Australian
Competition &
Consumer
Commission

Submission to the Productivity Commission review of Australia's anti-dumping and countervailing regime

July 2009

Summary

This submission sets out the Australian Competition and Consumer Commission's (**ACCC**) response to the Productivity Commission's (**PC**) issues paper in relation to its inquiry into Australia's anti-dumping and countervailing system.

The ACCC is of the view that in some circumstances the existing anti-dumping regime may allow outcomes that are inconsistent with the purpose of the anti-competitive conduct provisions set out in Part IV of the *Trade Practices Act 1974* (the **TPA**). The purpose of Part IV is to promote and protect the competitive process in the interests of consumers—Part IV is not designed to protect individual competitors or certain sectors of business from the rigours of competition. The inconsistency arises to the extent that the existing anti-dumping regime (i) applies to conduct that falls beyond the scope of the misuse of market power provisions of the TPA and (ii) may adversely affect the potential for imported products to form part of the collection of competitive constraints which influence the competitive environment in Australia

This submission notes that one of the questions posed in the PC's issues paper is whether dumping could be addressed under the anti-competitive conduct provisions of the TPA, focussing attention on any predatory motivation for dumping. The ACCC seeks to assist the PC's consideration of this issue by setting out the relevant contextual background with regard to the role of the ACCC and relevant provisions of the TPA, as well as practical implications that may arise in employing the TPA to address dumping issues.

In considering whether dumping issues could be addressed by the TPA, the ACCC notes the following issues and practicalities:

- There are complex economic and legal issues involved in proving allegations of predatory pricing in breach of the misuse of market power provisions under the TPA. Additionally, the provisions have been subject to recent amendment, the interpretation and application of which are largely untested in the courts.

- The time required for investigations and court processes can be lengthy in comparison to the timeframes that currently apply under the existing anti-dumping regime.

- Due to applicable legal restrictions, there are differences in approach to the level of transparency for investigations under Part IV and investigations under the existing anti-dumping regimes.

- The investigation of conduct by manufacturers based overseas gives rise to additional evidentiary and jurisdictional issues.

- There are significant differences in the remedies available under the TPA and the measures applicable under the existing anti-dumping regime.

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Introduction

1. On 23 March 2009, the former Assistant Treasurer and Minister for Competition Policy and Consumer Affairs (**the Minister**), the Hon. Chris Bowen MP, announced that the Productivity Commission (**PC**) would conduct an inquiry into Australia's anti-dumping and countervailing system (the **existing anti-dumping regime**). On 10 April 2009, the PC released an issues paper (the **issues paper**) which provided background to and sought comment on the existing anti-dumping regime, recent anti-dumping activity and the rationale for anti-dumping and countervailing legislation. The issues paper also sought input from interested parties on the costs and benefits of the existing anti-dumping regime and options for improving it. One of the options canvassed in the issues paper was the prospect of addressing dumping within Australia's competition policy framework.

2. The Australian Competition and Consumer Commission (**ACCC**) welcomes the opportunity to provide a submission in response to the issues paper. This submission seeks to assist the PC's consideration of the issues surrounding the existing anti-dumping regime and various proposals for change by providing background and context to the matters raised in the issues paper, particularly as they relate to the interaction between competition policy and the anti-dumping regime.

3. Specifically, this submission will set out:

   - relevant provisions of the *Trade Practices Act 1974 (Cth)* (the **TPA**), the legislation which establishes Australia's competition, fair trading and consumer protection framework and regulates certain national infrastructure industries

   - the avenues available to address misuse of market power and predatory conduct, and the basis for utilising the TPA to address dumping across the Tasman

   - practical considerations associated with the ACCC's enforcement of the TPA and

   - the interaction between the mergers provisions of the TPA, import competition and the existing anti-dumping regime.

