from the operation of the merger provisions.

8.18 Some of the submissions to the Committee pointed out that the term 'acquisition' was not defined and that in the case of acquisition of assets there was some doubt as to whether it covered acquisitions of certain kinds. After considering these submissions we see no reason why the law should not clearly cover acquisitions of assets even where the full legal and equitable interests in the whole of the assets is not acquired. The law should thus apply to acquisition of assets by lease or by hire or by hire-purchase or by exchange or by comparable means (for example a charter-party). This paragraph should not affect sub-section 50(2).

Mergers by Operation of Law

8.19 Consistent with the section being directed to economic effect rather than form, it should also apply to mergers of corporations effected by operation of law. This can happen for example in the case of amalgamations occurring by way of a scheme of arrangement under the various Companies Acts.

Conditional Contracts

8.20 Two problems arise from the drafting of the present paragraph 50(3)(b). The first is as to the time period within which the contract must be filed with the Commission. In Chapter 4 we have already recommended in relation to sub-section 45(8) that the equivalent period should be extended and we think that here it should also similarly be extended, namely from 7 to 14 days. The second problem, which is also common to both paragraph 50(3)(b) and sub-section 45(8), involves contracts containing provisions reflecting the wording of the paragraph or sub-section. It has been suggested that technical difficulties may arise if one party wishes to rescind such a contract. The present section provides for a condition that such a *contract* will not come into force unless and until approvals are obtained. One submission said it would be preferable if the section referred to the condition in terms that 'the acquisition will not take effect unless and until'. It was put that, as presently drafted, one party may suffer damage because the condition is a condition precedent and the other party may endeavour to rescind the *contract*; e.g. where clearance is denied and yet a clearance would be granted if another notice were lodged. This may be a difficulty; we think it should have attention when drafting amendments with a view to clarification (see also paragraph 4.50 *et. seq.*).

Failing Companies

8.21 The question of the treatment of acquisitions of failing companies is an important one, not the least because it was expressly adverted to in our terms of reference. We understand that, in fact, the Trade Practices Commission has until now always granted a clearance for the acquisition of a failing company when it has been satisfied that the company is, in fact, 'failing'. The question we were asked to consider was whether the law should expressly deal with the position of failing companies.

8.22 The Committee believes that a statutory defence should be available, rather than creating an exception. However in our view a failing company must be genuinely failing and the concept must be strictly defined. One submission suggested that 'failing' company should be defined so as to cover only those companies imminently likely to go out of business, for which there have been no alternative buyers on similar terms to those offered by the offeror. This definition seems appropriate for the simple case where the company conducts one business which is failing. The definition will, however, also have to deal with the situation where a multi-business company is selling a part of the business. In this latter situation, in our view, determination of whether the company is a failing company must be by reference only to that part of the business which is the subject of the sale. Any definition must relate to the relevant business of the company and there must have been reasonable efforts to find an alternative buyer.

8.23 In reaching this recommendation we believe that there is little point in preventing a merger if the target company is going out of business anyway. Additionally, to provide the statutory defence that we have recommended will minimise the general social cost of business failures and give reasonable consideration to the position of employees, creditors and others who might suffer from the complete failure of the target company. This we believe, will be achieved at no great cost to the

preservation of competition as a principle to be observed on a wide basis in Australian industry.

8.24 Finally on this point the Committee is of the view that there should be no clearance mechanism special to failing companies.

Threshold Tests

8.25 Many submissions to the Committee have urged that there should be a threshold test written into section 50 so that the provision should not apply to mergers involving at least one relatively small company. What the submissions had in mind is a monetary threshold criterion easily understood by the parties to the likely merger. Other submissions were opposed to a threshold. Nevertheless we favour the introduction of such a test. One effect will be that small companies, usually of a private nature, will be able to carry on their activities and negotiate the sale of assets or of their whole enterprise without being much concerned about the operation of section 50. A number of submissions to the Committee cited the case of a proprietary company, virtually carried on either by one man or as a family business, which is faced with the decision as to how or whether it should be continued upon the retirement or the death of the key personality. In many cases the most obvious purchaser of such a business is a larger company engaged in the same line of business. The submissions claim that section 50 has stood in the way of such small businesses being sold. We have a great deal of sympathy for this type of case.

8.26 In many cases the small company by virtue of its relatively small size cannot be a significant force in the particular market. This is a strong additional argument for a threshold test. In isolated cases, because of peculiarity of product or some quirks of geographic market, section 50 may be felt to operate to prohibit the proposed sale.

8.27 Various submissions made suggestions as to how a threshold test might be operated. The major alternatives suggested are to base the threshold test on one of the following:

(a) turnover,
(b) value of gross or net assets; or
(c) value of consideration for the takeover.

Any of these alternatives may operate by reference to the value of the target company alone or by reference to the aggregate value of the respective measure for both the company making the offer and the target company.

8.28 It seems to the Committee that any threshold test should not operate so as to favour one offeror for a target company as against another. To do so would be to distort the market. It is one thing to deny to one particular bidder for a target company the opportunity to complete a takeover because the takeover is likely to lessen competition, but quite another thing to distinguish between bidders, not on the basis of the effect that the bid may have in competitive terms in the market but simply upon difference in size of the offeror companies. For this reason we do not recommend any threshold test based on an aggregation of various possible monetary tests between the offeror company and the target company.

8.29 Our recommendation is that such a threshold test be based upon the turnover of the target company. We have selected turnover because it is a well known measure which a company normally calculates for its own purposes anyway and there is thus no need for it to make special calculations for the purposes of the Trade Practices Act. It is a concept easily understood and easily applied in practice. Our suggestion is that for the purposes of this exemption, the test would first be based on average turnover for the

two previous complete financial years. In recommending the introduction of such a test we are conscious that the establishment of a mere threshold in turnover terms could lead to a series of exempt acquisitions or pattern of acquisitions that could, either in the short or long term, give rise to an anti-competitive position of substantial control of a market, or reinforce the position of the acquiring company, perhaps in another market. This is a matter which we deal with separately below.

8.30 The Committee recognises, however, that there may be cases where small single mergers may take place in circumstances which are peculiar to the enterprises concerned and result in the merged firm dominating the market in which it operates. In that case a market share test would have obvious relevance. But a simple threshold exemption premised on that basis introduces all the costs associated with analysing market share and defining the market. The overall cost to industry, government and the community would be substantially greater than the public benefit to be derived from preventing single mergers of small businesses of that kind.

8.31 Such information as is available from an analysis of merger cases considered by the Trade Practices Commission between October 1974 and March 1976 does suggest that the threshold test would eliminate the need for a great deal of investigation which is necessary under the present Act, much of which gives rise to unnecessary apprehension on the part particularly of small businesses. After examining the various statistical data, the committee is of the view that a suitable level of turnover to be used as the upper limit for the threshold should be $3 million. We would be concerned if the threshold at this time were significantly above that level.

8.32 This test is still appropriate where the whole of the enterprise is being sold. Where only some of the operations of the business are being sold, we think it would also be appropriate to measure the threshold turnover, in accordance with generally-accepted accounting principles (perhaps to be spelt out in the Act), by reference to the turnover associated with those assets, e.g. if a branch or division of the business were being sold the turnover of that branch would normally be available. The Commission should be empowered to make calculations where necessary. Where actual records of turnover related to the particular assets being sold are not available, the Commission should be empowered to form an opinion as to the turnover likely to be related to the assets.

8.33 The Committee recommends that if the threshold test is to be adopted care be taken to ensure that the law cannot be used to avoid the operation of section 50 by artificial reductions of the turnover of the business being sold. This is a matter with which the Court or Commission should be able to cope, given an adequate statutory base. Finally although the Committee is recommending a present level of monetary turnover as a threshold it is of the view that there will be a need to change this monetary amount from time to time by amendment of the Act when necessary.

8.34 There is one exception to the case in which a threshold test should operate. There have been instances where a large company sets about establishing a pattern of acquisition of small companies each of which is in the same industry. The committee would propose that this form of pattern-buying should not escape the operation of section 50 irrespective of whether each of the target companies were under or over the threshold turnovers. Such acquisitions should be subject to the present test of section 50 as if the threshold provisions had not been enacted.

Clearance and Authorisation

8.35 In relation to clearance and authorisation we have already indicated our view

that the availability of the clearance procedures should be retained for merger matters. Consistent with that view we think that provision should be made for the Commission to grant clearance to an applicant on either of two grounds:

(a) that the turnover of the target company was below the prescribed threshold and the acquisition was not of the systematic or pattern type; or
(b) that the acquisition was not likely to have a substantial adverse effect on competition in a market for goods or services.

8.36 Submissions made to the Committee about clearances or authorisations suggested that the present statutory time limits should be changed. Some submissions suggested shorter time limits for authorisations; others suggested that the present time limit for the Commission to consider clearance applications (30 days) was not long enough for the Commission to make a proper investigation, especially in complex cases. Our view is that time is quite critical in many merger matters; indeed in the case of contested takeovers even a few days is quite critical to the parties. There is no doubt that the present legislation has this in mind but only in relation to mergers do present time limits exist for the Commission to make decisions upon applications. The existing time limits, especially those for clearance, seem to be generally consistent with time periods set out in other legislation, e.g. in Companies Act procedures for takeover offers and in Commonwealth legislation regarding foreign takeovers. Our view is that the time limits for clearance decisions might be extended, at the option of the applicants, for a further period. This is a matter already provided for in relation to authorisation applications but not clearances. But the further period should not be unlimited. To do so might detract from the incentive and urgency for the applicant to supply information, and the Commission to give its decision, and might also give the applicant an unfair opportunity in a takeover struggle where rival offerors for a target company are being considered by its shareholders. We consider that in clearance matters the time limit should remain at 30 days but with the applicant having the option to extend the time limit, not exceeding a further 21 days.

8.37 We have dealt above with the grounds upon which the Commission might grant clearance in merger matters. We now turn to the question of grounds for authorisation. Some submissions have suggested that there should be special grounds for authorisation in relation to mergers, grounds which would not be specified as such in relation to authorisation applications for section 45 or section 47 conduct. In particular it is suggested that industry rationalisation schemes to secure the benefits of economies of scale should be set out in the statute as a special form of public benefit which may be available in merger authorisation matters.

8.38 As noted elsewhere, the Committee does not favour the adoption of a 'shopping list' type of approach in relation to the authorisation test. Nor should the legislation indicate a framework of matters to which primary emphasis must be given. Each case will depend on its individual facts and merits, and applicants should be free to put the arguments they see as justifying their mergers with as little limitation as possible. Moreover, any such list, even if expressed to be non-exhaustive, tends to divert debate towards categorisation of public benefits against the list rather than assessment of the merits of the benefits.

8.39 Some submissions inferred not that no opportunity was given to raise matters but rather that the Commission's decision gave insufficient weight to the applicant's views. We are unable to form any concluded view as to whether this has been the case in any particular instance. One method of coping with this problem would be to allow clearance appeals to the Tribunal. This was a course pressed in some submissions. We

do not favour it. Many submissions urged on us the absolute need for expedition in processing merger clearance matters, and an appeal procedure would inevitably frustrate this. We think a party disappointed with the Commission's decision may take its own decision whether to proceed at risk or seek a declaration from the Court. In this regard we note the Trade Practices Act Amendment Bill 1976 would incorporate a new section into the Act, section 163A which would allow any person to approach the Court to seek a declaration on these matters.

8.40 Some submissions suggested that the Tribunal, in authorisation appeals, be empowered to grant a clearance if the evidence, which is invariably much fuller and more refined than that addressed to the Commission, adduced before the Tribunal indicated that the merger would not be likely to have the anti-competitive effects found by the Commission. We do not favour this course either. It would encourage clearance appeals to be conducted under the guise of reviews of authorisation decisions. If the Tribunal does indicate that, in its view, the merger is not substantially anti-competitive (that is, in our scheme now a relevant circumstance for consideration in determination of authorisations) then little time will be lost relatively if the applicant then again requests a clearance from the Commission.

Competition—Structure and Conduct

8.41 There was criticism in some submissions of the manner in which the Commission assessed the likely effect of the merger in terms of competition. The most consistent criticism was that the Commission laid too much emphasis upon the structural aspects of the merger, and had a tendency to assume that after the merger the merged company would have a maket share equal to that of the two companies prior to merger. It was suggested that not enough emphasis was placed upon the actual conduct of the respective firms in their existing markets, so that firms who had shown by their present conduct and past records that they were competitively minded, and behaved competitively in the maket, were treated no differently from those who had other attributes. In a merger the merged company is, of course, in an entirely different situation from the two parties prior to the merger. The committee is of the view that it is proper for the Commission and others called upon to judge competitive effects, to assess those effects by reference to conduct considerations as well as structural considerations because market structure of itself should not be used to impute conduct.

Alleged Conflict with Industries Assistance Commission

8.42 We turn next to consideration of an alleged conflict between the operations of the Industries Assistance Commission and either or both of the Trade Practices Act and the operations of the Trade Practices Commission. A number of submissions claimed that there appears to be a conflict in aims between the Industries Assistance Commission on the one hand and the operations of the Trade Practices Act and of the Trade Practices Commission on the other. This is an issue closely related to that discussed in the previous paragraph.

8.43 The Industries Assistance Commission is concerned with industry efficiency and in its examination of an industry to determine its assistance needs it may suggest that there is a need for rationalisation of the industry output in order to achieve reduced operating costs and greater viability. On the other hand the Trade Practices Commission may view the particular merger which would achieve reorganisation and reconstruction as structurally anti-competitive.

8.44 In order to consider further this area of alleged conflict we should first consider the role of the Industries Assistance Commission. Its primary function is to advise the

Government on the nature and extent of assistance which should be given to industries in Australia. With regard to the long term assistance requirements of manufacturing and primary industries, the Industries Assistance Commission Act requires that the Government refer the question to the Industries Assistance Commission and receive its report on the particular industry before assistance can be given. The Government is not however obliged to take the Industries Assistance Commission's advice. 'Long-term assistance' in this context means assistance which is provided by means of tariffs or other restrictions on imports or financial assistance which extends over a period greater than two years.

8.45 Specific policy guidelines, covering such aspects as the Government desires for improved efficiency of resource use, its concern for the interest of consumers and the recognised need for assistance policy to be in tune with national economic policies as a whole, have been written into the Industries Assistance Commission Act. Besides this, the Government requires that the Industries Assistance Commission includes in its report on an industry all pertinent facts including:

(a) level of assistance necessary to provide adequate protection against import competition;
(b) whether and by what means industry could be more efficient;
(c) whether and to what extent an industry should be restructured;
(d) the probable consequences of changing existing levels of assistance.

8.46 The result is that the Industries Assistance Commission undertakes a very detailed economic analysis of the industry under review and recommends the appropriate form and level of assistance, together with estimates of the likely consequences in the event of the Government's acceptance of the recommendations. As mentioned above, the Industries Assistance Commission at times indicates the need for a restructuring of the industry. This can take the form of a reduced number of units in an industry with a view to achieving greater economies of scale through larger production per unit. A reduction in numbers can result from:

(a) closure of plants,
(b) mergers,
(c) alternative uses of existing plants and buildings.

Rationalisation can also be achieved through greater specialisation of production, i.e. reduced number of products, models etc., produced at the firm and even industry level. The Committee appreciates the value of the industry studies made by the Industries Assistance Commission and considers that all reasonable reconstruction methods available to an industry, following Industries Assistance Commission advice on this need, should be encouraged as much as possible. Besides the encouragement of mergers to achieve the desired industry structure the Committee feels that the Trade Practices Commission should, in appropriate circumstances, take a favourable view of certain product specialisation agreements between producers, aimed at improving overall industry efficiency.

8.47 The Trade Practices Commission is obviously fully aware of the nature of the alleged area of conflict between it and the Industries Assistance Commission. In its first Annual Report dated 30 June 1975 it states:

> It is still quite wrong to see the Trade Practices Act as standing in the way of scale economy that is being encouraged by the Industries Assistance Commission. There is nothing more important to put in favour of a merger or rationalisation plan than that it achieves economies of scale that were previously beyond reach (paragraph 1.43).

Clearly the Commission feels that there is a misunderstanding of the role of the two

agencies. The Report goes on to say:

> The Industries Assistance Commission considers the whole industry and one may assume it is correct in its conclusion that the Trade Practices Commission would normally accept it. However, it would be unusual for the Industries Assistance Commission to nominate particular firms for merger. They nominate themselves. The Trade Practices Commission considers at the level of the firm as a unit in the industry, and where there are alternative moves available, it must be open to the Trade Practices Commission to consider the cost of one as against the other in terms of foreclosure of competition. And it must be open to the Trade Practices Commission, when it is thinking at the level of firm conduct, to consider safeguards and to call for undertakings. The roles of the two agencies are more complementary than in conflict (paragraph 1.44).

8.48 The Committee does not accept entirely that the arguments advanced by the Commission in this latter paragraph provide an insurance against a conflict in policy. We believe that where a merger is proposed in an industry which has been the subject of a report and recommendation by the Industries Assistance Commission, in terms which point to a greater concentration in the industry, and the report has been adopted by the Government, the Government itself should express its views on the merger to the Trade Practices Commission.

8.49 The Committee believes that this potential area of conflict is not at present a serious problem. If due note is taken of the desirability of the government expressing its views in certain cases, it should never become one.

Sub-section 90(9)—Ministerial Intervention

8.50 At present the law allows political intervention in merger authorisation matters. Where a merger authorisation application has been made, the Minister may inform the Commission by notice in writing that the Government considers that there are special considerations relating to the acquisition that make it desirable in the interest of national economic policy that an authorisation be granted for the particular acquisition. In such a case the Commission is bound by law to grant the authorisation.

8.51 Many submissions referred to this power. Very few submissions from the business community supported it. Most condemned it. A few suggested that the power should be exercised by regulation, subject to disallowance by Parliament.

8.52 Although the power has been exercised on only three occasions and not at all by the present government, we are of the view that the existence of the power is bad in principle and should be abolished by repealing the relevant provision (sub-section 90(9)).

8.53 The power is bad in principle for a number of reasons. It may operate unfairly by jeopardising companies who are engaged in acquisition carried out openly and in accordance with the Act to the advantage of others who may have greater political persuasion and who may otherwise not be having regard to the provisions of the Act. It can operate unfairly to third parties affected in takeover situations. It may not apply uniformly as between different industries or as between the same industry at different times. But perhaps most of all it may operate to deprive businesses of the opportunity to put their views on the particular question publicly and openly for consideration by either the Trade Practices Commission or the Trade Practices Tribunal, which would normally consider such authorisation applications.

8.54 The Committee believes that it would not be satisfactory to deal with the matter by regulation. Public interest should, in our view, be determined in accordance with the authorisation criteria laid down in the law rather than by the numerous other matters that would come up for consideration in a debate in Parliament on a motion to disallow such a regulation.

8.55 We have already stated our view that the Government should be free to make a submission to the Trade Practices Commission in relation to any authorisation applications on which it believes its views should be heard. In this respect, there is a general similarity to the procedure observed in the Government's submissions to the Australian Conciliation and Arbitration Commission in national wage cases.

8.56 The Committee believes that if the matter were serious enough to warrant it, the Government could at any stage legislate to approve the particular merger by specific legislation, in which case section 51 would except that merger from the operation of section 50. We would regard this as a reserve power only, to be used on extremely rare occasions.

Confidentiality—Mergers

8.57 A number of submissions to the Committee dealt with the question of confidentiality, which is particularly acute in relation to merger matters. The particular sensitivity in the merger context is associated with the desire of offerors to keep confidential the price offered, particularly for proprietary companies or for assets. This matter is dealt with generally elsewhere in this report (see Chapter 11).

CHAPTER 9

PART V

CONSUMER PROTECTION

9.1 The consumer protection provisions of the Act (Part V) formed an important part of our deliberations. The Committee is conscious of the fact that in recent decades the balance of bargaining power between seller and buyer has altered to the benefit of the former. This imbalance arises from such factors as the substantial increase in the range of products available to consumers in a modern industrialised society, the bewildering array of available options, and the development, with the aid of mass-media, of sophisticated and persuasive mass-marketing techniques.

9.2 Virtually all the submissions the Committee received on the subject of consumer protection accepted or argued for the retention of Part V. We consider that retention of Part V of the Act should not now be in question. Indeed, in the light of recent Australian experience at both State and Commonwealth levels, and experience overseas, the Committee considers that in some respects the consumer protection provisions contained in the Act need strengthening and extending. Commonly, submissions also argued for strengthening the provisions of, or expanding the ambit of, Part V.

9.3 The Committee recognises that a major question about consumer laws in Australia is the respective roles of the Commonwealth and the States. in both the enactment of legislation and the administration thereof. This is, of course, a sensitive matter involving judgments of a legal, social and political nature.

9.4 Notwithstanding our view that Part V of the Trade Practices Act should be retained, we do not wish unnecessarily to inhibit initiatives in State legislation. We also feel that it is important for consumer protection laws to be administered on a local basis as far as possible. Accordingly, the Committee would wish State agencies and courts to be more involved with the administration of Part V of the Trade Practices Act.

9.5 The Committee recognises that in the field of consumer protection a need also exists to ensure that consumers are afforded adequate protection against health risks, against individual hazards and against unfair trading practices. These matters form the basis for many of the Committee's recommendations relating to Part V. We are concerned, also, that adequate means of redress are open to consumers, and have recommended accordingly.

9.6 It is perhaps in the field of consumer information and education that a great deal more can be done. The Committee is anxious to see the development of this function encouraged at Commonwealth level, quite apart from that already being done at State level. Success in this respect should partially decrease the need for consumer protection services under the other functions. In this regard the Committee supports the establishment of an Australian Consumer Affairs Council.

9.7 We are conscious of the fact that consumer protection does involve a real cost to the community. This may be direct, in the form of higher prices to the consumer or greater administrative costs to the taxpayer. It may also be indirect in the form of loss of choice and limitation of personal freedom of the consumer or inhibition of initiative or innovative spirit of the producer. However, we believe cost is unavoidable if, as the community expects, there is to be developed, in Australia, a truly fair market for goods

and services. The real difficulty is to strike the balance between the social costs involved in consumer protection and the social benefits derived from it. In deciding on our recommendations we have borne these matters in mind.

Relationship with State Law

9.8 In paragraph 6 of the terms of reference the Committee is asked to give attention to any particular problems arising from the inter-relationship of the consumer protection provisions of the Trade Practices Act with State laws. The Act presently deals with this subject in section 75, which provides that the provisions of Part V are not intended to exclude or limit the concurrent operation of any law of a State or Territory, but that a person convicted under one law is not liable to be convicted again under the other law for the same conduct.

9.9 The Committee considers that uncertainty and confusion arises when different laws, each with its own constitutional limitations, attempt to deal with the same matter, even if in a slightly different manner only. The causes of this problem lie in the possible interaction of section 75 of the Act and section 109 of the Constitution, and in the differences in the terms and substance of the laws.

9.10 In relation to the matters dealt with in Division 1 of Part V—prohibitions of unfair practices—the administrative problems of separate laws requiring enforcement may be overcome relatively easily at the present time. Sensible administrative arrangements between Commonwealth and State enforcement agencies, discussed later in this chapter, and the operation of section 75 of the Trade Practices Act, if it avoids double jeopardy, would seem to overcome many problems.

9.11 Despite this, the Committee is not in favour of continuing a system whereby prohibitions of unfair practices are framed in different terms in the law of each of the States and the Commonwealth. The Committee strongly favours uniform law on these matters. Marketing of goods in Australia is commonly organised on a national, or at least multistate, basis. The costs of current legal compliance programs, taking account of variations in all possible different jurisdictions, are unnecessarily high. Marketers should not need to consult up to nine different authorities to plan their compliance programs.

9.12 In relation to the matters dealt with in Division 2 of Part V—implied conditions and warranties in consumer transactions—problems of multiplicity are not solved by administrative action or by section 75 of the Act. Division 2 deals with the substance of contracts for the supply of goods or services to 'consumers'. Because of constitutional limitations of both the Commonwealth and the States, and because each jurisdiction has approached the substantive law in its own way (including, importantly, the definition of a 'consumer'), questions whether conditions or warranties are now implied by law into contracts, and if so, which contracts, are determined by a number of distinctions of a technical nature which are largely irrelevant to both commercial behaviour and the interests of consumers.

9.13 The Committee believes that it is essential, both in the interests of commercial certainty and effective consumer protection, that the laws on the conditions and warranties to be implied into consumer transactions be uniform throughout Australia. The present position is extremely unsatisfactory to all those affected by the law.

9.14 Having concluded that uniformity of laws prohibiting unfair market practices is highly desirable (paragraph 9.11), and that uniformity of laws relating to implied conditions and warranties in consumer transactions, is essential (paragraph 9.13), the Committee considered the means by which such uniformity could be achieved.

9.15 In our view the Commonwealth should not vacate the field; that would be a retrograde step. Further, we consider that the existence of strong Commonwealth consumer protection legislation is, as a practical matter, essential for the development of uniform laws in these areas. The very existence of Commonwealth legislation creates a strong pressure for uniformity in other jurisdictions.

9.16 Having regard to the view expressed above, both with regard to Division 1 and Division 2, the Committee does not agree with the proposition put in a few submissions, namely that the Commonwealth should confine the application of Part V of the Act to interstate or international transactions and leave everything else to State law. The practical effect of such a step would be to eliminate the force of Part V of the Act. Relatively few consumer transactions would, as a matter of law, be classified as interstate or international.

9.17 In the light of the wide acceptance of Part V in the community today, and the very real and largely successful attempts by business to comply with it, to remove its force now would in the view of the Committee be detrimental to the level of consumer protection which the community now expects. In any event, to require proof of interstate trade as a precondition to the operation of Commonwealth law would insert an unnecessary element of complexity into litigation, diverting attention from the substantive issues involved.

9.18 A number of submissions put to the Committee the view that the Commonwealth should 'cover the field' of consumer protection legislation, to the extent of Commonwealth power. Such a move would, it was argued, give Australian business more certainty as to the law with which it must comply and avoid all questions of 'uniformity'.

9.19 The Committee notes the view of some legal authorities that the Commonwealth Act may already cover the field, and invalidate some State law. This matter is, we understand, to be argued before the High Court later this year. The comments that follow are based upon the assumption that it is legislatively possible for the Commonwealth to determine the areas of consumer law where Commonwealth and State laws should or should not have concurrent operation. We think there are four areas which require consideration and for each area we recommend different treatment.

9.20 In relation to prohibitions of unfair practices, the matters encompassed by Division 1 of Part V, the Committee considers that it is not essential that Commonwealth law take the position of covering the field, but we do favour uniform laws in this area as much as possible. There is definitely scope for greater Commonwealth/State co-operation on the substance of these laws. This is discussed further in paragraphs 9.24 and 9.25 below.

9.21 In relation to conditions and warranties to be implied into consumer transactions, the matters encompassed by Division 2 of Part V, we consider that it is desirable for the Commonwealth to cover the field with the one exception discussed in the next paragraph. As stated earlier (see paragraph 9.13) the Committee considers that uniform laws on these matters are essential. For the Commonwealth to cover the field in these matters will eliminate much of the confusion that presently exists about the precise relationship between Commonwealth and State laws in this area.

9.22 In relation to transactions for particular goods or services, e.g. the sale of motor vehicles, some States have legislation which implies into those transactions certain specific conditions or warranties particularly relevant to that good or service. For

example, the N.S.W. Motor Dealers Act, 1974 provides a statutory warranty that a motor vehicle dealer will repair undisclosed defects during a time period, or a distance travelled, calculated according to the financial sum involved in the transaction. The Committee would not wish Commonwealth law to override such specific legislation, which provides an important source of consumer rights in particular industries. For this circumstance we would make one exception to our recommendation that Commonwealth law cover the field in relation to Division 2 of Part V. Where such State legislation exists the consumer should have the benefit of the most appropriate law, Commonwealth or State. The Committee considers that in relation to such specific legislation it would be reasonable to expect the particular industry involved to have a close knowledge of the specific State law, and that business confusions due to the concurrent operation of both Commonwealth and State law in these areas would be minimal.

9.23 In relation to transactions to which Division 2 of Part V does not apply because of the constitutional limitations on the Commonwealth, e.g. intrastate transactions between individuals, State law is the only law. In this regard we recommend that the Commonwealth seek to persuade the States to adopt, as such general laws, laws which mirror the laws of the Commonwealth in these areas.

9.24 It will be recognised that inherent in the above recommendations of the Committee, on the respective roles of Commonwealth and State laws is the need, which the Committee consider to be urgent, for the Commonwealth and the States to establish a procedure to monitor change and develop uniform consumer laws. Not only will this be relevant to the matters covered by Division 1 of Part V, in respect of which the Committee envisages concurrent laws, but in the view of the Committee it is also relevant to Division 2 of Part V, where it is envisaged that the Commonwealth will largely cover the field.

9.25 The Committee recommends to the Commonwealth that it raise with the States the desirability of creating a Standing Committee, consisting of Commonwealth and State Ministers responsible for consumer protection laws, having as its principal task the achievement of uniform consumer protection laws. It should also have the objective of co-ordinating, as far as possible, reforms of laws in this area.

Use of State Consumer Protection Agencies

9.26 At the present time each State has an agency administering its consumer protection laws, which agency also has a responsibility to handle complaints from consumers. In most States these agencies have considerable staff capacity, and technical expertise, to handle consumer matters. The Commonwealth has the Trade Practices Commission, which has a Consumer Protection Division (largely operating through branches in State capitals), similarly responsible for Commonwealth law.

9.27 The Committee has been informed that in practice the State agencies and the Consumer Protection Division of the Trade Practices Commission do work closely together, so as to avoid duplication. The Committee has also been informed of a recent agreement between the Commonwealth and State Ministers responsible for consumer matters, that State agencies should be principally responsible for administrative action by Government on consumer complaints, and that the Trade Practices Commission should confine its investigative and enforcement activities to matters which arise in a multi-state, national or international context.

9.28 The Committee has already noted its view (paragraph 9.10) that the problems arising from a multiplicity of prohibitions of unfair practices by more than one

jurisdiction can, in large part, be overcome by sensible administrative arrangements between Commonwealth and State enforcement agencies. Accordingly, it agrees with the administrative arrangements noted in the last paragraph which, it is understood, has considerably reduced problems of multiplicity in this area. In particular, it should alleviate a problem of public confusion as to the place to which consumers should take complaints. The emphasis is now clearly, and appropriately, on the State Consumer Protection Bureaux to handle consumer complaints.

9.29 However, the Committee is of the view that more could, and should, be done by way of co-operation between the Commonwealth and State governments in the administration of Division 1 of Part V of the Trade Practices Act.

9.30 We recommend that the Commonwealth amend the Trade Practices Act to ensure that the States are able, from the viewpoint of Commonwealth law, to assume a major responsibility for the day-to-day enforcement of Division 1 of Part V of the Act. We suggest those amendments include:

(a) bringing State governments within the definition of 'person(s)' able to bring proceedings in respect of contraventions of Part V (we understand such an amendment is already before the Parliament in the Trade Practices Amendment Bill 1976),

(b) giving a designated State Officer statutory power to obtain evidence in respect of possible contravention of Part V of the Trade Practices Act, in the same manner and subject to the same safeguards and limitations as apply to the Trade Practices Commission (see particularly sections 155-157 of the Act). The Committee would have in mind giving such power to the chief executive of the consumer protection authority in each State but would recognise this to be ultimately a matter for agreement between the Commonwealth and each State, and

(c) permitting State Ministers for Consumer Affairs to exercise the power to give consent to prosecutions (paragraph 163(4)(b) of the Act) proposed to be instituted by officers of that State in respect of a contravention of Part V; but retaining to the Commonwealth Minister, in the interests of uniformity and certainty, the sole right to consent to private prosecutions.

Similar provisions will also be needed in respect of the Commonwealth Territories, if Commonwealth policy is to deal with the Territories in the same manner as it deals with the States.

9.31 The concurrent operation of the powers mentioned above could, unless sensible arrangements are made, create other problems, for example, when different States take different attitudes to unlawful conduct that is essentially the same offence. One State may wish to institute a prosecution, another may refuse consent. Clearly the development of such inconsistencies is undesirable.

9.32 In the view of the Committee, any similar conduct by a single person, or related persons, which arises in more than one State and in respect of which legal proceedings are contemplated should be dealt with by the Commonwealth and not a State agency. For example, an advertiser could place the same, or very similar misleading or deceptive advertisements in several newspapers, each local to a particular State. The Committee is, of course, aware that this procedure is already the subject of ministerial agreement (see paragraph 9.27).

9.33 It is, of course, ultimately a matter for the States as to whether they wish to take on the responsibilities and exercise the recommended powers of the type described in paragraph 9.30. However, the Committee understands that is the gravamen of the

abovementioned agreement between Commonwealth and State Ministers. We believe that such a decentralised system of administration of Part V will ensure an efficient utilisation of the limited public service resources devoted to consumer protection matters. It should also give a practical encouragement to the procedures for Commonwealth and State co-operation, suggested in paragraph 9.25, to achieve a desirable uniformity of Commonwealth and State laws in this area.

9.34 Apart from dealing with the multi-state, national or international matters mentioned in paragraph 9.27 above, the Committee envisages that the Trade Practices Commission would also have an enforcement role for Commonwealth law in any State which did not wish to adopt the day-to-day powers and responsibilities under the Trade Practices Act recommended in this report.

Use of State Courts

9.35 At present, legal actions relying upon Division 1 of Part V of the Act must be brought in the Australian Industrial Court. This is because section 86 of the Act expressly preserves, for the exclusive jurisdiction of the Australian Industrial Court, proceedings in respect of an offence against Part V, and proceedings for injunctions and damages. In the view of the Committee this exclusive jurisdiction is unnecessarily restrictive. It should be possible, as an alternative, for such action to be brought in any appropriate (having regard to the order sought) State or Territory court. At the present time, State courts exercise federal jurisdiction in a wide range of matters. The Committee believes such courts should be given jurisdiction also on matters arising under Commonwealth consumer laws. Such an extension would be of assistance to both State consumer agencies, and the public generally, to whom State courts are more familiar and accessible than the Australian Industrial Court. However, the Committee would wish to discourage any practice of 'forum shopping' from arising in this regard.

9.36 A related matter, the establishment of a Commonwealth consumer claims tribunal, similar to those operating in most States, was contained in a number of submissions. It has been suggested to us that the purpose of such a tribunal would be to give consumers a cheap, convenient and quick method of redress under the Trade Practices Act. It should be noted, in this regard, that such tribunals as various States have already established, would seem to have jurisdiction at the present time (within their monetary limits) in respect of the contractual terms implied by Division 2 of Part V. Those matters are not, at present, within the exclusive jurisdiction of the Australian Industrial Court.

9.37 Nevertheless, the Committee sees no sufficient reason at the present time to establish an additional consumer claims tribunal; existing State arrangements on the whole seem adequate here. In any event there is basic difference in function between the type of consumer claims tribunal currently operating in the States, which exercises wide powers based primarily on a principle of fairness, and the type of tribunal created to have jurisdiction in relation to the rights contained in the particular terms of a statute.

Definition of 'Consumer'

9.38 The definition of 'consumer' is central to much of Part V of the Act—particularly Division 2. Many submissions addressed the question. The present definition, contained in subsection 4(3) of the Act, makes a person a consumer of goods or services acquired, after characterising the goods or services as being 'of a kind ordinarily acquired for private use or consumption' and then excluding certain transactions of a commercial nature.

9.39 As the Committee sees it, the most significant aspect of the debate about the definition of 'consumer' is whether the definition, and thus the protection, should be restricted to 'traditional' consumers, persons who engage in the particular transaction for reasons unrelated to commercial purposes.

9.40 The Committee is strongly of the view that the definition of a 'consumer' should be sufficiently broad to provide protection to a range of business transactions, particularly purchases by small businesses. In our view one important function of the consumer protection provisions of the Act is to redress, between supplier and customer, inequalities in the technical expertise required to recognise, and the bargaining power to negotiate, a fair bargain. These inequalities are not necessarily limited either to 'traditional' consumers or to transactions involving what might be termed 'consumer' goods, in a narrow sense. For example, an insurance company purchasing a lounge chair for its reception area could not be expected to have any more expertise, or bargaining power, than a householder. Nor would a small pie manufacturer necessarily have any expertise or bargaining power in relation to the purchase of an office typewriter (which would probably not be regarded as a 'consumer' good in the sense mentioned above).

9.41 For these reasons the Committee does not agree with proposals that the definition of consumer be necessarily limited either to transactions where the goods or services involved are for 'personal, domestic or household use' or to transactions for 'non-commercial purposes'. The Committee would also reject the distinction between corporate and non-corporate purchasers, on the grounds that it is illogical and promotes form over substance.

9.42 The Committee believes that the present test of a 'consumer' has been rightly criticised on three grounds:

- that it is insufficiently sensitive to the inequalities that occur in commercial transactions not involving 'consumer goods' in a narrow sense (discussed above),
- that it has inherent uncertainties, and
- that it makes an illogical distinction between the test in relation to goods and that in relation to services.

The uncertainty mentioned above flows from the meaning of the word 'private', used in the present Act, as to which the Committee has been given at least three possible alternative interpretations. The illogical distinction between 'goods' and 'services' is that the latter excludes acquisitions for the purposes of, or in the course of, a profession, business, trade or occupation, or for a public purpose, whilst acquisitions of the former do not have to meet that test.

9.43 Bearing in mind the need for certainty adverted to in paragraph 2 of the terms of reference of the Committee, and the matters discussed above, the Committee considers that the best approach to the definition of consumer should be primarily by reference to the price paid by the consumer for the goods or services. This definitional approach has already been adopted in other legislation, for example sub-section 1(6) of the Hire Purchase Act, 1960 (N.S.W.) as amended by the Commercial Transactions (Miscellaneous Provisions) Act, 1974 (N.S.W.). The arbitrary nature of a monetary limit test may be reduced by setting a figure which may be altered by regulation. The Committee recommends that the appropriate test for the Trade Practices Act should be a limit of $15,000 on the value of the goods or services, or such higher amount as may be prescribed by regulation.

9.44 But there are some transactions which will inevitably be above the monetary

limit, which would be encompassed by the present definition and should continue to be encompassed—in the interests of the non-commercial consumer. A contract for the construction of a family home is one example. For this reason, the Committee considers that a further category should be added to the definition of 'consumer', where the transaction relates to goods or services priced over $15 000. That category would include all acquisitions of goods or services of a kind ordinarily obtained for *person, domestic or household uses*, a category which, the Committee considers, would have limited application above $15 000. We recognise that the boundaries of such a category are not wholly certain, but believe that in practice that uncertainty is likely to affect only a limited number of cases.

9.45 The Committee would make two general exclusions from the abovementioned tests of 'consumer', in relation to situations where the questions of technical expertise and bargaining power referred to in paragraph 9.40 are not of the same relevance to the public interest. First, the Committee would continue the present exclusion of acquisitions of goods for the purpose of re-supply. Secondly, we consider that there should be a general exclusion for goods acquired for the purpose of being used up or transformed in a commercial process of production as an input into the repair, treatment or processing of goods, or of fixtures on land.

Dealings in Land

9.46 A number of submissions expressed concern that Division 1 of Part V does not generally apply to conduct related to the supply of an interest in land. Section 52 would seem applicable but of course the remedies for breach of that section are limited.