Role of the ACCC

4. The ACCC is an independent statutory authority responsible for administering the TPA and other legislation.

5. The ACCC's primary function is to ensure compliance with the law by undertaking investigations and taking appropriate action (either administratively or through the courts), adjudicating on matters brought before it under the authorisation and notification provisions contained in Part VII of the TPA and providing information to businesses and consumers about the operation of the TPA. In enforcing the provisions of the TPA, the ACCC's primary aims are to:

   - stop unlawful conduct
   - deter future offending conduct
   - undo the harm caused by contravening conduct (for example, by corrective advertising or restitution for businesses and consumers who have been adversely affected)
   - encourage the development and effective use of TPA compliance systems and
   - where warranted, punish the wrongdoer through the imposition of penalties or fines.

6. The ACCC's *Compliance and enforcement policy*[1] outlines the ACCC's enforcement priorities. In particular, the ACCC gives priority to matters that demonstrate one or more of the following characteristics:

   - conduct of significant public interest or concern
   - conduct resulting in a significant consumer detriment
   - conduct demonstrating a blatant disregard for the law
   - conduct involving national or international issues

[1] ACCC (2009). Available at http://www.accc.gov.au/content/index.phtml/itemId/867964.

- conduct detrimentally affecting disadvantaged or vulnerable consumer groups
- conduct involving a significant new or emerging market issue
- conduct that is industry-wide or is likely to become widespread if the ACCC does not intervene
- ACCC action is likely to have a worthwhile educative or deterrent effect or
- the person, business or industry has a history of previous contraventions of trade practices law.

7. Where appropriate the ACCC may also pursue matters that test or clarify the law.

8. While the ACCC is a government body, its status as an independent statutory authority means that it acts independently in enforcing the law. The ACCC's independence is reflected in section 29 of the TPA which precludes the Minister from giving directions to the ACCC in connection with the performance of its functions or the exercise of its powers under the TPA in relation to, among other things, the competition provisions set out in Part IV of the TPA.

Objectives of the TPA

9. The TPA is the primary legislation for the regulation of competition and consumer protection in Australia. The object of the TPA is to enhance the welfare of Australians through the promotion of competition and fair trading, and provision for consumer protection.

10. The key parts of the TPA are set out below:

- Part IIIA which regulates third party access to nationally significant, essential facilities
- Part IV which prohibits anti-competitive practices (including parallel criminal offences and civil penalty provisions relating to cartel conduct)
- Part IVA which prohibits unconscionable conduct in commercial and consumer transactions

- Part IVB which sets out certain industry codes of conduct
- Part V which prohibits unfair practices and includes provisions relating to product safety and information requirements, country of origin representations, conditions and warranties, and misleading and deceptive conduct
- Part VA which deals with the liability of manufacturers and importers of defective goods
- Part VC which contains criminal conduct provisions relating to fair trading and consumer protection
- Part VII which establishes the framework within which the ACCC and, in certain cases, the Australian Competition Tribunal (the **Tribunal**) assess applications for exemption from the application of certain elements of Part IV of the TPA on public benefit grounds
- Part VIIA which establishes a role for the ACCC in undertaking price monitoring or surveillance in relation to certain industries or businesses declared by the Australian Government
- Part X which relates to international liner cargo shipping
- Part XIB which deals with anti-competitive conduct in the telecommunications industry and
- Part XIC which regulates access to services the in the telecommunications industry.

11. The TPA has economy-wide application, applying to all firms in all sectors of the economy.

Part IV of the TPA

12. The competition provisions of the TPA are contained in Part IV. In essence, Part IV prohibits conduct that substantially lessens competition or amounts to a misuse of market power. Some of the key prohibitions under Part IV of the TPA relate to:

- anti-competitive contracts, arrangements or understandings (including parallel criminal offences and civil penalty provisions relating to cartel conduct)
- exclusionary provisions
- price fixing
- primary or secondary boycotts
- misuse of market power
- exclusive dealing arrangements
- resale price maintenance and
- anti-competitive mergers and acquisitions.

Purpose of Part IV

13. It is important to note that the purpose of Part IV of the TPA is to promote and protect the competitive process in the interests of consumers. The competition provisions under Part IV are not designed to protect individual competitors or certain sectors of business from the rigours of competition.