9.47 The Committee can see no reason why the promotion and sale of land should have such a privileged position; we consider that the full range of proscriptions contained in Division 1 of Part V should apply, as appropriate, to all sales, leases, tenancies or licenses of an interest in land. Particularly is this so in light of the large number of interstate promotions of land sub-divisions which, because of the great distances sometimes involved, often mean that the purchaser is acquiring land which he has not inspected.

9.48 The Committee has elsewhere dealt with the use of land in the context of Part IV of the Act, i.e. to achieve results restrictive of competition that could not be achieved by a direct agreement. This is a different problem from that mentioned in the previous paragraph and the technique adopted to refer to land in each context will require co-ordinated drafting.

9.49 In addition, however, the Committee is also concerned that the present prohibitions in Division I, even if extended to apply to contracts relating to an interest in land, would nevertheless not adequately cover the main abuses which have arisen in the promotion of land transactions. Accordingly, the Committee has also recommended (see paragraph 9.78) certain changes to deal more extensively with these matters.

Misleading or Deceptive Conduct

9.50 Section 52 of the Act prohibits misleading or deceptive conduct in trade or commerce. The prohibition is a general one attracting only civil remedies. Submissions to the Committee on this section reflect a disagreement in the community about this approach. Many saw the section as the most significant provision in the whole of Part V of the Act giving a capacity of flexibility to deal with changing marketing techniques which may place the consumer at an unfair disadvantage. However some others saw it as a broad, uncertain prohibition which unnecessarily interferes with business conduct,

causes a great deal of cost to the business community and achieves no real benefit to the consumer to outweigh these costs.

9.51 A number of submissions adverted to a general raising of standards by Australian business following its enactment. The Committee believes that there has been a genuine and willing attempt by business to pay heed to the standards that have been set by the Trade Practices Act, including this section.

9.52 In the opinion of the Committee, section 52 is an attempt to prescribe, by statute, a minimum level of probity and fairness to which it is in the public interest that commercial behaviour conform. The Committee therefore supports the continued existence of such a general provision. We feel that any initial extra cost to business, for establishing procedures to ensure compliance with this minimum standard is, to the extent it affects prices, not an unreasonable charge for the community to bear. It is also the belief of the Committee that the widespread endeavours by Australian business to comply with the standard set by section 52 (and, of course, the other rules of Division 1 of Part V generally) will have the longer term benefit of adding to the confidence of the Australian public in Australian business standards.

9.53 The Committee is, of course, concerned by suggestions that the section introduces uncertainty into trade or commerce. This uncertainty allegedly derives from the section catching mere puffery or artistic devices which do not affect the substantive message of the promotion, and from the possibility that the section may result in action in cases where there is no more than a mere tendency to deceive, as measured by the lowest common denominator within the community. However, the Committee believes that in the context of section 52 this uncertainty may well be overstated. We consider that mere puffery and artistic devices are not, of themselves, within the scope of the provision as it currently stands, unless they genuinely affect the content of the representation.

9.54 A number of submissions suggested that the concept of wilfulness be imported into section 52. The Committee is unable to agree with these suggestions, for the purpose of the section is to provide general protection to consumers, not to provide penal sanctions against those who take advantage of consumers.

9.55 A number of submissions also suggested to the Committee that it was not certain whether section 52 required proof of actual damage or whether the mere possibility of damage were sufficient to invoke the section. The Committee considers that the section should apply to conduct which is likely to mislead or deceive, without requiring proof that the conduct has mislead or deceived, but should not apply to conduct which has merely a tendency to mislead or deceive. We recommend that section 52 should be amended to make it clear that it applies only to conduct 'that is, or is likely to be, misleading or deceptive'.

Unconscionable Practices

9.56 A number of submissions asked the Committee to give consideration to recommending the introduction of a section which would declare as unlawful, unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce. Such a provision would be similar to section 5(a)(1) of the U.S. Federal Trade Commission Act.

9.57 A number of submissions also recommended to the Committee that the Trade Practices Act be amended to allow relief to be given against harsh or unconscionable contracts. A draft Ordinance on this topic, prepared for consideration in the A.C.T., appeared to form the basis of most comments made to the Committee.

9.58 The Committee considers that a general prohibition of 'unfair' conduct, as contained in the U.S. Federal Trade Commission Act, could, under Australian conditions, result in a considerable degree of uncertainty in commercial transactions. Accordingly, we are strongly of the view that a like prohibition should not be incorporated into the Trade Practices Act at this time.

9.59 However, we do see advantages in prohibiting, but as a civil matter only, unconscionable conduct or practices in trade or commerce. The Committee so recommends, principally to give the Act a greater ability to deal with the problem outlined in the first paragraph of this chapter—the general disparity of bargaining power between sellers and buyers.

9.60 Unconscionability is a standard quite apart from, and usually not encompassed by, the standards of misleading or deceptive conduct. It is a standard which historically developed under the equitable jurisdiction of the courts, which has also been adopted by specific legislation in Australia (e.g. section 88F of the N.S.W. Industrial Arbitration Act; various State and Territory money lenders and hire-purchase Acts) and, accordingly, is a familiar concept to Australian law.

9.61 The Committee has deliberately referred to 'unconscionable conduct or practices', in contrast to the common legislative formulation of 'harsh or unconscionable contracts'. In the view of the Committee the reference to 'conduct or practices' avoids possible arguments that unconscionable conduct in relation to contracts would not come within the reference to the contract itself. It notes that legislation in various States of America and in some provinces of Canada (e.g. in the Ontario Business Practices Act and the British Columbia Trade Practices Act) has adopted this approach. The Committee does not wish to adopt the concept of 'harsh' for these purposes, on the basis of the uncertainty of that concept.

9.62 As to the question of what kind of conduct should be considered unconscionable, the Committee considers that fairly detailed legislative guidance should be given on that point. Factors such as the commercial nature and setting of the practice, the complexity of any contemplated or executed transaction and the relative ability of the parties to understand that transaction and protect their interests, would be relevant. The Committee noted that one form of guide list was adopted in the A.C.T. Ordinance, and understands further that such a guide list is currently under consideration between Commonwealth and State Ministers for Consumer Affairs.

False Representations

9.63 Section 53 was criticised by some submissions as having technical defects likely to make it less effective than generally supposed.

9.64 Before discussing these suggested defects, the Committee would like to express the general view that it should not be the function of section 53, which has criminal law sanctions, to prohibit as wide a sweep of false and misleading conduct as possible. Section 53 should deal only with conduct which has demonstrably led to abuses and involves a real potential for harm. Section 52, which has sanctions of a civil nature, provides a more appropriate approach to a general prohibition of undesirable practices.

9.65 Turning to the suggested technical defects in section 53, the most significant point made by a number of submissions was that the section adopts different threshold concepts in that it refers to 'false representations' in some paragraphs, 'representations' in other paragraphs and 'false or misleading statements' in yet others. The

view was expressed that the section should adopt more consistent, preferably the same, wording. The wording 'false or misleading representations' was suggested as the formula to be employed in each sub-section.

9.66 The differences in wording in the present section 53 have formed the basis for suggestions that the several paragraphs of section 53 invoke different mental elements to constitute a contravention. It is the view of the Committee that this interpretation of the section is not correct and that each paragraph imposes strict liability in respect of the offence set out in that paragraph. However, if the Committee's view of the present section is incorrect, we would consider this to be an undesirable result, as a matter of the policy of the Act.

9.67 While the Committee accepts that a reduction in the number of concepts used in the section may result in a more consistent interpretation and, thereby, in greater certainty in some respects, we consider that it would raise other uncertainties. We are concerned that the present carefully chosen, differentiated wording was adopted as a technique to ensure that the section was not unnecessarily broad. Some of the paragraphs which would be extended by the suggested amendment apply to subject matter of a general nature, e.g. 'quality', 'grade'. The extended application of this subject matter could encompass conduct of a trivial nature. The Committee would be concerned at the possibility of that result, or of uncertainty arising from an implication that trivial conduct would be so caught. We accept that the suggestion may merit study beyond that which the committee had time for. However, in the absence of such a study we would not support the suggestion.

9.68 In relation to paragraph 53(a) it was suggested that the word 'particular' was unduly restrictive and should be deleted. The Committee was concerned that such a deletion may widen the scope of the paragraph so as to encompass general standards, qualities, grades, styles or models and thereby create a great deal of uncertainty as to the application of the paragraph. Accordingly, the Committee would not favour this deletion.

9.69 It was also suggested that paragraph 53(a) should be extended to encompass: (i) history or previous use, (ii) composition, (iii) nature, (iv) characteristics, (v) quantity, (vi) size, and (vii) the reason for goods or services being available for supply. Different considerations apply to each of these suggestions.

9.70 In regard to (i) 'history or previous use', the Committee is aware of doubts that section 53, in its present form, would apply to situations where mechanical devices measuring usage, e.g. motor vehicle odometers, are adjusted so as to display lesser usage than is actually the case. The view of the Committee is that such conduct, in connection with the supply of goods or services, should be prohibited by section 53.

9.71 In regard to (ii) 'composition', we consider that a strong prohibition against deceptive labelling is warranted. Accordingly, we recommend that the present references to 'quality' and 'grade' be supplemented by the addition of a reference to 'composition'.

9.72 In regard to (iii) 'nature', (iv) 'characteristics' and (v) 'quantity', these concepts are presently employed in section 55 and the Committee can see no reason why, in relation to goods, they should be duplicated by section 53. Section 55 applies, in Australia, one section of the Paris Convention for the Protection of Industrial Property, as revised at Stockholm in 1967, to which convention Australia is a party. The section is of wider application than other provisions in Part V in that it applies to transactions, including intrastate, by natural persons as well as by corporations.

9.73 It should be noted that section 55 applies only to 'goods', whereas section 53 applies to both 'goods' and 'services'. The Committee recognises that this has produced an anomalous result and sees no good reason why section 53 should not be amended to remove the anomaly as far as possible, by extending section 53 appropriately.

9.74 In regard to (vi) 'size', that concept would, in our view, normally come within either the concepts of 'quantity' or 'characteristics' discussed in the previous paragraph and we would see no need to deal with the matter separately.

9.75 In regard to (vii) 'the reason for goods or services being available for supply', we believe that concept and, to the extent that conduct relating thereto does not already come within section 55, the concepts of 'nature', 'characteristics', 'quantity' and 'size', are better left to the general approach of section 52.

9.76 Paragraph 53(e) is limited to statements about 'price reductions'. A number of submissions suggested that this was too narrow and should be broadened so as to either apply to price generally or to some other concept such as 'price advantage'. It was put to the Committee that extensive surveys by consumer agencies had indicated that statements of price need not necessarily relate to price reductions to be seriously unfair to consumers. Similarly, unfairness may result from representations not directly concerned with questions of 'existence' or 'amounts' but with ancillary questions such as where, when and how to obtain the benefit of the reduction, or the reason for the reduction. We consider it desirable that these matters fall within the prohibition. On this basis the Committee considers that there are grounds at least to extend paragraph 53(e) to matters relating to the existence of or amounts of a 'special price', which is separately defined in the Act.

9.77 Further technical difficulties were submitted to the Committee in connection with the use of the terms 'warranty' and 'guarantee' in paragraph 53(g). The particular problems were that those concepts were too restrictive and should be extended to include any statements as to the existence of rights or remedies for the purchaser. The primary problem that has been raised is that of misleading statements as to the exclusion of conditions and warranties implied under Division 2 or State Acts. Doubts have been expressed whether paragraph 53(g) adequately deals with this type of case. We recommend that any doubts in this respect be removed, so that the paragraph clearly covers the matter.

9.78 As stated earlier in this chapter, in the opinion of the Committee Division 1 of Part V should extend to transactions for the sale, lease or license of an interest in land. However, the greater bulk of abuses in land transactions arise from the use, in the promotion of land, of false or misleading representations concerning the location of the land, its characteristics, e.g. 'building block', 'ocean views', zoning or the availability of services. Merely extending the definition of 'goods' or 'services' for the purposes of Division 1 of Part V would not, in the view of the Committee, by itself adequately deal with these major abuses. For example, there are significant doubts as to whether those abuses would fall within the concepts of 'particular standard, quality or grade' (paragraph 53(a)) 'user or benefits' (paragraph 53(c)), 'the need for' (paragraph 53(a)).

9.79 Accordingly, we recommend that separate provision be made in Part V to prohibit, in the promotion of land transactions, false or misleading representations concerning the characteristics (other than physical dimensions), location and future use of the land, or the services associated with the land.

9.80 Real property law, which is properly a matter for State and Territory legislation, presently provides well-established rules relating to misdescriptions as to the physical dimensions of land. The Committee would not wish to disturb the law on those matters. Moreover, the Committee does not consider that the proposed amendment should create an offence for failure to disclose a matter discoverable by title or other formal search, normally carried out in the conveyancing process.

Offering Gifts and Prizes

9.81 Three suggestions for technical amendments to section 54 were made in submissions to the Committee. First, it was suggested that the word 'offer' was too restrictive, because the courts may characterise relevant situations, which should fall within the prohibition, merely as an 'invitation to treat'. The Committee feels that in the context of section 54 it is unlikely that the word 'offer' would be so construed and would not see any need to amend the Act on this account.

9.82 Secondly, the suggestion was made to the Committee that a corporation offering gifts or prizes, as contemplated by the section, should have the onus-of-proof to establish the intention of providing the gifts or prizes as offered. The Committee does not accept this suggestion as any such change would alter the very nature of the offence and not merely the method of proof. We are not in favour of altering the nature of the offence.

9.83 Thirdly, it was submitted that the section should be extended to encompass not only gifts, prizes or other free items, but also offers for supply at reduced or special prices. The Committee considers that paragraph 53(e), discussed above, is adequate in respect of price reductions and special prices at which the corporation does not intend to supply. In respect of the offer of reduced or special prices for goods or services which the corporation does not intend to supply at all, the same considerations apply as would apply in respect of free items and the Committee recommends amendment to make this clear.

Bait Advertising

9.84 The essence of section 56 is the requirement of intention not to offer for supply at the relevant special price, in reasonable quantities. It was argued in submissions to the Committee that this requirement of intention is likely to make section 56 largely ineffective in practice. It was further noted in submissions that other comparable legislation, e.g. section 37 of the Canadian Combines Investigation Act and section 13(2A) Victorian *Consumer Affairs Act* 1972, as amended, apply not to, or not only to, such an intention but apply to situations where the advertiser does not, in fact, supply the advertised goods in reasonable quantities. The Committee considers that section 56 should apply not only to the intention but also to the fact of non-supply and that the Act should be amended accordingly.

9.85 The Committee recognised, however, that by extending the section to the fact of non-supply, it may be necessary and appropriate to provide a special additional defence where the supplier has either:

(a) offered to supply, or to procure someone else to supply, the customer within a reasonable time with the advertised goods or services at the advertised price; or
(b) offered to supply immediately or to procure someone else to supply equivalent goods or services at the same price;

and in either case, if the offer has been accepted by the customer, the supplier has, in fact, so supplied or procured supply. If the offer is made and not accepted by the

customer, we believe the supplier should still have a defence. Other than this additional defence the Committee considers that the defences provided by section 85 of the Act are adequate.

9.86 It was also suggested to the Committee that there should be an onus-of-proof upon a corporation to prove that it did, in fact, intend to offer goods or services for supply at a special price. The Committee did not agree with this suggestion for the same reasons as set out in paragraph 9.82.

9.87 A further suggestion to the Committee was that in section 56 there should be enumerated the factors to be taken into account when determining whether the corporation had the requisite intention. The suggested factors related to the conduct of sales staff in attempting to sell a potential customer an item other than that offered for supply at a special price. The Committee considers that sales staff should be permitted to attempt to sell alternative lines to customers.

Accepting Payment Without Intention to Supply as Ordered

9.88 It was suggested to the Committee that the need to prove intention, and the difficulty of proving it, at present unduly and unnecessarily limits the ability of a potential litigant to make use of section 58 and that the section should be amended to allow failure to supply as ordered after a reasonable period to operate as sufficiant proof of the requisite intention.

9.89 In the view of the Committee, to amend the section in this fashion would be going too far; *inter alia*, it would be extending the scope of the section to impose a criminal sanction for a breach of contract. The element of intention is the essence of section 58. The Committee considers that it must be proved as such—however difficult that may be—otherwise the section could become far too broad in its application.

9.90 It was also suggested to the Committee that the section be amended to apply additionally to situations where the corporation holds itself out as being prepared to accept payment without intending to supply as ordered. The purpose of the suggestion was to allow an injunction to be obtained to prevent advertisements likely to lead to future contraventions. The Committee considers that an amendment of this kind would not add to the existing law. In those situations where the courts would grant an injunction to restrain an advertisement on the ground that the corporation was holding itself out as being prepared to accept payment but did not, in fact, intend to supply as ordered, the advertisement would seem to constitute evidence of an attempt to commit the present offence under section 58, and attempted offences may presently be restrained by an injunction under section 80.

Misleading Statements About Home-operated Businesses

9.91 The Committee believes that the conduct presently prohibited by section 59 should continue to be prohibited. However, conduct of this nature is only one form of misleading statement concerning the advantages of engaging in a form of business activity that might result in the individual at which it was aimed acting to his own prejudice. Such statements are often, but not always, concerned with part-time activities of a franchise nature. We recommend that the section be extended to prohibit materially or prejudicially false or misleading statements concerning the profitability, risk or other material aspects of business opportunities which require the investment of money by an individual (not a corporation) together with his performing work associated with that investment.

Coercion at Place of Residence

9.92 We draw to the attention of the legislative draftsman the suggestion made in some submissions that there is an unnecessary complication between sub-section 84(2) and the words 'cause or permit a servant or agent of the corporation' in section 60. Unnecessary complication should, of course, be avoided.

9.93 Some criticism was made of the restriction of the prohibition to 'undue harassment'. We are not satisfied that there is a case for changing this requirement.

Consumer Standards

9.94 Sections 62 and 63 of the Act permit regulations to be made prescribing, respectively, consumer-product safety standards and consumer-product information standards. A breach of such a standard prescribed by regulation is an offence.

9.95 To date the Government has used these powers only once, in 1974, in respect of a product safety standard concerning bouyancy aids. In the opinion of the Committee this is an important legislative tool for consumer protection. It is recommended to the Government that it direct sufficient resources to this part of its overall program of consumer protection to ensure that these powers are effectively utilised.

9.96 The Standards Association of Australia (S.A.A.) has, for a long time, been developing voluntary standards relating to consumer products, particularly standards relevant to safety aspects of such goods. These standards are developed by committees whose membership include all relevant sections of the community such as government, manufacturers and consumers. The Committee considers that the S.A.A. has achieved a trust and respect in the community, in relation to the development of consumer standards, which should be relied upon by the Government when considering the substance of standards to be adopted under the Trade Practices Act. The Committee would recommend against any proposal that the Government develop any new agency to duplicate the work of the S.A.A. on the content of consumer standards.

9.97 As mentioned above, the S.A.A. has already developed a large number of standards relating to consumer products. In pursuance of the recommendation of the Committee in paragraph 9.96 above, it is recommended that the Government now give urgent attention to considering which of those consumer standards already prepared by the S.A.A. should be prescribed under the Trade Practices Act.

9.98 It was put to the Committee that the Government should now adopt under the Trade Practices Act, by reference, all the consumer standards which are now, or are in the future, developed by the S.A.A. The Committee does not agree with this proposal. The adoption of standards under the Trade Practices Act is essentially a legislative exercise and in the view of the Committee it must be done in a manner that is politically accountable.