14. The *Review of the Competition Provisions of the Trade Practices Act* (the **Dawson Review**) noted that:

> …[c]oncentrated markets should attract scrutiny to ensure that competition is maintained, but the purpose of the competition provisions of the [TPA] is to promote and protect the competitive process rather than to protect individual competitors. The competition provisions should not be seen as a device to achieve social outcomes unrelated to the encouragement of competition. As a matter of policy those outcomes may be regarded as desirable, but the policy will not be competition policy. Nor should the competition provisions seek the preservation of particular businesses or of a particular class of business that is unable to withstand competitive forces or may fail for other reasons. Those are matters which may legitimately be the

> subject of an industry policy, but that is not a policy which is to be found in the competition provisions in Part IV of the Act.[2]

15. Similarly, in its 2004 report, *The effectiveness of the* Trade Practices Act 1974 *in protecting small business*, the Economics Reference Committee noted that:

> …[t]o summarise the [Economic Reference Committee]'s view on this issue, the purpose of the [TPA] is to protect competition. This can best be achieved by maintaining a range of competitors, who should rise and fall in accordance with the results of competitive rather than anti-competitive conduct. This means that the [TPA] should protect businesses (large or small) against anti-competitive conduct, and it should not be amended to protect competitors against competitive conduct.[3]

Predatory pricing and the TPA

16. One of the questions posed by the issues paper is whether dumping could be addressed under the anti-competitive conduct provisions of the TPA, focussing attention on any predatory motivation for dumping.[4]

17. The avenues available to address misuse of market power and predatory pricing conduct are set out in section 46 of the TPA. Section 46(1) of the TPA prohibits a corporation that has a substantial degree of market power from taking advantage of that power in that or any other market for certain proscribed purposes summarised below:

(a) eliminating or substantially damaging a competitor

(b) preventing the entry of a person into any market or

(c) deterring or preventing a person from engaging in competitive conduct in any market.

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[2] Committee of Inquiry (2003), *Review of the Competition Provisions of the Trade Practices Act*, p 36-37.

[3] Economics Reference Committee (2004), *The effectiveness of the* Trade Practices Act 1974 *in protecting small business*, p 6.

[4] PC (2009), *Issues paper*, p 20.

18. While predatory pricing is not a statutorily defined term, it is generally understood to occur when a company sets its prices at a sufficiently low level with the purpose of damaging or forcing a competitor to withdraw from the market. This leaves the company with less competition, allowing it to disregard market forces, raise prices and exploit consumers. Sections 46(1AA) and 46(1AAA) specifically deal with predatory pricing issues.

19. Section 46(1AAA)[5] relates to predatory pricing and provides that pricing below cost can be a misuse of market power under section 46(1) even if the corporation may never be able to recoup losses. Section 46(1AAA) specifically provides that a corporation may breach section 46(1) if it supplies goods or services for a sustained period at a price that is less than the relevant cost of supplying the goods or services, even if the corporation cannot—and might not ever be able to—recoup the losses incurred by supplying the goods or services.

20. Section 46(1AA)[6] specifically prohibits a corporation that has a substantial share of the market from supplying, or offering to supply, goods or services for a sustained period at a price that is less than the relevant cost to the corporation for certain impermissible purposes which are the same as those outlined at paragraph 17 (a) to (c) above.

21. Part IV of the TPA (relevantly including section 46) applies to all corporations unless the application of the provisions are exempted under federal, state, or territory legislation as provided for in section 51 of the TPA. In addition, exemption from the application of section 46 on public benefit grounds is not available under the authorisation and notification provisions contained in Part VII of the TPA.

22. The protection of the competitive process as the purpose of the TPA has been reiterated in the context of section 46—for example, Chief Justice Gleeson, and

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[5] Section 46(1AAA) was inserted into the TPA by way of the *Trade Practices Legislation Amendment Act (No. 116) 2008*, assented to on 21 November 2008. This legislation also inserted section 46(6A) which sought to clarify the meaning of 'take advantage' by setting out a list of non-exhaustive factors to which the court may have regard. The concept of take advantage is relevant to section 46(1).

[6] Section 46(1AA) was inserted into the TPA in 2007 by the *Trade Practices Legislation Amendment Act (No. 1) 2007*, assented to on 24 September 2007.

Justices Gummow, Hayne and Callinan noted in *Melway Publishing v Robert Hicks* that section 46 aims to promote competition, not the private interests of particular persons or corporations.[7]

Enforcement and remedies

23. As outlined in the ACCC's *Compliance and enforcement policy*[8] the ACCC's approach to compliance and enforcement includes:

- education, advice, persuasion
- voluntary industry self regulation and schemes
- administrative resolution
- section 87B enforceable undertakings[9] and
- court action.

24. It is important to note that the ACCC does not have any power to impose penalties on parties it believes to be in breach of the TPA. The imposition of penalties is a role reserved for the courts. Accordingly, if the ACCC believes that the TPA has been breached, it can only seek penalties by instituting legal proceedings before the Federal Court of Australia and proving its case.

25. For corporations, the maximum penalty available for contraventions under section 46 of the TPA is the greater of:

- $10 million

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[7] (2001) 205 CLR 1 at 13.

[8] ACCC (2009). Available at http://www.accc.gov.au/content/index.phtml/itemId/867964 . See in particular page 2 setting out the compliance pyramid.

[9] Section 87B provides for the ACCC to accept a written undertaking in connection with a matter in relation to which it has a power or function under the TPA (except in relation to Part X, international liner cargo shipping). If the ACCC accepts such an undertaking and believes that a term has been breached, it can apply to the court for orders including directing compliance, payment to the Commonwealth and payment of compensation to third parties.

- where the value of the illegal benefit can be ascertained, three times the value of the illegal benefit or

- when the value of the illegal benefit cannot be ascertained, 10 per cent of the turnover (of the corporation and all its related bodies corporate) in the relevant period—being 12 months ending at the end of the month in which the conduct occurred.[10]

26. Individuals are exposed to a civil penalty of up to $500,000.[11] In addition, under section 86E of the TPA the court also has the power to make an order disqualifying a person from managing corporations for a period that the court considers appropriate.

27. The ACCC can also seek an injunction under section 80 of the TPA. It can also, through representative proceedings (under a section 87(1A)/(1B) application) seek other remedial orders on behalf of consenting persons that have suffered loss or damage arising from a contravention of Part IV of the TPA.

28. Further, a person who suffers loss or damage arising from a contravention of Part IV of the TPA may seek damages from the contravenor under section 82 of the TPA.

Dumping and trans-Tasman trade

29. In 1990, as a result of the *Australia New Zealand Closer Economic Relations Agreement* (the **CER Agreement**), the TPA was amended to reflect the close cooperation between Australia and New Zealand across the Tasman. The CER Agreement eliminated the application of the existing anti-dumping regime to trans-Tasman trade, bringing trans-Tasman dumping activity within the ambit of competition policy. Anti-dumping legislation in Australia and New Zealand now contains exemptions with respect to goods originating in the other's jurisdiction.

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[10] Section 76(1A)(b) of the TPA.

[11] Section 76(1B)(b) of the TPA.

30. A number of reciprocal amendments to relevant legislation in Australia and New Zealand were required to give effect to the CER Agreement as it related to dumping and competition policy.

31. In Australia, section 46A was inserted into the TPA prohibiting corporations with a substantial degree of market power in a trans-Tasman market from taking advantage of that power for certain proscribed anti-competitive purposes. A trans-Tasman market means a market in Australia, New Zealand or Australia and New Zealand. The conduct prohibited is of a similar nature as section 46(1) set out above. The reciprocal provision in New Zealand is section 36A of the *Commerce Act 1986 (NZ)*. In addition, sections 5(1) and (1A) of the TPA provide for extra-territorial operation of section 46A of the TPA. Section 46B of the TPA states that immunity cannot be claimed by the Australian Commonwealth, states and territories in relation to the relevant New Zealand laws.