9.99 The Committee was informed of a proposal, currently under study by Commonwealth and State Ministers for consumer affairs, to establish a Committee of Commonwealth and State Government officers to advise the federal Minister responsible for the Trade Practices Act on standards that should be made mandatory under the Act. The Committee considers this proposal to be constructive co-operation between the Commonwealth and State Governments on consumer affairs.

9.100 Quite apart from the question of which standards the Government should adopt under the Trade Practices Act, it was submitted to the Committee that the technique for adoption should be adoption, by reference, in the regulation made under the Trade Practices Act, of the relevant S.A.A. standard. Only in this manner, it was

put to the Committee, would the consensus of community views which formed the basis of the S.A.A. standard be maintained under the Trade Practices Act. Whilst the Committee has sympathy for this view, it feels, nevertheless, that the legislative technique adopted by the Commonwealth must always remain a matter of its own discretion. The Committee notes, however, that this technique of adoption of standards by reference appears to have operated successfully in State legislation with similar criminal sanctions and commends this technique to the Commonwealth.

Standards Applicable to Export

9.101 The *Trade Practices Act* 1974, as originally passed, did not permit standards under sections 62 and 63 to exclude or differentiate exports. The *Trade Practices Act* 1975 changed that to allow a discretion to exclude goods intended to be used outside Australia, provided the goods were marked so as to indicate that they were for use outside Australia.

9.102 It has been suggested to the Committee that all exports should be outside the scope of the standard-making power or, at least, that foodstuffs subject to compliance with exports regulations made under the Customs and Commerce (Trade Descriptions) Acts should be outside the power.

9.103 The Committee agrees with the proposition that all goods intended for export be excluded from the operation of sections 62 and 63, upon condition that such export goods are appropriately marked. It is the law of importing countries, not Australia, which should set such standards.

9.104 The marking requirement is in our view essential to distinguish, in the course of trade or commerce in Australia, those goods intended to be exported, and thus exempted, from goods intended for Australian consumption which are required to comply with the standard. The Committee considers that a mark 'export only', prominently displayed, would be appropriate. However, where goods intended for export in fact comply with the Australian standard, despite no legal requirement to do so, we consider there should be no requirement to mark 'export only' on those goods.

9.105 It was put to the Committee that labelling requirements in some countries may be contravened by a mark 'export only'. No actual example was put to us. Nevertheless, provision must be made for such a possibility and we recommend that regulations be empowered to provide, in particular cases where the mark 'export only' is likely to contravene foreign labelling requirements, for the use of an alternative mark (or no mark if any mark would be likely to contravene foreign requirements) specified in the regulations. The Committee considers that in situations where regulations permit no mark, the manufacturer should be required to give an undertaking to the Government that the goods will not knowingly be placed upon the Australian market under any circumstances.

Standards for Food Products

9.106 It was put to the Committee that food was a special product that should be totally outside the scope of the standard-making provisions of the Trade Practices Act. The Committee was further informed about discussions that are currently in progress between the Commonwealth and State Governments to develop uniform food legislation throughout Australia which would, *inter alia*, prescribe standards for food products.

9.107 The Committee considers that at the present time food should not be excluded from the products in respect of which a standard may be prescribed under the Trade

Practices Act. However, when national uniform food standard legislation is adopted in Australia the Committee would see it as appropriate for that legislation to prescribe standards for food products rather than the Trade Practices Act.

Hazardous Products

9.108 The Committee received submissions that at present the Trade Practices Act does not provide a procedure whereby the Government can act quickly to prevent the sale of hazardous products. In contrast, the Customs Act does have such a power in relation to imported goods, whereby the Minister may prohibit, by instrument in writing, the importation of 'goods which, in the opinion of the Minister, are of a dangerous character and a menace to the community'.

9.109 The inability of the Trade Practices Act to deal with hazardous products is, in the opinion of the Committee, a substantial legislative defect. The Committee recommends that the Government amend the Trade Practices Act so as to empower the responsible Minister to take action to prohibit sale of particular hazardous products, similar to the powers presently provided under the Customs Act. The Committee recommends that the power of the Minister to make such an order be limited to a period of 12 months, during which period he would have the necessary time to take normal action by promulgation of a consumer-product standard under the Act.

Unsolicited Goods and Services

9.110 It was suggested to the Committee that it may at present be uncertain whether a person who received unsolicited goods and subsequently agreed to buy them would be liable upon a subsequent refusal to pay. We are satisfied that the present provisions of section 65 are adequate in this respect.

9.111 At present sections 64 and 65 apply to unsolicited entries in a directory. In the light of submissions on the matter, the Committee gave consideration to extending the provisions of sections 64 and 65 to other unsolicited services. In the view of the Committee the evidence of abuses of this nature does not indicate any need for penal sanctions to be provided by Commonwealth legislation. We do however, subject to the comments in the next paragraph, recommend that a civil right to resist assertion of a right to payment of other unsolicited services be introduced into Part V. We do not, however, consider that this matter be made an offence under the Act.

9.112 There should be an exception to the prohibition of asserting a right to payment for unsolicited services in cases where there is a continuing arrangement for the provision of the services, similar to the exception in respect of unsolicited credit cards in paragraph 63A(1)(b). It must be emphasised that the proposed prohibition in relation to unsolicited services recommended in paragraph 9.111 is a prohibition only in respect of claims for payment for such services. We are concerned not to hinder the provision of some essential services, where such services should be provided on an unsolicited basis even if payment for them is thereafter demanded. We are therefore recommending an exception to the prohibition where the services are reasonably provided in situations of urgent necessity, e.g. where urgent medical attention is given to an accident victim. It may be that there are other necessitous circumstances and, if they can be identified, any exception should cover them as well.

9.113 The Committee's view is that any such section should be subject to the civil sanctions of Part VI only and that the recipient of unsolicited services should not be liable to make any payment for the services.

Terms Implied into Consumer Transactions

9.114 The Committee received a number of suggestions as to improvement of the substance of the terms implied into consumer contracts by Division 2 of Part V. For the reasons outlined in the next paragraph the Committee does not intend making recommendations on most of these suggestions. However, the Committee does wish to make recommendations on the matter of section 73 of the Act, which essentially exempts financiers from liability for the implied terms, and section 74, which provides warranties in contracts for the supply of some services, and on the question of manufacturers' warranties.

9.115 The substance of the terms to be implied into consumer transactions has been the subject of a great deal of study in recent times. For example, the N.S.W. Law Reform Commission and the Commonwealth/State Government Committee on Consumer Credit Laws have both given attention to the problem. Having regard to the studies by those bodies, and to the view of this Committee that uniformity in this area of the law is vital, and further the recommendation contained in paragraph 9.25 that a Standing Committee of Ministers responsible for consumer protection laws should be created to achieve such uniformity, the Committee feels that the substance of the terms implied by the Act should be the first area of co-operation and agreement between Commonwealth and State Ministers. We consider that the present terms should continue to be implied by the Trade Practices Act until new terms are devised as a result of those activities.

9.116 The terms implied into contracts between consumer and supplier by sections 69–74 are described as 'conditions' and 'warranties'—familiar terms to the law of contract. The Trade Practices Act relies upon the general law of contract to provide the remedies for breach of these implied terms. In one particular respect the Committee considers that general reliance to be defective. In some jurisdictions in Australia the general law prevents a consumer, faced with a breach of an implied condition in a contract for the supply of goods, from terminating the contract if property in the goods has passed to him, or he has accepted them before he has had an opportunity of discovering the defect by an examination of the goods, e.g. see section 16(3) and section 42 of the Goods Act 1958 (Vic.).

9.117 The English Law Reform Committee in its Tenth Report, the Committee on Consumer Protection (the Molony Committee) in its Final Report, the Molomby Committee in its Report on Consumer Credit, the Sale of Goods Committee of the Law Council of Australia and the Law Reform Commission of New South Wales have all recommended that the situation be remedied. In some jurisdictions the law has been altered accordingly, e.g. section 15 of the Consumer Transactions Act 1972-73 (S.A.) and section 39 of the Sale of Goods Ordinance 1954-1975 (A.C.T.).

9.118 The Committee recommends that the Trade Practices Act be amended to permit termination for breach of a condition implied by the Act, notwithstanding that property in the goods may have passed or the consumer may have accepted the goods, at all times until the consumer has had a reasonable opportunity to examine the goods.

9.119 We have given consideration to the question raised in some submissions of whether, apart from the special type of case referred to in paragraph 9.22, there should be a general provision requiring a supplier expressly to state what conditions or warranties apply in respect of the transactions. An example of this kind of legislative provision is found in the U.S. Magnuson-Ferguson Act 1974 and in a current private member's Bill before the Canadian Parliament. We do not believe that such a

provision should be viewed as appropriate, on an Australia-wide basis, at this time if for no other reason than the high cost of implementation.

Manufacturers Warranties

9.120 As discussed above, the Trade Practices Act implies certain non-excludable terms into a contract for the supply of goods between a consumer and a supplier. In relation to goods, these implied terms cover generally undertakings as to title, encumbrances and quiet possession, merchantability and fitness for purpose and correspondence with description and sample.

9.121 A number of submissions directed our attention to recent legislation in S.A. (Manufacturers Warranties Act 1974) and the A.C.T. (Manufacturers Warranties Ordinance 1975) which:

- give consumers a right to enforce certain express and statutorily implied warranties against the manufacturer, or importer, of goods, and
- give suppliers an indemnity to recover from manufacturers the amount of liability which has been imposed on a supplier due to a breach of a term implied by law with respect to goods, to the extent that the consumer could have recovered damages against the manufacturer in respect of that breach.

9.122 The Committee considers that the legislation mentioned above is based upon a sound principle—that it is the manufacturer placing goods on to the market in the first place who is largely responsible for the quality of goods and that the law should require manufacturers to be directly responsible for statutorily-imposed standards in respect of the quality of those goods. In consumer transactions covered by Division 2 of Part V of the Act, the law now imposes a standard of quality to be met by goods placed into trade or commerce. We do not accept that it is appropriate for liability for a breach of that statutory standard to rest upon persons other than the manufacturer simply because the consumer has no contractual nexus with the manufacturer. Of all the persons in the distributive chain, the manufacturer is the person best placed to effect appropriate insurance against such liability and obviously is the only person who can adjust the manufacturing process to take account of any persistent defects.

9.123 Further, the present system of placing all responsibility upon the last supplier in the chain, i.e. the supplier who deals with the consumer, can operate most unfairly. In the case of packaged goods, for example, that supplier will not usually examine the goods and, accordingly, will not be aware of defects that may be discoverable on examination. Further, he would not be aware of latent defects. In both these respects the supplier must rely upon the manufacturer. Yet that supplier would be liable under the Trade Practices Act for breaches of the statutory standards and may be frustrated in an attempt to gain indemnity from his supplier by an exemption clause in his contract or some other inability to sue another party in the chain.

9.124 In the modern world it is commonly the manufacturer who prepares and disseminates literature describing his products. Consumers oftern rely upon this literature when purchasing goods. Sections 52 and 53 of the Trade Practices Act prohibit a range of false representations in connection with the supply, or promotion of the supply, of goods. To a great extent this gives consumers a right of action when relying, to their detriment, upon a false representation in the literature of a manufacturer.

9.125 However, the Committee feels that this right may not be appropriate, or sufficient, in all cases where the consumer may seek to rely upon an affirmative representation in manufacturers' literature. If this is in fact the position, the

Committee feels that it is not a totally satisfactory one. In the view of the Committee, manufacturers should be civilly liable to consumers for express representations in fact made by them concerning goods manufactured by them.

9.126 There will, of course, be cases where manufactured goods are imported into Australia. Where the foreign manufacturer carries on business in Australia the consumer can still enforce these manufacturers' warranties. In all other cases of imported goods, for obvious practical reasons, the Committee recommends that this liability be imposed upon the importer of goods into Australia.

9.127 Accordingly, the Committee recommends to the Government that the Trade Practices Act be amended to provide:

- that a manufacturer or importer of goods is liable to a consumer buyer, whether or not the consumer purchased the goods from the manufacturer, or to persons who derive title to the goods through that buyer, for breach of any express warranties given by the manufacturer, or of impied warranties essentially of the same kind as those presently implied by the Trade Practices Act into contracts between a seller and a consumer buyer, but that the manufacturer should not be liable for any breach that has been caused by an act or omission after the goods have left the control of the manufacturer; and
- that this liability upon the manufacturer is to be concurrent with the liability presently placed upon the actual seller, but where an actual seller incurs liability to a consumer by reason of a breach of an implied warranty and the consumer could have recovered similar damages against the manufacturer, the actual seller can recover from the manufacturer an indemnity for his liability.

Liability for Loss or Damage from Breach of Certain Contracts

9.128 The provision of credit for the purchase of goods usually takes one of three forms. In the first, the supplier of the goods also provides the credit. In the second, the credit provider becomes the nominal purchaser of the goods from the supplier in order to re-supply them by way of lease, hire or hire purchase, without the credit provider ever taking physical possession of the goods. In these situations the credit provider takes the ownership in order to obtain greater security for the loan. In the third, the credit provider forms a contractual relationship with the consumer for the provision of credit but at no stage has he ownership of the goods. Different considerations arise in each situation.

9.129 Prior to the Trade Practices Act, State Hire Purchase Acts rendered the financier who supplied goods as owner (the first and second situations above), liable without limitation of amount for breaches of the terms implied by those acts as to title, quality and fitness of the goods. In some cases the financier was entitled to be indemnified by the dealer.

9.130 The effect of Division 2 of Part V of the Trade Practices Act is also to imply certain conditions and warranties into contracts between a consumer and a financier who supplied goods as owner. However section 73 of the Act provides that in the second of the situations outlined in paragraph 9.128 only the original supplier, if corporate, and not the credit provider, would usually be liable by reason of a breach of a term implied by Division 2. In the first situation the credit provider and supplier are the one person and his liability for breach of the implied terms is unaffected by section 73. In the third situation the credit provider does not 'supply' the goods to a consumer and the credit agreement is not affected by Division 2.

9.131 Both the Molomby Committee, referred to earlier, and the equivalent

committee in the U.K., the Crowther Committee, considered that when a supplier and financier are 'linked' they should be jointly and severally liable for breach of a term, express or implied, of the contract of sale, or of any collateral arrangement. Both Committees also considered that the financier should be entitled to be indemnified by the supplier for any such liability. Again both Committees proposed to exclude financiers from liability unless the conduct of a 'linked' supplier in connection with the supply of goods or services to the consumer led to the making of the credit agreement.

9.132 We endorse the recommendations of the Molomby Committee concerning the liability of 'linked' credit providers. We also agree with the recommendation of the Molomby Committee that the consumer be enabled to proceed against the financier, provided he has also proceeded against the supplier, and that the consumer be entitled to recover any judgment against the financier to the extent that he has not recovered from the supplier. We recommend that section 73 be amended accordingly. Further, having regard to our earlier recommendations concerning manufacturers warranties, we recommend that the financier have a right of subrogation for the suppliers' right to indemnity against the manufacturer.

Implied Terms in Contracts for Services

9.133 The argument was presented to the Committee that the definition of 'services' for the purposes of section 74 was unduly restricted and that the wider definition used generally for the other purposes of the Act should apply also to this section. The Committee saw some merit in this suggestion but considered that it should not make a recommendation on it at the present time in light of the consideration being given to the matter by the Commonwealth/State Committee on consumer credit laws.

9.134 It was also put to the Committee that a person who called for tenders for the provision of services was not necessarily in such a strong position that he could demand a warranty of the nature which would otherwise be implied by section 74 of the Trade Practices Act. The Committee considers that there should be no exception for a contract by way of competitive tender.

Enforcement and Remedies in Relation to Part V

Offences against Part V

9.135 The widespread nature of the support in the community for the condemnation of undesirable business practices by criminal law measures formed the basis of many submissions on Part V. The bulk of those submissions also argued for the retention of substantial penalties. The Committee essentially agrees with these views. However, the Committee considers that the penalty of imprisonment, currently provided by section 79, is unnecessary and should be eliminated.

9.136 Disquiet was also expressed to the Committee that a single advertising theme could, if used in a nation-wide, multi-media campaign, result in the commission of a large number of offences within very few days. The imposition of maximum penalties for each offence would cause serious difficulties to most advertisers.

9.137 The Committee is concerned about the possible magnitude of the penal liability that advertisers may incur in respect of essentially similar advertisements, placed respectively in newspapers or on radio or television, in the framework of a single advertising campaign lasting no longer than two months. By 'essentially similar advertisements' we mean advertisements where the substance of the conduct differs only as to the names, addresses or telephone numbers of persons from whom the goods or services are available, or by whom the goods or services are made, the date of

publication, the publisher, the colour or size of the advertisement, the advertised prices or the period during which the advertised goods or services are available.

9.138 In respect of such campaigns, the Committee considers it should not be open to a court to impose a criminal penalty in respect of each separate offence committed, to the extent that the sum of the penalties would be greater than the maximum penalty that could have been imposed in respect of one offence.

9.139 The Committee would not wish to see any change to the current position in respect of civil liability under sections 82 or 87. If the legislative scheme recommended above is adopted, care will be needed to ensure that the procedural facility contained in section 83, or a procedural facility to a like effect, is retained.

9.140 The Committee recognises that a problem could arise in this regard from its earlier recommendation that State and Territory courts also have jurisdiction under the Act. In this respect the Committee reiterates its view stated earlier, that multi-state proceedings should be handled by the Commonwealth.

9.141 The suggestion was made to us that there should be provision for costs to be awarded against the complainant in the event of an alleged contravention being dismissed. As this is the normal position in a civil action, the suggestion can refer only to criminal prosecutions. In that regard it is normally considered to be against public policy to deter the legitimate prosecution of suspected criminal conduct by fear of economic loss if the charge is not sustained. Costs are rarely awarded against the prosecutor unless there was a wrongful or malicious element in the commencement of the prosecution. The requirement that a Minister of the Government of a State or the Commonwealth must consent to the prosecution should constitute an adequate safeguard against wrongful prosecution. In any event we could not accept the proposition that the complainant, rather than the prosecutor, should be liable for the costs of a prosecution over which, in almost all instances, he would have no control. It would be highly impolitic to discourage members of the public from reporting possible criminal offences for fear of the liability which might be incurred even if the complaint were well-founded but failed for technical reasons beyond their control.

Defences

9.142 It was suggested to the Committee in several submissions that there should be an onus-of-proof upon the Crown in proceedings under section 79 to show the *mala fides* of the defendant. In the view of the Committee this would render the provisions of Division 1 of Part V unworkable, for the Crown would then be obliged to prove matters which are peculiarly within the knowledge of the defendant. Defences of the nature provided in the Trade Practices Act are commonly to be found in consumer-protection legislation and we see no reason to depart from this common practice.

9.143 It was also suggested to the Committee that the two-part defence provided in sub-section 85(1) be divided into two alternative defences by replacing the word 'and', before paragraph (b), by 'or'. The Committee would not favour this amendment. Sub-section 85(1) at present incorporates and extends the defence known as honest and reasonable mistake. The Committee does not consider that either element of that defence is alone sufficient.

9.144 However, the Committee does consider that sub-section 85(1) currently operates unduly harshly. For example, some concern was expressed to the Committee that the requirements of 'reliance on information supplied by another person', and 'the exercise of due diligence' were uncertain and could make excessive demands upon corporations for preventive measures. The Committee considers that the sub-section

should be restructured to provide a defence to a criminal prosecution when the defendant establishes that the contravention in respect of which the proceeding was instituted was:

(a) due to an honest and reasonable mistake, or
(b) due to reasonable reliance on information supplied by another person, or
(c) due to the act or default of another person or to an accident or to some other cause beyond his control and in which case he took reasonable precautions and exercised due diligence to avoid the contravention.

The Committee would consider this to be a major change to the law on this matter.

9.145 Another suggestion was made to us, that sub-section 85(3) be amended by the deletion of the phrase 'and had no reason to suspect'. The Committee would not recommend this amendment for it would allow a defence to a person who published an advertisement even though he has been put on notice that the advertisement may constitute a contravention of Part V.

Representative and Class Actions

9.146 A number of submissions proposed that the authorities responsible for the administration of the Trade Practices Act, or other authorised persons, be empowered to commence actions on behalf of consumers for remedies under sections 80, 82 and 87. The alternative, or additional, suggestion was made that actions be allowed by, and on behalf of, a class of consumers with a view to obtaining an order in favour of those members of the class who were able to satisfy a judicial officer that they had, in fact, suffered damage as a result of a contravention of Division 1 of Part V.

9.147 The Trade Practices Act now enables the Minister for Business and Consumer Affairs, the Trade Practices Commission or any other person to apply for an injunction under section 80 and, where a contravention is found and an injunction is granted, an ancillary order may be made under section 87 to redress any injury to identifiable persons, not necessarily the applicant, caused by the contravention or by any like conduct of the defendant. These sections operate to allow some representative actions on behalf of identifiable consumers for remedies other than damages. The Committee later recommends amendments to sections 80 and 87 to remove certain restrictions on the operation of those sections.

9.148 The Trade Practices Act does not prevent consumers joining together in an action to recover damages under section 82. However any order obtained by such an action will be in favour only of those consumers who applied for the order and orders will not be made in favour of a class of consumers not all of whom were identified. It would be open for State Governments, in their administration of Division 1 of Part V, to grant legislative authority to the consumer protection authorities in those States to represent a consumer or a group of identifiable consumers in an action for damages under section 82.

9.149 The Committee is of the opinion that no further amendments are necessary to the Trade Practices Act to allow representative actions on behalf of consumers. We do not consider that it would be desirable to allow actions to be brought on behalf of a class of consumers which included persons who were not identified, for it would be difficult or impossible for a corporation against whom such an order was made to ascertain either the amount of its liability or the persons entitled to the benefit of the order. Furthermore, such an order would seem to extinguish the rights of consumers to take their own individual actions, which the Committee would consider to be undesirable.

Injunctions

9.150 The Committee is concerned that section 80 may be of only limited value in preventing injury to consumers. The section presently authorises the court to grant injunctive relief to restrain conduct that is, or would constitute, a contravention of Part IV or V of the Act, or certain conduct which is preliminary to such a contravention. There is some doubt as to how far the section is available to prevent a threatened contravention of the Act. Many of the amendments to the provisions of Division 1 of Part V, which were suggested to us, derived from this very concern. The Committee would prefer to see a greater reliance upon preventative than punitive measures and we draw attention to this issue in order that any amendment might be made which is necessary to place beyond question the power of the court to prevent threatened contraventions of the Act.

9.151 Moreover, an injunction is normally only granted where there is a likelihood of repetition of the objectionable conduct and, if the conduct has ceased, injunctive remedies are no longer available. In this latter respect we recommend that section 80 be amended to allow an injunction to be granted without the necessity to prove that there is a threat that the objectionable conduct will, or is likely to, continue.

9.152 There remains another limitation on the efficiency of section 80. While the prevention of any further publication of an offending advertisement may thereby prevent further deception, it would not remove any misunderstanding already resulting from that advertisement.

9.153 The Committee received several suggestions for amendment of the Act which were addressed to these problems. First, it was suggested that provisions be made for the issue, by the Minister or the Commission, of an administrative cease-and-desist order, similar to the power available to the U.S. Federal Trade Commission under section 5 of the Federal Trade Commission Act 1914, as amended. Secondly, it was suggested that the Court be empowered to require a corporation responsible for misleading or deceptive conduct to make an affirmative disclosure of all relevant and material facts necessary to remove any misconceptions caused by the conduct. A variant of this suggestion was the proposal to require corrective advertising explaining why, and how, earlier claims were false or misleading and setting out the true position. We were given the example of Article 5 of the Act on the Repression of Fraud 1963 (France) which allows the court, on conviction of an advertiser, to order the publication of its judgment in prescribed newspapers and in public notices, at the defendant's expense. Thirdly, it was suggested that section 80 be amended to empower the court to grant a mandatory injunction, directing the performance of some act.

9.154 It is possible that the court already has some measure of the powers necessary to deal with the problem outlined in paragraph 9.152 above. Under section 87 the court may make such order as it thinks fit to redress injury caused to persons by any contravention of the Act by the defendant. However, doubts have been expressed as to whether the words 'redress injury' in the section would encompass a publication which, by itself, would not redress any injury because it would have to be followed by further action by any party who suffered damage. Moreover orders under that section may presently only be granted as ancillary to relief under sections 76, 79, 80 or 82, and it is possible that they may be made only where it is possible to identify the persons likely to be injured. It is further possible that Courts will be reluctant to make orders of the nature of affirmative disclosure or corrective advertising, unless the power to make such orders is expressly conferred upon them. Again, under section 80 the court may have power to grant an injunction restraining a defendant from making a claim unless

accompanied by an affirmative statement to the effect specified by the court. However, an injunction of the nature described would not be available unless it was proposed that similar claims be made in the future.

9.155 The Committee would not recommend for Part V the establishment of administrative cease-and-desist orders of the type proposed. Such a proposal would involve both a radical departure from the existing scheme of Part VI and administrative arrangements of considerable complexity. Certainly the hearing and review or appeal requirements that would be necessary would present few advantages over hearings in court. Additionally, such a proposal may raise difficult constitutional problems.

9.156 The Committee would favour the amendment of section 80 to empower the court to grant mandatory injunctions which might be available in addition, and as an alternative, to the negative injunctions now available under section 80. These mandatory injunctions would also encompass orders for affirmative disclosure and corrective advertising.

9.157 We consider that mandatory injunctions should be available for matters arising under Part V only on the application of the various Commonwealth and State authorities empowered to bring proceedings under that Part.

Ancillary Orders

9.158 The Committee considers that the orders which are at present available under section 87 should be available to any person who suffers detriment as a result of a contravention of section 52 or of the proposed provision prohibiting unconscionable conduct, without requiring that relief be also given to him under sections 80 or 82. In most instances the remedies under section 87 would be the more appropriate remedy. Similarly, the range of orders under section 87 should be available to a defendant in any proceedings upon an obligation which was incurred by him as a result of misleading, deceptive or unconscionable behaviour by, or on behalf of, the plaintiff.

9.159 We consider that section 87 should expressly permit an order requiring the repair of goods, the provision of parts for goods or the provision of services. Often this will be the most efficient, least costly and appropriate means of redressing the detriment suffered by the consumer.

Research and Dissemination of Information

9.160 It was suggested that the power of the Commission under paragraph 28(1)(b), to examine critically the laws in force in Australia relating to the protection of consumers, should not be limited only to those matters referred to it by the Minister for Business and Consumer Affairs. The Committee sees no reason to change this section.

9.161 It was also suggested to the Committee that the Commission be empowered to disseminate, for the guidance of consumers, information on their rights and obligations under any laws of Australia whether Commonwealth, State or Territorial. At present the Commission, under paragraph 28(1)(e), has power to disseminate only information concerning provisions of laws of the Commonwealth or of the Territories. We recommend that the Act be amended to achieve this broader function. It is important that the Commission should co-operate with the States in this respect.

A Consumer Affairs Council

9.162 The terms of reference of the Committee specifically asked whether Australian consumers are benefitting from the Act. Many submissions claimed that consumers are

so benefitting and, as already mentioned, we concur in this opinion. However, to further this benefit the Committee believes that there exists a need, at Commonwealth level, for a general advisory body to stand off and oversee in some continuing fashion, the promotion of consumer interests in Australia. Accordingly, we recommend the establishment of an Australian Consumer Affairs Council.

9.163 The proposed body should comprise persons who are intimately connected with the several facets of consumer affairs, yet are generally free from the pressures of day-to-day involvement in the legislative or administrative aspects of consumer protection. It is important that the Council be independent of Government and quite distinct from it, even though it has the function of advising the Government. It must be seen as a lay body broadly representative of the interests of Australian consumers and producers and not as a Government dominated body.

9.164 Since the consumer protection provisions of the Act extend throughout Australia, it is desirable that the membership of the Council include representatives from the several States and Territories. Since the Act regulates relationships between producers, sellers and consumers it is desirable also that these be represented on the proposed body. Since the Council's activities will relate directly to the operation of the Government department responsible for administering the Act, it is desirable that it, too, should be represented.

9.165 These considerations suggest in broad terms how the membership of the Council should be constituted. Wide representation of State interests will be achieved by appointing a member from each of the Consumer Affairs Councils of the States and Territories. More direct recognition of the special importance of consumer, manufacturing and commercial groups will be accorded by appointing three members from a panel of six nominated by the Australian Federation of Consumer Organisations, the Standard Association of Australia and the Australian Consumers' Association, and three members from a panel of six nominated by bodies representing industry and commerce. Representation of the Department of Business and Consumer Affairs will give a needed link with full-time practitioners and with the Department which will be responsible for servicing the Council. A senior member of the Trade Practices Commission should serve as consultant to the Council to give needed advice on matters affecting the current operation of the Act. The Council should have a part-time secretary and a full-time research officer to prepare background papers and it should meet at least twice yearly. The Council should have a Chairman, appointed in addition to the members enumerated above, who should not be a permanent member of the public service or a serving parliamentarian. The Council would report to the Minister for Business and Consumer Affairs.

9.166 The main function of the Council would be to advise the Commonwealth Government on matters relevant to the interests of consumers, which the Council would wish to draw to the attention of the Government, particularly in such areas as desirable legislative or administrative action and consumer education. It would also have the function of advising the Government on any matter which the Government may bring to its attention.

9.167 The Council will, *inter alia*, be composed of representatives of all States and the Commonwealth. As the Committee sees it, the Council will play an important role in assisting the co-operation of Commonwealth and State Governments which this Committee has previously recommended.

CHAPTER 10

THE SCOPE OF THE ACT AND EXEMPTIONS

10.1 There is a widely expressed support throughout Australia for the central philosophy of the Trade Practices Act. The idea of competition and its benefits has been embraced by the public, the business community and political parties alike. However, the Committee has observed a very strong and widely-held sentiment in many segments of the community, importantly including the Government itself in relation to its own commercial activities, that competition is something for others, not for one's self.

10.2 We believe it to be extremely important that the Trade Practices Act should start from a position of universal application to all business activity, whether public sector or private sector, corporate or otherwise. Only in this way will the law be fair, and be seen to be fair, and avoid giving a privileged position to those not bound to adhere to its standards. In this respect it will be seen that we regard the present Act to be inadequate.

10.3 Any exceptions should be only by way of specific legislation, enacted by the relevant Parliament. The Act allows for such exceptions.

10.4 There are, however, constitutional limitations on the Commonwealth Government to legislate on these matters. Limitations of this nature arise for example in relation to intra-state trading by natural persons, State banking, State insurance corporations and corporations which were not established primarily for purposes of trade or commerce, but which nevertheless engage in conduct of a trading or commercial nature, e.g. municipal councils.

10.5 The problems which flow from the limitations placed upon the constitutional power of the Commonwealth could be solved either by each of the States enacting complementary legislation or by a reference of powers to the Commonwealth by individual States. In the interests of establishing and continuing uniform application of the Act throughout Australia, we recommend that the Commonwealth Government initiate consultations with State Governments.

10.6 We now consider the other areas in which this legislation falls, or may fall, short of universal application.

Employees and Organisations of Employees and Employers

10.7 Paragraph 5 of the Committee's terms of reference asked us to give particular attention to the application of the Act to anti-competitive conduct by employees, and employee or employer organisations. The Committee received a substantial body of comment on this term of reference, nearly all being directed to the question of anti-competitive conduct by employees and employee organisations. The great bulk of those comments supported the view that anti-competitive conduct by employee organisations should not be excluded from the application of the Act.

10.8 Employer organisations, in so far as they engage in restrictive trade practices themselves, or provide a vehicle for their members to do so, are already subject to the Act save in the manner stated in paragraphs 10.9 to 10.10 below. We see no reason to alter this position.

10.9 The *Trade Practices Act* 1965 provided that in determining whether an agreement was examinable under that Act regard was not to be had to any provision of the agreement relating to the remuneration, conditions of employment, hours of work

or working conditions of employees. This exception applied equally to employees and employers and their organisations.

10.10 The *Trade Practices Act* 1974, in paragraph 51(2)(a), continues the exception of the 1965 Act but also provides an exception which goes further, in relation to employees and their organisations only, by excepting:

- any act done by employees not being an act done in the course of the carrying on of a business of the employer of these employees;
- any act done by an organisation of employees not being done in the course of the carrying on of a business of that organisation.

The reasons for this extension to the exception by the 1974 Act are obscure, certainly to the Committee.

10.11 First, the Committee considers that the Act should leave no doubt that it applies to restrictive conduct of organisations of employees which is carried out by agreement, arrangement or understanding with another person engaged in trade or commerce.

10.12 The scheme of procedures for resolving issues under the Trade Practices Act is inappropriate for most other issues involving those organisations of employees. There are already well-established procedures for resolving disputes involving those organisations, under the Conciliation and Arbitration Act. The Australian Conciliation and Arbitration Commission has built up expertise in this field. Duplication of this expertise would be difficult and costly. We recognise, however, that the power of the Commission to deal with an industrial issue is limited by the requirement that the issue have an interstate element, and by the confining of the powers of the Commission to matters arising out of the employer/employee relationship. Some intrastate matters which would, if not for the exception in paragraph 51(2)(a), fall within the scope of the Trade Practices Act may fall within the scope of industrial legislation of the States.

10.13 However, there remains some conduct which presently falls outside the operation of the Trade Practices Act, the Conciliation and Arbitration Act and most State industrial legislation.

10.14 The situation which has been the subject of most concern is the secondary boycott, where employees of one employer place a boycott upon the dealings of that employer with another person. Numerous examples were mentioned in submissions to us, but the examples most frequently cited were boycotts by bread delivery drivers against retail outlets which were selling cut-price bread and boycotts by petrol tanker drivers against service stations advertising cut-price petrol.

10.15 The Committee understands that, in those cases, employees decided among themselves to boycott one or more traders or potential traders because the employees claim if they do not do so the operation of the competitive process usually through price competition, will place their jobs in jeopardy. They seek to implement that boycott without having to justify it to anyone as being in the public interest.

10.16 In this regard, we have elsewhere stated our view that no section of the community should be entitled to be the judge in its own cause on matters directly aimed at interfering with the competitive process between firms. We make no exceptions to that position. If an organisation or group of persons for its own reasons deliberately interferes with the competitive process, then the community is entitled to have those reasons scrutinised by a body independent of the persons engaged in the dispute. If that independent body finds those reasons inadequate, the community is entitled to require that the position be remedied.

10.17 In the usual case, secondary boycotts do not involve a dispute between an employer and employees which could be brought by either party before the Australian Conciliation and Arbitration Commission under the Conciliation and Arbitration Act. In any event the employer may not choose to bring the matter before the relevant body, even if he wished to do so, for fear of widening the "dispute" and having his whole operations shut down. Moreover, without any collusion at all with his employees, he may himself find his own position in sympathy with his employees because their actions relieve him from the pressures of his customers for him to make concessions to them on price. Thus it is quite unrealistic to expect that the employer will, as a matter of course, bring secondary boycotts before the body.

10.18 But the trader at whom the employees' actions are aimed is deprived of his ability or his liberty to trade in such manner as he sees fit, and the community suffers, without anyone (the trader himself or consumers) being able to raise the matter in a forum impartial as between all the persons involved or affected. There are some common law actions in tort which might, in theory, be available but these are in most cases dead-letters in practice.

10.19 In these circumstances we recommend that the law provide an effective avenue of recourse for the trader directly affected, by allowing him access to an independent deliberative body. That some procedures for solving the matter should be available was something on which submissions of interested parties were virtually unanimous.

10.20 We make no recommendation as to whether these procedures for recourse should be established under the Trade Practices Act or the Conciliation and Arbitration Act. The submissions were divided as to which approach was preferable. However, we believe the trader who is the object of the employees' action should not simply have the choice of toeing the line or suffering substantial damage or in some cases going out of business. He too is entitled to have his "day in court".

10.21 We now turn to the terms of the exemption at present provided by the law in paragraph 51(2)(a)—see paragraph 10.10 earlier. Many submissions urged that the extension made by the 1974 Act should be repealed. We have already noted our view that there should be no exception for anti-competitive collusion between employees, or organisations of employees, and others (see paragraph 10.11). We regard the extended exception as being too wide. The Committee recommends that the exception should be recast along the lines of the 1965 exception.

10.22 Some submissions were concerned in case any proposed reduction in the scope of the exemption would infringe Australia's obligations under relevant International Labour Organisation Conventions, to allow employees freedom to organise and form trade unions. The relevant Conventions seem to be No. 87—Freedom of Association and Protection of the Right to Organise, 1949, and No. 98—Right to Organise and Collective Bargaining, 1949. Australia ratified both Conventions on 28 February 1973.

Governments and their Instrumentalities

10.23 Legislation does not apply to the core of Government activity (legally referred to as the acts of the Crown) unless the legislation expressly or by necessary implication states to that effect. The Trade Practices Act is silent on the matter. Accordingly the acts of government are not subject to the Trade Practices Act because there seems to be no ground upon which to assert a necessary implication, unless they can be said not to be the acts of the Crown. We do not here debate the issue as to which government activities are subject to this Crown immunity and which are not so subject. It is sufficient to note that such an issue arises in every case where the Trade Practices Act may have relevance to government activity.

10.24 It was put to us in a number of submissions that all governments and their instrumentalities should be bound by the Act, whenever they engage in trade or commerce. A particular problem of concern in some submissions was the non-application of the Act to contractual arrangements between government authorities and private parties. These arrangements could, if made between corporations in trade or commerce, have been subject to Part IV of the Act. However the government is able to participate, and even encourage, such arrangement without regard to the Trade Practices Act. The problem is, of course, wider than the application of Part IV; it also involves the application of Part V.

10.25 We take the view that the Commonwealth Government should be prepared to accept for itself, in relation to its commercial activities, restrictions which it places on others. The same standards of commercial conduct are clearly as appropriate for officers of the Government as for persons in a less protected position. The Committee, therefore, recommends that the Commonwealth Government and its instrumentalities, when engaged in commercial activities of its own should be bound by the Trade Practices Act to the same extent as a corporation. There is no intention to make the Act applicable to the Government in its performance of purely governmental function.

10.26 The Committee believes that it would also be desirable for the Act to apply to State Governments and their instrumentalities in the same fashion. As we understand the position it would be beyond the power of the Commonwealth Parliament to provide for this by Commonwealth statute. In any event we would recommend that the manner in which that object is to be achieved be a subject of the consultative process between the Commonwealth and State Governments already recommended.

10.27 We note that if governments are to be bound by the Trade Practices Act it would not be appropriate to attract the application of the criminal provisions of the Act. The civil remedies, such as declaration, injunction and damages, are the appropriate remedies.

Professions

10.28 We turn now to the question of the application of the Act to the business activities of professional persons who practise privately for fees.

10.29 In relation to Part IV of the Act, it was argued particularly by bodies representing members of professions, that those members and their professional associations should be free to engage in self regulation. They suggested that certain agreements within professions tended to be meritorious in their own right and in the public interest. By these agreements, the right was claimed to fix or recommend the fees or prices to be charged by members, and to establish codes of ethics and the policing of them. The argument alluded to the notion that professionals should not be regarded, for trade practices purposes, as a section of the business community. Some submissions suggested that members of professional associations would cease to support their association in the absence of such agreement. Submissions from such groups, in the main, urged that the Committee recommend that professions be totally and expressly exempted from the Act.

10.30 Numerous submissions took the opposite view, and suggested that there was no reason why members of the professions and their associations should be treated as being in a different position from other sections of the business community. Suggestions of this nature were also advanced by groups within professions, as well as by inference in other submissions which referred to the scope of the Act generally.

10.31 The Committee has already expressed its view that the Act should apply in a general fashion to those in the community engaged in trade or commerce. We regard as unrealistic the proposition that members of professions are not part of the business community.

10.32 We have already stated our views on price fixing and price recommendations between competitors. In this regard we make no distinction between professions and other persons engaged in trade or commerce. The reasons given in paragraph 4.59 in relation to price fixing and paragraph 4.70 in relation to price recommendations apply generally.

10.33 In relation to other restrictions often included in codes of ethics or constitutions of professional associations, we believe that the Act should apply to such restrictions in the same way as it applies to restrictions by other groups, and members of groups, engaged in trade or commerce. We have already stated that no section of the community is entitled to be the judge in its own cause. Authorisation is, of course, available for agreements which may, in fact, have anti-competitive effects. Such agreements may receive authorisation in the usual way and in the process the public benefit of those agreements will have been publicly demonstrated.

10.34 The States have a particular interest in the regulation of professions, many of which are already regulated by State legislation. However, where the States legislate to allow specific restrictions in a particular profession, the exception already provided in paragraph 51(1)(b) of the Trade Practices Act should continue to apply, subject to the present regulatory power of the Commonwealth Government to remove the exception in any particular instance.

10.35 Division 1 of Part V sets certain minimum standards of business conduct. Most, if not all the professions, impose equal, if not stricter, standards upon their members. We see no reason why those provisions should not apply to the professions nor would we expect its application to cause the professions any concern.

Small Business

10.36 Specific mention of small business in two of the terms of reference of the Committee indicates the Government's concern that small business should not be adversely affected by the operation of the Act. Consideration of the position of small businesses in this respect raises on the one hand matters of definition and measurement and on the other matters of principle.

10.37 'Smallness' is, of course, a relative term; the concept of small business must be related to the average size of establishment in the particular industrial and commercial society under consideration. Size may be measured quantitatively in many different ways; number of employees, turnover, assets and market share suggest themselves as potential benchmarks for measurement. Number of employees is often selected as the measure—a small firm in the United Kingdom is officially defined as one employing less than 200 people, while in the United States the Small Business Administration has a benchmark test of less than 500 employees. In Australia the Committee of Enquiry into Small Business considered the appropriate figure to be 100 employees of fewer.

10.38 We feel, after examining available statistical evidence that the simple size measure of small business in the Australian context should be 100 employees or fewer for manufacturing and mining industry and 20 employees or fewer for wholesale, retail and other service enterprises. In each of these two categories small business constitutes not less than nine-tenths of the number of all enterprises in the industry category but

accounts for a widely varying proportion of employment—ranging from 18 per cent in mining to about 50 per cent in retail trade.

10.39 Certain qualitative characteristics are also associated in the minds of many people with small businesses. Independent ownership and control, personalised owner-management and highly localised operations are some which spring readily to mind. It is these qualitative criteria, which are much less amenable to measurement and assessment than mere size criteria, that more directly focus attention upon the reasons generally accepted by the community for preserving and encouraging small businesses. They lead us to a consideration of the matters of general principle referred to above.

10.40 The Committee sees two broad value-judgments as providing the foundation upon which the body of trade practices legislation in Australia and elsewhere has been constructed and considers these a useful start-point from which to examine the position of small business.

10.41 The first of these is the acceptance of competitive capitalism as a socio-economic system based upon the institution of private enterprise. Implicit in this is the broad assumption that the needs of the community, including consumers, are most effectively satisfied through the operation of the market mechanism in which the driving force is competition. Competition produces efficiency in the narrow economic sense by driving prices down and efficiency up. It affects efficiency in a wider social sense by ensuring that national resources are allocated in such a way as to ensure that consumers in the market will have their desires satisfied at the lowest cost consonant with the quality desired. Trade practices legislation is therefore aimed to preserve and promote competitive situations and competitive behaviour and to prevent or restrict anti-competitive situations and conduct.

10.42 The second value-judgment is that the economically weak should be protected against the unfair or predatory acts of the economically strong, a belief that is derived from notions of human dignity and acceptable norms in the conduct of human affairs. Attitudes as to what constitute norms in human affairs will change from generation to generation and the change will show in the practical expression they receive in legislative enactment and administrative enforcement; exercises of economic power which were accepted by society a generation ago are no longer tolerated today.

10.43 Thus trade practices legislation looks not only to the preservation of competition but also to the regulation of potential misuse of economic power which is inimical to the public interest or the public benefit.

10.44 We accept these two broad value-judgments, recognising that they have no essential connection one with the other but are in practice intertwined and are both, at least in their idealised form, accepted by the majority of Australians.

10.45 It is with reference to this dual base that the particular position of small business in trade practice legislation should be examined, including the question whether small business could or should be afforded special treatment under the Act.

10.46 On this point the Committee received many submissions, some urging special treatment, others rejecting it. Small businessmen, large enterprises, trade associations, consumer groups, government departments—all had something to say on the matter and many offered evidence to support arguments one way or the other. No clear position emerged from a consideration of all the submissions.

10.47 One major argument advanced against any special treatment being afforded to small business is that, because it does not have access to economies of scale, it is less

efficient than big business. This argument cannot, of course, apply across the board, for there are many market situations where economies of scale are not relevant to the service provided. Where economies of scale are not a deciding factor, conclusive proof as to the relative efficiencies of big and small business is elusive, if not impossible to marshall. Studies in a number of countries appear evenly divided on the question of purely economic efficiency. The extensive report of the United Kingdom Committee of Inquiry on Small Firms, which embodied some research into the relative efficiency of small and large firms, provides a succinct summing-up of the position when it says that on the basis of the information and techniques used, the evidence does not suggest that small firms are more or less efficient than large units and that this conclusion tends to support other related evidence in the field.

10.48 Because of its apparent ability to operate on a level of economic efficiency in general terms, there appears to be no case to provide special treatment for small business in terms of the first of our value judgments. We also looked at the case for assisting small business in the area of protection from the misuse of economic power, and the continuance of small business as a desirable social end. To what social objectives, then, can the preservation of small business be related?

10.49 The basis for all activity is the satisfaction of human wants or desires, both material and non-material, and these are satisfied by both consumption and productive activity. While the former may be regarded as perhaps more fundamental, the latter is still regarded by most as essential to a full and fruitful life. So the social objective in this regard may be seen as the satisfaction of both consuming and producing desires in the community. Efficiency in the pursuit of this objective will then be seen to be, for the individual as a consumer, the production of a wide range of goods and services at reasonable cost and, for the individual as a producer, the right to work in a manner which will give him satisfaction in a job well done.

10.50 Thus the small businessman, like any other member of the community, should have the right to be protected in his work from the abuse of economic power which might otherwise threaten his livelihood. That is to say, that his business demise might be considered a social cost, in terms of deviation from the ideal of 'fairness' in business, which society is not prepared to bear. This concern with the social misuse of economic power is not at all new. Perhaps the best early example is the English Statute of Monopolies which endeavoured to curb economic power as early as 1624. Much more recent government moves to control market power in a wide spread of OECD, EEC and ECSC countries have been made in the 1950s and 1960s.

10.51 We need to consider therefore the proposition that special protection from the misuse of economic power should be afforded small business; treatment over and above that which it already derives under the Act and which we believe our suggested amendments will strengthen and clarify.

10.52 It is suggested by some that the protection the Act affords small businessmen in this respect has not been fully utilised by them either because they are not aware of the protection it affords, because they are fearful of reprisals of various indirect kinds if they come forward and declare themselves to the Commission, or because they are deterred by possible litigation costs. We are unable to determine the accuracy of these suggestions.

10.53 Some trade associations have argued that, as was also the case in the United Kingdom, small firms need to take collective action and also require recommendations and guidance from their associations—matters which could be regarded under the Act

as being in restraint of trade. They claim that the Act has not, on the whole, benefited small business.

10.54 From the brief figures already given it is apparent that small business is of great significance in the Australian economy. Other statistical series can be cited to support this assertion. In fact, some would argue that small businesses are so numerous that, in the first place, they should not need protection and secondly, any additional protection would cost too much to the remaining members of the community.

10.55 The main arguments offered in support of special protection, by the National Small Business Bureau, are identical to those used in other countries based on a similar system of competitive capitalism. The basis of those arguments is that small firms are important to the economy, in respect of innovation and of providing competition and resistance to concentration of economic power. In the United States and Canada, in particular, there is a widespread conviction that the preservation of small business is absolutely essential to the whole edifice of competitive capitalism. It is further argued that small firms are a seed-bed for the new industries of tomorrow, by providing opportunity for entrepreneurs to develop their talents.

10.56 Considering these arguments and the many submissions made to it on this subject the Committee feels that, while on balance the Act has probably operated to favour small business, particularly to shield it from the abuse of economic power, there is a case for making some changes in the Act which will afford further protection and will, at the same time allow for ready changes in ownership, which is often related to the entrepreneurial skill, enterprise or inventiveness of the founder.

10.57 We believe these amendments, and others proposed, will assist small business in protecting it from predatory conduct and will provide lower barriers to entry and exit. The general changes in the Act should provide for greater certainty to small business as it will for business as a whole. There are other actions Governments may take to assist small business in many ways not related to trade practices but these fall outside our terms of reference.

Exceptions and Exemptions

10.58 The Committee was presented with numerous proposals to exclude from the operation of all or some of the provisions of the Act, both particular organisations, and matters relating to particular industries or affecting different functional levels within those industries. The requests covered both goods and services provided locally and, in some cases, internationally. We refrain from listing the industries and organisations claiming exclusion. However, as already indicated, we consider that in general the Act should apply across-the-board and be admissible of exceptions only where a case for public benefit can be made out, or where Parliament has specifically legislated to regulate the area.

Matters covered by other Legislation

10.59 Sub-section 51(1) presently provides an exception from the operation of Part IV of the Act in the case of acts or things done which are specifically authorised or approved by Commonwealth, State or Territory legislation. In the case of State legislation the exception is subject to the present regulatory power previously noted (paragraph 10.34).

10.60 It was put to us by a number of submissions that the exception should be extended in three principal respects to—

- any sector of trade or commerce established or regulated by legislation;

- any conduct authorised or approved by a Minister or officer of a Commonwealth or State government;
- any conduct within the range of statutory powers of an organisation.

10.61 In relation to industries in respect of which regulatory legislation is or may be enacted we consider that the provisions of the Trade Practices Act (including the authorisation process where applicable) should, subject to specific legislative approval of particular matters, have primacy over restrictive trade practices adopted by or within any such industry. Any other position may facilitate an undesirable identification of interest between the regulators and the regulated, which does not take account of the wider economic and social goals of the community. The Trade Practices Act provides a useful and necessary public safeguard against this possibility.

10.62 The enactment of the Trade Practices Act has demonstrated the intention of the Commonwealth to play a full role in the field. We consider that this role should continue and that the Commonwealth must retain the responsibility of determining how far exceptions in particular areas will be allowed to detract from the uniform operation of the Act. No exception should be made without specific legislative approval of the conduct in issue. The Committee does not recommend any extension to the exception already provided in sub-section 51(1).

10.63 We consider that Part V of the Act should continue to have application in the manner discussed in Chapter 9. Accordingly, we would also not support the above proposals referred to in paragraph 10.60 as a proper limitation on the operation of Part V.

Exports and Imports

10.64 It was submitted to the Committee that the present exception provided by paragraph (g) of sub-section 51(2) was too narrow. That paragraph, at present, provides an exception in the case of agreements relating *exclusively* to the export of goods from Australia or to the supply of services outside Australia. A number of suggestions were made to extend the scope of this exception.

10.65 One suggestion was that companies which export 51 per cent or more of their total production should be specifically excluded from the operation of section 50, and from certain other provisions of Part IV especially in relation to joint venture activities. The purpose of such an exception would be to allow a greater degree of rationalisation and exploitation of economies of scale following upon a restructuring of export oriented industries. The Committee does not consider such a wide exception desirable as it would extend to activities which might have substantial implications for competition in Australian markets. The authorisation test we have recommended leaves it open to such companies to demonstrate that there is a net benefit to the public, as a result of an increase in export trade and despite adverse effects in the domestic local market.

10.66 It was also suggested to us that activities directed to export alone may still have implications for domestic markets. It was proposed that the exception should not be restricted to matters which relate 'exclusively' to the export of goods from Australia, or to the supply of services outside Australia. Again, we consider that where a provision of an agreement goes beyond such matters, and competition in Australia is adversely affected, a net benefit to the Australian public should still need to be demonstrated, perhaps with the assistance of Government submissions, and not be presumed, as the submissions in effect suggested. Accordingly, we would not support the recommendation.

10.67 Some submissions expressed concern at the requirement that full and accurate particulars of export arrangements be filed. First, we feel that filing, for example, every price change should not be necessary and the Act should be amended accordingly. Secondly, the question of confidentiality of particulars was raised with us. We note the legislative guarantee contained in section 166 which presently applies to particulars furnished under paragraph 51(2)(g). We also note that the last mentioned paragraph is presently the subject of an amendment by the Trade Practices Bill 1976. The Committee believes that blanket exemption without registration should not be afforded to such arrangements. Competition in the domestic Australian market is safeguarded if such arrangements must at least be filed. However we do believe that the Act should provide that the Minister or his authorised officer may not use or disclose any such particulars as filed except for the purposes of determining whether to institute proceedings under Part VI, and for use in those proceedings. We recommend that section 166 be amended accordingly.

10.68 It was suggested to the Committee that an exception similar to that in relation to exports be provided for agreements dealing with imports into Australia. Issues of competition in a domestic market arise directly in the case of imports but not necessarily in the case of exports, and it is with domestic competition that the Act is concerned. Restrictions in dealings with imported goods which adversely affect domestic competition must be subject to the Act. We do not recommend any exception of import agreements.

10.69 It was also suggested that an exception similar to that in relation to exports be provided in relation to the interchange of goods or services between Australia and another country pursuant to governmental trade arrangements or agreements. Sub-section 172(3) permits regulations to be made excepting prescribed contracts, classes of contracts or conduct pursuant to a specified arrangement between the government of Australia and the government of any other country. We consider that this exception is adequate to deal with inter-governmental trade arrangements.

Copyright and Industrial Property

10.70 Sub-section 51(3) provides that in determining whether a contravention of provisions of Part IV of the Act has been committed, (other than sections 46 and 48) regard shall not be had to certain matters relating to patents, registered designs, copyrights and trade marks. It was suggested to us that the exception is too limited and, in particular, that the exception should extend to arrangements whereby one party provided 'know-how' to the other. Arrangements of this nature usually involve the provision of highly confidential information of a technical nature, often relating to a manufacturing process or business method.

10.71 We consider that such arrangements should not be the subject of exemption, and that the Act should apply in the usual manner. In this regard, the Committee refers to its recommendation that, in an authorisation, registration, or clearance application, trade secrets and 'know how' in certain categories (see paragraphs 11.39 and 11.41) should receive confidentiality as of right. This should resolve any genuine problem in this regard. In any event the Committee believes that the precise content of such technical information is not normally contained in the formal agreement which restricts its use.

Sub-section 51(2)

10.72 The Committee's attention was drawn to a possible ambiguity in paragraphs (a) and (b) of sub-section 51(2). It was suggested that, as presently drafted, the

exception might extend to the entirety of a contract when a provision of the contract is entitled to the exception. A similar ambiguity may be present in paragraphs (c) and (d). We recommend that any ambiguity be removed and that it be made clear that the exception extends only to the appropriate provision of a contract.

Primary Industry Exemptions

10.73 In relation to the rural industry sector of the economy, particularly its major contribution to exports and the earning of foreign exchange, a number of submissions referred to the regulation making power currently contained in sub-section 172(2) which provides a means for exempting certain conduct engaged by specified organisations or bodies concerned with the marketing of primary products. Some submissions also referred to the provisions of paragraph 51(2)(g) together with the proposed amendments to this provision as outlined in the Trade Practices Bill 1976.

10.74 The current position is that under sub-section 172(2), regulations may exempt primary industry organisations or bodies concerned with the marketing of primary products from the provisions of the Act. A large number of primary products exemptions from the provisions of section 45 of the Act have been made, but according to submissions, not all requests for exemption have been successful.

10.75 The primary thrust of most submissions on the subject of exemption in this area expressed support for the need for primary industry exemptions from the provisions of section 45 to allow individual farmers to negotiate collectively and to allow marketing organisations to carry out their required functions. Submissions referred to the *unique* marketing structure in agricultural industries, in that individual growers, invariably small, could not successfully negotiate sales on their own behalf It was said that removal of exemptions would result in individual bargaining resulting in major hardship to growers. Some submissions also felt that exemptions from the provisions of section 47 relating to exclusive dealing should be given. One submission requested total exemption from the Act.

10.76 One submission, while agreeing with the necessity for primary industry exemptions, felt that they should not allow a marketing authority to go too far. This submission specifically referred to the situation where a State marketing authority acting as a monopoly under the sub-section 51(1) exemption could set prices on the local market to the detriment of the consumer and at the same time legally prevent competition in that market. Sub-section 51(1) in effect, allows exceptions to the relevant provisions of the Act to the specified functions of State Marketing exception. The Committee points out that the current Act has the power to prevent such State authorities from engaging in particular undesirable activities and if problems occur, this power should be used.

10.77 One submission requested us to recommend that sub-section 172(2) be amended so that both sides to any contract, arrangement or understanding in restraint of trade receive the exemption. The point was made that proceedings under sections 80 and 82 could be instituted against the other party to any agreement in restraint of trade.

10.78 The submissions relating to paragraph 51(2)(g), expressed concern as to the use of the word 'exclusively' and as to the requirement that 'full and accurate particulars' of any agreement must be provided to the Commission in order to obtain the exemption. We have dealt with both these matters in paragraphs 10.66 and 10.67 and see no reason to apply a different rule on this particular subject to primary industry matters.

10.79 In relation to the overall question of the need for certain primary industry exemptions for rural products, the Committee accepts the need at this time for certain individual primary producers to be able to act collectively in arranging the sale of their products, including price negotiations. The main reason for this is, of course, the nature of the market in which such producers operate: there are a very large number of sellers which individually have very little or no bargaining power and who sell to comparatively few buyers who further process the product and/or arrange for marketing to the consumer. In the majority of cases factors such as perishability of the products, limited on-farm storage facilities and the need for cash to meet production and living expenses compel the farmer to sell his product when it becomes available to sell. However, we do not think that this reasoning should lead to a sweeping exemption for primary industry. These exemptions are matters which the Government should consider carefully, on a case by case approach.

10.80 The Industries Assistance Commission has already presented a report to the Government entitled *Rural Income Fluctuations, Certain Taxation Measures* which recognises the overall problems resulting from fluctuating and uncertain incomes. That Commission is currently working on a report examining other means, besides taxation, which could help alleviate this problem.

10.81 In many rural industries the primary produce is further processed before sale to the consumer. The processors may be either grower controlled through co-operatives or privately owned and in each case buy directly from the producer (grower). We see that cases can arise where there is a need for co-operation between competing processors and their supplying growers for such functions as the regulation of production and supplies onto the market in order to satisfy consumer demand. However, we see little justification for consultation and agreement between rival processors, particularly proprietary processors, regarding prices they should offer growers if the agreement does not involve the growers also. This appears to be a restriction which could very likely operate to the detriment of the grower. Sub-section 172(2) seems to be directed to exemptions to protect growers, not processors. Apart from exemption, rival processors, if authorised to do so, may continue agreements on prices to be paid to growers if growers are also a party to the agreement. An opportunity for authorisation as is presently the case is suggested to be continued for these cases.

10.82 Despite the Committee's general philosophy expressed at the start of this Chapter, we can see reasons why the unique circumstances of the primary producer (as distinct from the processor) should receive some recognition. Accordingly, we recommend no change at this time to the present law in this area.

CHAPTER 11

PROCEDURES, INCLUDING CLEARANCE AND AUTHORISATION

11.1 Although the Act is intended to be largely self-enforcing and in the Committee's view has been so operating, procedures involved in the administration of the Act are important and submissions to the Committee sought changes in procedures as well as in the substance of the Act. The Committee received many submissions seeking changes to procedural aspects, particularly those relating to clearance and authorisation.

11.2 The Committee believes that some changes might, with advantage, be made to the procedures, statutory or otherwise. The Committee has in mind that procedures should be as expeditious, economic and efficient as circumstances allow, and should not impose unnecessary burdens in terms of costs and delays upon business or upon the effective operation of the Commission, and should be consistent with the spirit of the Act.

11.3 This chapter deals with procedures arising under Part VII (clearance and authorisation), with some points about procedures in the Trade Practices Tribunal and the Courts as they affect the operation of the Act, and finally with some specific issues concerning remedies relating to Part V.

Clearances and Authorisations

11.4 At present, in respect of certain classes of conduct which may be covered by Part IV, parties have an opportunity to approach the Commission to obtain one of two forms of approval known as clearance or authorisation. The difference between the two forms of approval is often not well understood, particularly by the business community. The present *Clearance* procedures are those obtained in:

- section 92, for section 45-type conduct (here the Commission is not required to make a determination);
- section 93, for sub-section 47(2)-type conduct (here clearance is obtained on lodgment of particulars of conduct and continues unless and until the Commission otherwise determines); and
- section 94, for section 50 mergers (here the Commission is required to make a determination within 30 days; if it does not, there is a statutory clearance).

The *Authorisation* procedure involves a judgment by the Commission, subject to appeal to the Trade Practices Tribunal, whether public benefits exist to the degree and in the manner stipulated in the Act such as to justify an anti-competitive contract or practice which is otherwise unlawful.

11.5 Clearance and authorisation are not available in respect of all conduct which might be covered under the restrictive trade practices Part of the Act. Clearance and authorisation are available for the following:

- contracts etc. in restraint of trade (section 45), but not authorisation in respect of price agreements between competitors regarding supply of goods,
- exclusive dealing, but not clearance in respect of sub-sections 47(3) and 47(4) conduct,
- mergers (section 50).

Clearance and authorisation are not available in respect of:

- monopolisation (section 46),

- resale price maintenance (section 48),
- price discrimination (section 49).

11.6 The formal clearance and authorisation provisions distinguish the Australian law from most of its overseas counterparts.

11.7 When the relevant parts of the present Act came into operation early in 1975, the Commission received very many applications for clearance and authorisation in respect of existing and continuing patterns of conduct. In addition there has been a steady stream of applications to the Commission since that date for either fresh instances of similar conduct, or entirely fresh conduct. Notable in the area of fresh conduct have been merger applications. What the Commission did was to use very freely its power to grant interim authorisations in order to give it time to consider the heavy flow of applications on their own merits. (This power is not used at all in relation to merger applications where there are strict time limits requiring the Commission to give a decision within 30 days in the case of clearance and four months in the case of authorisation.) The Commission still has a backlog of applications relating to section 45 and section 47, dating back to the early 1975 period, which it has not yet made decisions upon in a final sense, although interim authorisations are running in many cases. The Committee was told that it will be at least another 12 months before this backlog of applications is cleared up, as the Commission is working through them on an industry-by-industry basis and in many cases detailed examination of industries is needed in order to take decisions. Indeed, we understand that much of the Commission's work in the last twelve months has been in public hearings relating to some of these authorisation applications—hearings designed to establish industry-type information which can be the basis of resolving applications in a given number of cases.

11.8 Applications for clearance and authorisation, and the adjudication on those applications by the Commission, is clearly an area of the law with which the business community is very concerned. This is reflected in the large number of submissions on the subject and appears to indicate that some sectors of the business community are as much concerned with procedural aspects as with substantive aspects. To some extent this concern by the business community tends to break down the self-enforcing nature of the law itself. It seems to the Committee that the attitude to the operation of the law prevalent in the business community may be categorised as follows:

(a) some businesses have, since the Act came into operation, or immediately before that date, re-ordered their affairs so as to comply with the Act and its substantive provisions;
(b) a second category has applied for either clearance or authorisation, with minimal change to its then current business practices;
(c) a third category may have decided to run risks that some conduct was in breach of the Act, at least in a marginal sense, and this decision would have been taken deliberately, thus eschewing the opportunity for clearance or authorisation.

11.9 Before turning to detailed consideration of specific submissions to amend the procedures we consider whether clearance and authorisation provisions should be continued at all. A significant number of the submissions from both business and legal groups urged that the clearance procedures should be abandoned. Some of these did however suggest that merger clearance procedures should still be available.

11.10 The Committee is of the view that the clearance provisions of the Act should be repealed, except in relation to mergers. The reasons for this conclusion include:

(a) the very existence of clearance provisions has meant that in a significant number of cases corporations previously engaging in anti-competitive conduct have sought clearance of that conduct rather than relying upon their own decision as to whether the conduct was anti-competitive, and if it were so, was of such degree of anti-competitiveness that the Act was infringed. This has encouraged the practice of submitting for clearance by the Commission, patterns of business conduct which on any view of the law are likely to be only very marginally anti-competitive. In some measure the existence of the clearance opportunity in relation to section 45 and section 47-type conduct has deprived the community of the sort of self-reliance which competition-oriented legislation might be expected to encourage in a private enterprise system,

(b) the abolition of clearance provisions will not mean that the effect that the particular conduct has on competition will not be taken into account, in any case the applicant wishes to make to justify anti-competitive conduct. It will be taken into account in the authorisation procedure. The Committee proposes that the test for authorisation be changed in such a way that the effect on competition of particular conduct for which authorisation is sought will be taken into account and balanced against public benefits that the applicant can demonstrate,

(c) the Committee proposes (see Chapter 4) a simpler and more uniform test for measuring the quantum of effect on competition, before the respective sections of the Act operate. This simpler test should make it easier for parties to determine how the law applies to their own operations, without recourse to the Commission for a clearance decision,

(d) if the parties wish to apply for approval, only one form of application need now be made,

(e) abolition of the clearance provisions will mean that the Commission can give more attention to other aspects of its operations, especially in deciding authorisation applications and acting as an enforcement agency in respect of breaches of the Act.

Authorisation—Nature of Test

11.11 Although a number of submissions to the Committee suggested the abolition of the clearance process, no submission suggested that a process of authorisation should be abandoned. It seems to the Committee that it is generally accepted in the Australian environment, and in regard to the size of the market and the size of economic units operating in that market in at least some industries, that there will be cases in which the community accepts that public benefit or public interest considerations should justify the existence of restrictions on competition. As mentioned elsewhere in this Report, there are very few circumstances in which anti-competitive conduct of the type now dealt with by Part IV should be prohibited absolutely. Most of the examples which the Committee believes should be so treated relate to price fixing in one form or another. Both the present Australian Act and its predecessor recognise that there will be occasions when public benefit or public interest considerations will warrant the continuation of some types of anti-competitive conduct.

11.12 At present the Act provides that the Commission shall not make a determination granting an authorisation unless it is satisfied that the particular conduct results, or is likely to result, in a substantial benefit to the public, being a benefit that would not otherwise be available and that in all the circumstances that

result, or that likely result, as the case may be, justifies the granting of the authorisation.

11.13 Thus, authorisation cannot be granted by the Commission unless the Commission is satisfied that each element of the authorisation provision is met, namely:

(a) the relevant conduct must result, or be likely to result, in a public benefit;
(b) the benefit must be substantial;
(c) the benefit must be to the public;
(d) it must be a benefit that would not otherwise be available; and
(e) as a catch-all type of tailpiece, all the circumstances must justify the granting of the authorisation. This presumably includes some assessment of the anti-competitive effects of the particular conduct.

11.14 We are of the view that the existing test for authorisation is too harsh upon the applicants, particularly the elements of 'substantiality' and 'not otherwise available'. We propose to change the nature of the test.

11.15 The Committee is firmly of the view that the thrust of the restrictive trade practices provisions of the Act is, and should remain, that competitive behaviour is its primary aim. The Committee accepts that it is fundamental to our present economic and political ideals and our social system of maximum freedom, including freedom of enterprise, that opportunities for competiton should remain amongst various enterprises in as wide a field as possible. This is because competitive behaviour is to be valued for the benefits that it brings to the community at large. However, if in a given case it can be shown that public benefits, i.e. not merely benefits to the parties to the restrictive conduct, are available, and that those benefits outweigh the benefits to the public foregone by the absence or restriction of competition, then that conduct should be permitted to continue. In other words we still favour the maintenance of the primary position that competitive behaviour is to be preferred, but that many who engage in restrictions of competition should be able to obtain an authorisation if they can show that on balance there are public benefits that outweigh the effects on the public of the restrictions of competition. In a few cases detailed in Chapter 4, all related to price restrictions, we agree that authorisation opportunities should not be available. We therefore recommend that the authorisation test be changed as indicated.

11.16 There is one major exception to the foregoing recommendation. As will appear from Chapter 4 it is the Committee's view that, in respect of certain types of exclusive-dealing conduct, and similar conduct where there is placed some restriction upon the supplier, no action can be taken against such types of conduct unless the Commission is affirmatively satisfied both that the particular restrictive conduct has a substantial adverse effect upon competition and that there is not demonstrated public benefits in sufficient degree as to outweigh the effect of the competitive restrictions. The structure of this approach to the prohibition itself renders unnecessary a procedure of authorisation for these matters.

11.17 The Committee considered whether it should try to enumerate as a series of gateways, or in 'shopping list' form, the various factors which might be taken into account in making an assessment of public benefit. This course was advocated in some submissions. We reached the conclusion that this is undesirable. Such lists have been used in earlier Australian legislation and in legislation overseas. We believe that the existence of such lists in a law of this type tends, in the course of the development of case law, to divert attention away from the proper assessment of the benefits claimed and towards a consideration of interpretational aspects of whether particular benefits

can be fitted into particular items in the list. Since the evaluation of public benefit must be left to the body charged with assessing it (in this case the Commission and, on appeal, the Tribunal), it is better in the Committee's view to leave that body at large on the public benefit issue, rather than have it spend a good deal of its effort on fine points of categorising particular benefits against a statutory list, which must at best be no more than indicative. The same question is dealt with in the specific context of mergers in Chapter 8 (see paragraph 8.39).

11.18 The clearance procedure is not applicable to section 46, section 48 or section 49-type conduct. We have already endorsed the strong stand of the present law against restrictions directly affecting prices. Consistent with this provision the Committee thinks that no opportunity should be provided for authorisation in relation to section 48-type conduct for the reason that the granting of such authorisation even on an interim basis will set up the sorts of rigidities of price conduct that it is the purpose of the Act to discourage. As to section 46, monopolisation, the economic and social consequences of the prohibited conduct are such that there will be very few cases where approval of clearance or authorisation could ever be contemplated. We have elsewhere recommended that section 49 be repealed—see Chapter 7.

Authorisation—Public Hearings

11.19 Under the present law the Commission is empowered to hold public hearings in respect of authorisation applications. The Commission has used this power in a number of cases.

11.20 It has been submitted to the Committee that the Commission's power to hold public hearings in respect of authorisation matters should not be continued. Some submissions draw attention to the heavy cost to the applicants of their involvement in public hearings. Public hearings are also very costly in the use of Commission resources. It was also said that those who desired the sort of detailed and costly hearing that is involved in public hearings had an opportunity of appealing to the Trade Practices Tribunal if they were disappointed with the Commission's decision on an application for authorisation. The possibility of two public hearings on the one matter (one in the Commission and the second starting afresh in the Tribunal), and the cost of two such hearings in terms of both monetary outlay and time and effort of business executives, reinforces us in the view that it would be desirable to discontinue public hearings by the Trade Practices Commission.

11.21 Nevertheless it is important that there be a continuous process of assessment of competition effects and public benefits by the Commission and the Committee believes that the Commission can best serve this role under the Act by leaving the conduct of public hearing procedures to the Trade Practices Tribunal, on appeal, and to courts when matters are brought before them. We recommend elsewhere that there be opportunities in certain circumstances, and at certain stages, for applicants to have discussions with Commission members in relation to their applications. As indicated in those paragraphs this should provide at least as good an opportunity for the Commission members to understand at first hand the aspects of the respective industries and businesses with which they have to deal. We would hope that these consultations could be conducted in a relatively informal manner, as compared to the existing public hearing procedures.

11.22 One suggestion made in submissions was that where the Commission felt there was a need for a public hearing, it should refer the matter to the Trade Practices Tribunal which would then conduct the public hearing. The Committee does not favour this suggestion. The Committee is strongly of the view that authorisation

matters should continue to be dealt with by the Commission in the first instance in each case. The Trade Practices Tribunal, as such, has no executive staff and has in practice relied, as the Act allows it to rely, upon the Commission to assist in proceedings before the Tribunal by having Commission staff make enquiries and Counsel for the Commission appear before the Tribunal to put arguments and examine witnesses. This seems to be a proper role for the Commission in Tribunal proceedings and if it is to fulfil this role it will need to have virtually all the information necessary for it to make a decision itself on the authorisation application. Consequently, the Committee is of the view that the most expeditious and least costly way of resolving issues, consistent with reasonable opportunities for applicants to press their cases, is for the Commission to take decisions on authorisation applications without the present public hearing procedure but with the advantage of consultations referred to in paragraph 11.35 and to allow those parties, who wish to do so, to appeal to the Trade Practices Tribunal where a public hearing will be available.

Information Concerning Applications

11.23 Applications are required to be in writing in the form prescribed in the regulations. Although applicants are encouraged to submit supplementary statements these are usually inadequate for the Commission to resolve the matter without further enquiry. This leads to an information-gathering process by Commission staff and requests for further information from the applicant and other persons who may be interested. The present practice is for the Commission to issue, with printed application forms, roneod sheets indicating the type of market information it will need in order to decide the application. This allows applicants to state their case in their own way and seems to be generally satisfactory. No submission suggested otherwise.

11.24 The Act provides no compulsory powers for the Commission to obtain information for the purpose of deciding applications short of public hearings and clearly takes the view that it is in the interests of applicants to provide necessary information and answer questions designed to test it. We are of the view that this approach is satisfactory to the extent that it is in the interests of applicants to provide necessary information.

11.25 We have suggested in Chapter 4 in relation to matters currently covered by sub-section 47(2) and similar restrictions accepted by suppliers, that in considering an authorisation application the Trade Practices Commission should, in these cases only, have to determine positively that there was a substantial adverse effect on competition as well as assess claims that there was a net benefit to the public. Consistent with what has been said elsewhere, powers to obtain information should be extended to cover the case of applications for proposed sub-section 47(2) conduct if the scheme proposed in Chapter 4 is adopted in this respect. These powers should extend to obtaining information from the applicant and other parties in the agreement, and in the case of conduct, for the applicant and those directly involved.

Common Form Applications

11.26 In several submissions, reference was made to the desirability of one application being sufficient to deal with multiple agreements which have a common or standard form or repetitious conduct. The Committee recognises that to require a corporation to make a separate application in respect of each agreement of this type is costly and cumbersome to the applicant, the Commission and those using the Register. We recommend that provision be made to enable an applicant to include agreements in common or standard form in the one application.

11.27 This does not mean, however, that an application may be made in relation to a hypothetical form of agreement without providing particulars of parties, which was a suggestion made in some submissions. We consider that where an applicant seeks authorisation, it is in respect of the substance of an agreement, not its form, and the identification of parties is part of the substance. Such identification is relevant not only to define the scope of the authorisation but to allow proper assessment of the relevant market and the effect of the agreement upon competition, both being necessary parts of the authorisation-determination process. Further, where an application of this type is granted, the corporation may be required to advise the Commission of any change in parties and particulars relevant to public benefit or competition issues. No amendment of the law may be necessary in this regard, since such a requirement could be made a condition of the grant of authorisation, but the conditions should be specified in positive terms and in a detailed way.

Time Limits

11.28 The Committee received a number of submissions suggesting that a time limit be imposed within which the Commission must determine applications. In principle the Committee favours the introduction of time limits. In Chapter 4, we suggest that a four-month time limit (along the same lines as now exists for mergers) be introduced for the Commission to deal with authorisation applications in relation to joint ventures (paragraph 4.81).

11.29 However, we have some reservations whether full consideration could be given to authorisation applications for other forms of conduct or agreement if a time limit were to be introduced immediately. This depends upon the extent to which our recommendations are adopted, particulary regarding exclusive dealing and its extension to cover equivalent restrictions upon a supplier. There is now a backlog of applications before the Commission; we would hope that our recommendations would reduce that burden in two ways:

(a) by eliminating clearance as a procedure for sections 45 and 47 conduct;
(b) by the adoption, in effect, of a neutral registration system for exclusive dealing, and its extension.

11.30 It may be possible to treat many of the present applications for clearance or authorisation as registrations under that system, thus reducing the cost in time and effort in both private and public sectors, of introducing the registration system.

11.31 We recommend that a general four-month time limit be legislated for in relation to authorisation applications, with a commencement date for this provision to be proclaimed. For joint venture applications, the time limit should run immediately upon the commencement of the amending Act. Other applications relating to sections 45 and 47 agreements or conduct should become subject to time limits from the earliest date when it is practicable to have applications considered promptly, in light of the volume of applications which would remain if the law were amended as we have recommended.

Withdrawal of Applications

11.32 There is no right to withdraw an application once made. When withdrawal of an application is requested, the practice of the Commission is to make a determination formally dismissing the application. The application and documents relating to the application remain in the public register, together with that determination.

11.33 The Committee recommends that provision be made to enable an applicant to

withdraw an application without the necessity for the Commission to make a determination upon it. Where time limits are provided in respect of such an application, it would be necessary to ensure that the time ceased to run once the application was withdrawn. Withdrawal of an application should not mean that the documents are withdrawn from the register.

Discussion with Commissioners

11.34 At present there is no right of discussion afforded to applicants. In practice there are opportunities for discussion with members of the Commission staff and occasionally with the Chairman. A number of submissions suggested that it was of major importance to applicants that, as a matter of right, they should be able to discuss their applications with the Commissioners deciding the issue, or at least with one of those Commissioners. The need for such a right was put mainly on the basis that the applicant was entitled to know which aspects of his application were the most important to those deciding the application, so that he might have an opportunity of reinforcing his application in that particular area. In some cases, an applicant has come to know of the Commission's concern with a particular aspect only when the application has been refused and reasons given. This has led to fresh applications and the submission of additional information with the result that, in some cases, a Commission decision has been reversed.

11.35 We recommend that the law provide for an opportunity for applicants to have discussions with one or more Commissioners, (but preferably, we think, one), before a final decision is taken by the Commission. The following sets out the pattern which the Committee has in mind:

(a) discussions should be available in relation to all applications, except merger clearance matters, where the 30-day time limit would make such discussions impracticable. It seems preferable not to extend the time limit for this purpose.
(b) the opportunity for discussions should be afforded as a matter of right to the applicant, and in the discretion of the Commission, to such others as have notified their interest and have a real interest in the matter.
(c) to provide a basis for such discussions the Commission should issue to persons set out in (b) a draft decision in all cases where either:
    (i) the decision is unfavourable to the applicant in whole or in part; or
    (ii) the decision is wholly favourable but there are objections to the application on the register.
(d) in notifying the draft decision the Commission should invite the applicant and any others decided upon to notify within 14 days whether discussions are desired. In the event of no reply within that period, or a reply indicating that no discussions are desired, the decision should take effect.
(e) discussions should be held during a period of 30 days running from the expiration of the 14-day period mentioned above. The time limits for starting and terminating a discussion should be in the discretion of the Commissioner conducting it. Prior indication in writing of the substance of the matters to be discussed will minimise the time needed.
(f) the draft decision and correspondence about discussions should be on the public register.
(g) discussions, if desired, should take place at a place to be determined by the Commission. The Commission should consider the convenience of parties. It might be expected that many discussions would be held in State capital cities rather than in Canberra.
(h) the discussions should be informal with a responsibility on the Commissioner

conducting the discussions to make a record in summary, but not in verbatim form, of what took place. This record should be placed upon the public register, subject to the rules of confidentiality.

(i) in the interest of informality and expedition, representation at the discussions should be confined to parties, or if they are companies, their officers or staff. In particular, consultants e.g. accountants, economists, barristers or solicitors practising as such, should not be representatives.

(j) if objectors wish to be heard in discussions they should be heard in the same discussions as the applicant and in the applicant's presence. The objectors should also have the right to hear what the applicant says.

11.36 The Committee's view is that there is a case for discussions along these lines. There is a need for some formality to ensure that there is a public record of the discussions in the interests of both the applicant and the Commission. However, the Committee is concerned that the discussions may be easily diverted from the real merits of the issues arising in connection with its decision upon the application to questions of procedure at the discussions or other formalities. For this reason we think that the effort will only be worthwhile if the discussions are truly directed at the merits of the issue. Consistent with our view that outside consultants should not represent companies at these discussions, the Committee proposes that the Commissioner conducting the discussions should not be assisted by a Crown Solicitor's officer. He may need to have one or more members of the Commission staff with him to assist with papers and take notes for the record of the discussions which the Commissioner will have to keep.

11.37 If these recommendations are adopted, it is considered that a review of the scheme should be made after it has been in operation for perhaps two years to see whether continuation of the discussions is worthwhile, or the procedures modified.

Confidentiality

11.38 The Committee received several submissions which expressed concern as to the issue of confidentiality of information submitted to the Commission in relation to applications. We recognise the problems which arise in this area, although we consider that information should be publicly available unless publication would be harmful to the legitimate and vital interests of the applicants or other persons providing it.

11.39 In striking a balance between confidentiality and publication, we consider that there are some categories of sensitive business information where confidentiality should be available as of right, subject to what is set out in paragraph 11.41, and we recommend that:

(a) trade secrets and 'know-how';
(b) in merger cases, details of the money price offered; and
(c) details of current costings;

should be afforded confidentiality on this basis.

11.40 In all other cases, we recommend that confidentiality should be left to the discretion of the Commission. We consider that where a claim for confidentiality is refused the person submitting the information should have the right to withdraw that information. In cases where the information has been given pursuant to the statutory information gathering power (see paragraph 11.25), we recognise that special considerations will have to apply which will strike a just balance between effective information gathering by the Trade Practices Commission in these cases and the proper protection of sensitive business information. This procedufe should apply to both applicants and other persons, e.g. objectors, submitting material. There should be

an opportunity for discussion with a member of the Commission where confidentiality is about to be refused. It has been suggested to us that a Commissioner, not associated with the determination of the merits of the substantive application, should determine the issue of confidentiality. This, it is suggested, would enable the information to be withdrawn without any fear of prejudice on the part of other Commissioners deciding the substantive application. We realise that this could give rise to practical difficulties. In the light of this we make no recommendation on the point.

11.41 Although the suggestion was put to us, we do not recommend that there be a right of appeal to the Trade Practices Tribunal in these situations. We recommend that confidentiality should not be permitted to be raised where the information in question is elsewhere publicly available, or has been obtained otherwise. Finally, confidentiality should not be expected or granted, by legislation or otherwise, to prevent disclosure of the fact of application and broad details of the application and its grounds, or of objection or support and the grounds of objection or support, as the case may be.

Interim Authorisations

11.42 There is now a power in the Commission to grant interim authorisations. The Commission used this power very freely in relation to the bulk of applications received early in 1975, and has continued to use it to some extent. It has been suggested that this power should be repealed. The Committee's view is that interim authorisations should be an option open to the Commission, unless and until time limits are set for the determination of all applications. The Commission has not sought to use its interim authorisation power in relation to merger matters, where there are time limits, and we would think it inconsistent with the existence of time limits in any other area for interim authorisations to be granted, rather than matters be decided speedily on their merits.

Privilege in Respect of Statements on Register

11.43 The Act already provides protection against liability for statements made by members of the Commission, or persons appearing on behalf of a person in public hearings before the Commission, or witnesses summoned to attend or appearing before the Commission. It is not clear that persons making statements which are placed in the public register are equally protected. Some submissions referred to this, and suggested that absolute privilege should be accorded to all statements on the register.

11.44 The Committee would be concerned if the law were amended so as to allow any member of the public to make a statement on the public register, and thus available for inspection by the public generally, without accepting some responsibility if the statement were deliberately defamatory. There is not the same public policy consideration for giving absolute protection to those making statements upon the register as there is for giving absolute protection to judges, advocates and witnesses in court proceedings, or the equivalent. Accordingly, we recommend that no specific provision be incorporated into the Trade Practices Act, leaving the issue to be decided by the general law.

Legal Professional Privilege

11.45 It was put to us in one submission that section 155, which gives the Commission power to compel the furnishing of information and documents, may abrogate any claim of common law legal professional privilege. The Committee does not believe that this is the legal position. It is a well established principle that statutes encroaching on rights of citizens are subject to strict construction, and that unless the statute restricts those rights by very clear language, the rights should not be considered to be affected. (See *Melbourne Corporation* v. *Barry*, (1922) 31 CLR 174 at 206, D.

Pearce: Statutory Interpretation in Australia (1974) Paragraphs 100-104, *Commissioner of Inland Revenue* v. *West Waller* (1953) S.A.I.T.R. 64, *O'Flaherty* v. *McBride* (1920) 28 CLR 283 at 288, *Krew* v. *Commonwealth Commissioner of Taxation* (1971) 45 A.L.J.R. 249 at 250, *Director of Investigation and Research* v. *Canada Safeway Ltd* (1972) 2 D.L.R. 3rd 745).

11.46 Nonetheless, we see no reason why any doubts remaining on this score should not be laid to rest by a specific sub-section in Section 155 that the section does not override at any time the then common law doctrine of legal professional privilege. We are firmly of the view, however, that the exemption should not extend beyond that common law doctrine.

Trade Practices Tribunal Procedures

11.47 The Committee has been informed of some essentially administrative problems concerning the Tribunal registry. Although the Act contemplates the appointment of Deputy Registrars, none has been appointed. This has caused some difficulties and costs for parties in the Tribunal. We recommend that the situation be reviewed, and some arrangement made for Deputy Registrars to be available in each capital city.

Procedures in the Courts

11.48 There are three levels of Courts in which the Act could arise for consideration—in State Courts, the Australian Industrial Court and the High Court of Australia. The Committee has received some submissions dealing with various aspects of procedure in these Courts.

11.49 The Australian Industrial Court is the primary judicial body in which the Act is enforced, both as to the restrictive trade practices of Part IV, and the consumer protection provisions of Part V, Division 1. The State Courts are already asked to consider the application of the Act in litigation between private parties, and the operation of Part V, Division 2. If our recommendations in Chapter 9, 'Consumer Protection', as to the enforcement of Part V of the Act are accepted, State Courts will have an extended role.

11.50 In Chapter 9, we also discussed a number of questions of procedure of particular relevance to the operation of the provisions of Division 1 of Part V. We now discuss questions of procedures of more general relevance.

Interim Injunctions

11.51 The Committee was referred to views expressed by the Court in *T.P.C.* v. *Vaponordic (Aust.) Pty Limited and Chamberlain Consolidated Holdings Pty Limited* (1975) (CCH) ATPR 40-009, which indicate that the Australian Industrial Court may not grant an interim injunction to the Commission under sub-section 80(2) unless the Commission gives an undertaking to pay damages to a party harmed, should the outcome not be the grant of an injunction. The submissions demonstrated a substantial degree of confusion concerning the existence of the requirement that, in *ex parte* proceedings, the usual undertaking as to damages must be given in favour of a defendant. The Attorney-General does not have to give such undertakings. It was suggested to us that the Act be amended to do away with the need for the Commission to give an undertaking for damages.

11.52 The Committee would favour this solution for proceedings commenced, not only by the Commission under Part VI, but also by the various Commonwealth and State authorities to be empowered to bring proceedings under Part V, in

Commonwealth or State Courts, and so recommends. However, for proceedings commenced by any other person, the Committee considers that an undertaking as to damages should continue to be required, but that the Minister be expressly authorised to give the undertaking on behalf of a private applicant in appropriate cases. The Committee recommends that the Minister be similarly authorised to underwrite an applicant's undertaking as to costs.

Evidence

11.53 Section 79 of the Judiciary Act (Commonwealth) provides that, unless the Parliament otherwise provides, the laws concerning evidence and procedure applicable to proceedings in a federal court are those of the State in which the court is sitting. This results in some lack of uniformity in the application of the provisions of the Trade Practices Act, due to differences between the rules of evidence of various States. The Committee recommends that special provisions be inserted in the Trade Practices Act to provide uniform rules in relation to proceedings under Part VI of the Act as to the admissibility of business records and documents originated by persons who later died. The provisions of Part 11B of the Evidence Act (N.S.W.) appear to us to be appropriate. We recommend that the Act be amended so that these rules apply in all courts in proceedings arising under the Trade Practices Act.

Disclosure—Section 157

11.54 In relation to disclosure by the Commission to a party in pending or current proceedings of matters favourable to that party, the Committee considers that the obligation imposed upon the Commission in Section 157 to disclose information is too narrow in respect of proceedings instituted under Part VI. Section 157 relates to Part VI at present only in respect of civil action under section 77 to recover a pecuniary penalty for contravention of Part IV. The Committee recommends that the obligation to disclose information in section 157 should be broadened to cover sections 76, 79, 80, 81 and 87, as well as section 77.

Admissibility of Evidence in Part V Matters—Judges' Rules

11.55 Concern has been expressed to us as to the manner in which Commission staff have conducted investigations in some instances. We do not express a view on these allegations. However, we believe that persons conducting such investigations should be aware of and apply the standards of fairness expected under codes such as the Judges' Rules. These are rules which prescribe in a general way the standards of propriety to be followed in the course of conducting investigations by officers of police. In essence, they aim at establishing guidelines for police in their questioning of suspects to secure a measure of fairness in the obtaining of admissions, upon pain that non-observance can lead to the refusal of the courts to admit admissions in evidence. The Committee notes that the whole question of conduct by Commonwealth officers conducting criminal investigations is subject to consideration following the Report of the Australian Law Reform Commission on this topic in 1975.

11.56 The Law Reform Commission noted that the Judges' Rules (at least in the version current in England prior to 1964), or rules analogous to them, apply in most Australian States. It also expressed doubts as to the efficacy of the safeguards provided by these rules. Notwithstanding this, we recommend that pending any action which may be taken by the Government on this aspect of the Commission's Report, the Minister should, at least for the intervening period, give a directive:

(a) to the Trade Practices Commission under section 29 of the Act, that officers of the Commission shall act in accordance with the Judges' Rules applicable in the jurisdiction where enquiries are being made;
(b) to officers of his own Department, to the same effect as in (a).

The Minister should also request that the Government give a similar direction to the Commonwealth Police.

11.57 To the extent that the Judges' Rules do not presently apply in any particular jurisdiction, the rules of conduct to be followed should be such other rules as the Minister directs.

11.58 Our observations are directed at Part V investigations. We make no specific recommendations on the matter in relation to Part IV of the Act, because of the possible overlap between investigations for contravention and information gathering for clearance and authorisations. We would, however, expect the Commission to apply similar standards of fairness in this area. We also draw attention to the comments of the High Court in *Total Australia Ltd.* v. *Trade Practices Commission* (1976) 8 ALR 153, in relation to the giving of particulars.

Trade Practices—Regulation 14

11.59 One submission suggested that regulation 14 of the Trade Practices Regulations is unduly limited in that it confines its effect to proceedings 'under the Act'. There does not appear to be any compelling reason why its effect should be limited in this way, and the Committee recommends that the limitation be removed.

Actions for Damages

11.60 The Committee believes that a successful plaintiff in a civil action for damages under section 82 should be entitled to compensatory (i.e. an amount equal to the loss or damage suffered by him) but not punitive damages, together with any additional amount that the court may allow, not exceeding the full cost to him of proceedings under the section, and of any investigation in connection with the matter. We recommend the Act, to the extent that it does not so provide at present, should be amended to ensure that a successful plaintiff will not be out-of-pocket. To the extent that a successful plaintiff is out-of-pocket, this is an additional burden which, the Committee believes, he should not have to bear.

Legal Aid

11.61 A number of submissions referred to the availability of legal aid in relation to proceedings under the Act, a matter which is dealt with in section 170. All of these submissions favoured the preservation of this provision, and some saw it as essential to ensuring that rights given by the Act were not illusory.

11.62 In our view, the availability of legal aid should continue. We have already recommended that State courts should be given jurisdiction on matters arising under Commonwealth consumer law (paragraph 9.35). Legal aid should, of course, be available in proceedings under the Act in those courts, and we so recommend.

APPENDIX

FINDING GUIDE TO CERTAIN RECOMMENDATIONS

(This Appendix is not intended to be a summary of recommendations. For the substance of the recommendations please refer to the Report and not to this Appendix)

Paragraph	*Chapter 4—Sections 45 and 47, Agreements in Restraint of Trade and Certain Vertical Practices*
4.8	the phrase 'restraint of trade' should be eliminated from the Act and replaced by a notion more closely related to the concept of competition;
4.12	there should be a single test of effect upon competition, namely 'a substantial adverse effect on competition';
4.14	the competitive effects of most agreements and practices should be tested by reference to a market for goods or services; but in a few cases, as set out in the Report, should be tested by reference to the parties to the agreement or their competitors;
4.22	in the determination of a 'market', regard should be had to substitute products having a reasonable inter-changeability of use and high cross-elasticity of demand;
4.36	the Act should apply to agreements by holding companies to restrict the dealings of their subsidiaries;
4.40	the Act should extent to anti-competitive covenants running with land;
4.45	the Act should apply to restrictions in commercial leases, including licences;
4.48	repeal sub-section 45(3);
4.59	all price-fixing agreements between competitors, subject to exceptions relating to joint venture and joint acquisition pricing, should be absolutely prohibited and incapable of authorisation;
4.61 and 4.70	'true' recommended price agreements, including agreements to maintain prices, should be capable of authorisation;
4.65	multi-level collective pricing agreements should be capable of authorisation;
4.81	joint venture agreements should be capable of authorisation, except some price-fixing agreements;
4.81	there should be a 4-month time limit for the Commission to decide authorisations in relation to joint ventures;
4.82	buying group agreements should be capable of authorisation;
4.97	repeal sub-section 47(3);
4.106	section 47 should apply to vertical restrictions upon suppliers as well as buyers;
4.116	collective boycotts should be capable of authorisation;
4.121	instead of a scheme of prohibition and authorisation of matters, the conduct within sub-section 47(2) as enlarged should be lawful, if registered with the Commission, until a positive adverse decision;
	Chapter 5—Termination of Franchise Agreements
5.7	a franchisee should have a right, upon termination of his franchise, to secure fair compensation for his investment, including goodwill;
5.12	the right should not apply where the termination is for default by the franchisee;
5.15	the right should not be capable of exclusion.
	Chapter 6—Section 46, Monopolisation

6.9	it should be made clear that the Act requires intent to monopolise;
6.11	it should be made clear that monopolisation does not occur by reason only of investment in new capital plant and equipment.
	Chapter 7—Section 49, Price Discrimination
7.21	repeal section 49.
	Chapter 8—Section 50, Mergers, including Assets Acquisition
8.7	a law on anti-competitive mergers is necessary;
8.18 and 8.19	merger law should take in acquisition of interests in assets and mergers of companies effected by operation of law;
8.22	a statutory defence should be provided in the case of a failing target company, defined by reference to the imminent likelihood of it going out of business, and lack of alternative buyers on similar terms;
8.25, 8.29 and 8.31	merger provisions should not apply to small acquisitions (businesses with an average annual turnover for the two previous complete financial years of $3 million);
8.34	the threshold test should not be applied where the acquiring corporation engages in a pattern of buying small businesses in the same industry;
8.35	clearance procedures should be retained for mergers;
8.52	the power of ministerial intervention in merger matters should be removed;
	Chapter 9—Consumer Protection
9.11 and 9.25	there should, as far as possible, be uniform laws in relation to prohibitions of unfair practices and the Commonwealth and State Governments should create an appropriate Standing Committee of Ministers;
9.13	the Commonwealth Government should legislate to cover the field in relation to conditions and warranties to be implied into consumer transactions (except where State law, in relation to particular goods or services, also provides appropriate rights to a consumer);
9.30 and 9.35	State consumer protection agencies and State courts should have a greater involvement in the administration of these provisions of the Act;
9.43	'consumer' transactions should be defined primarily by reference to the price paid for the goods or services ($15 000 or such higher amount as may be prescribed by regulation) but should also include transactions above $15 000 in respect of goods or services ordinarily obtained for personal, domestic or household uses;
9.47 and 9.78	separate provision should be made to prohibit in the promotion of land transactions, false or misleading representations concerning characteristics, location and future use of the land or the services associated with the land;
9.59	the Act should prohibit, as a civil matter only, unconscionable conduct or practices in trade and commerce;
9.103 and 9.105	all goods intended for export should be excluded from the operation of the standards provisions of the Act, upon condition that the goods are appropriately marked;
9.109	the Act should empower the responsible Minister to take action to prohibit the sale of hazardous products, such an order to be effective for twelve months only;
9.111	there should be a prohibition, subject to civil sanctions only, of unsolicited services;
9.127	a manufacturer should be liable to a consumer for breach of any express warranty given by him or of implied warranties of the same kind as those presently implied in consumer transactions;

9.135	the penalty of imprisonment should be eliminated;
9.138	special provisions should limit potential penal liability for essentially similar advertisements;
9.144	the defence to part V prosecutions should be restructured;
9.156	the court should be empowered to grant mandatory injunctions.
9.162	an Australian Consumer Affairs Council should be established.
	Chapter 10—The Scope of the Act and Exemptions
10.11	the Act should apply to restrictive conduct of organisations of employees, carried out in combination with another person engaged in trade or commerce;
10.19	a business directly affected by a secondary boycott by employees should have recourse through access to an independent deliberative body, under either the Trade Practices Act or the Conciliation and Arbitration Act;
10.24 and 10.25	the Commonwealth Government and its instrumentalities should be bound, in its commercial activities, to the same extent as a corporation; desirably the position with State Governments will be similar;
10.31	the Act should apply to the business activities of professional persons who practise privately for fees.
	Chapter 11—Procedures, including Clearance and Authorisation
11.10	the clearance provisions of the Act should be repealed except in relation to mergers;
11.15	the authorisation test should be changed to enable authorisation if it can be shown that, on balance, there are public benefits that outweigh the effects on the public of the restrictions of competition;
11.20	public hearings by the Trade Practices Commission should be discontinued;
11.31	a time limit should be provided for the processing of authorisation applications;
11.35	an applicant for authorisation should have a right to discussions with one or more Commissioners before a final decision by the Commission;
11.39	confidentiality of information supplied to the Commission should be available as of right in certain categories of sensitive business information;
11.56	the Minister should give a direction to the Commission and his Department that officers act in accordance with the relevant Judges Rules in investigating matters in relation to Part V of the Act.

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