32. To further facilitate the bilateral application of the misuse of market power provisions, amendments were made to other relevant legislation to address evidence, judicial procedure and enforcement of foreign judgments. In Australia, amendments were made to the *Federal Court of Australia Act 1976* and the *Commonwealth Evidence Act 1975*. In New Zealand, amendments were made to the *Judicature Act 1908* and *Reciprocal Enforcement of Judgments Act 1934*, and *Evidence Act 1908*.

33. Since the inception of section 46A, the ACCC is aware of only one case involving allegations under section 46A: *Berlaz Pty Ltd v Fine Leather Care Products Ltd.*[12] The case was a private action brought before the Federal Court of Australia. This case related to the termination of a distributorship agreement by Fine Leather Care Products, a New Zealand firm; Berlaz, the affected Australian firm applied for an interlocutory injunction requiring continuation of supply. Berlaz submitted that Fine Leather Care Products had misused its market power in denying it further supply of its products. The application was rejected by the Court.

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[12] (1991) ATPR ¶41-118.

34. The ACCC is of the view that the effectiveness of the CER Agreement and resulting legislative amendments to bring trans-Tasman dumping activity within the ambit of competition policy rests largely on the high degree of convergence in the legal systems, competition law and enforcement regimes, and business practices operating in Australia and New Zealand.

Proving alleged contraventions of section 46

35. Complex economic and legal issues are involved in proving allegations of predatory pricing in breach of the misuse of market power provisions. The difficulty arises because the initial signs of predatory pricing conduct are often pro-competitive. Further, there is often no written evidence of the requisite anti-competitive purpose in order for an allegation to be upheld. Not surprisingly, section 46 of the TPA has been subject to much discussion and review. Among others, the Dawson Review and the Senate Economics Reference Committee's *Inquiry into the effectiveness of the* Trade Practices Act 1974 *in protecting small business* have considered the issue of section 46.[13]

36. As previously indicated (paragraphs 19 to 20 above), section 46 of the TPA has been subject to recent amendments—specifically, those which establish that pricing below cost can be a misuse of market power, even in the absence of recoupment (section 46(1AAA)) and proscribe a corporation with a substantial share of the market from supplying products for a sustained period below cost (section 46(1AA)).

37. The recent amendments to section 46 mean that the provisions, particularly in the context of predatory pricing, remain relatively untested by the courts and do not

[13] The Dawson Review did not recommend that any amendments be made to section 46. However, the Economics Reference Committee's *Inquiry into the effectiveness of the* Trade Practices Act 1974 *in protecting small business* made a number of recommendations regarding section 46. The *Trade Practices Legislation Amendment Act (No. 116) 2008*, assented to on 21 November 2008, involved the insertion of section 46(1AAA) and section 46(6A) (see note 5 above). These amendments addressed two recommendations of the Economics Reference Committee.

have the benefit of judicial guidance on interpretation and application of the provisions.

38. Some examples of predatory pricing cases undertaken by the ACCC pursuant to section 46 are set out at Box 1 below. These cases do not involve the application of section 46 in its recently amended form.

Box 1: Recent cases involving predatory pricing

ACCC v Eurong Beach Resort[14] Litigation was commenced in September 2002 and concluded in December 2005. This matter involved misuse of market power, price fixing, market sharing, exclusive dealing and harassment and coercion through predatory pricing regarding barge operations to Fraser Island. In particular, the respondent consented to findings that it had misused its power in the relevant market by charging prices less than its cost of its fuel and wages for the purpose of eliminating or substantially damaging a competitor. Orders by consent were handed down in the Federal Court of Australia which included declarations, penalties totalling $900,000 and $100,000 towards the ACCC's costs. Among other things, this case demonstrated that conduct in contravention of section 46 is not restricted to larger markets involving large corporations.

Boral v ACCC[15] Litigation commenced in March 1998. In February 2003, the High Court of Australia found that Boral Masonry Ltd did not breach the misuse of market power provisions of the TPA as alleged by ACCC on the basis that Boral Masonry did not have substantial market power. One of the issues that arose from this case was whether recoupment is a necessary element of a predatory pricing claim under section 46. In particular, the majority judgments allowed the possibility of interpreting section 46 to require the ability to recoup losses by pricing at supra-competitive levels. Justice McHugh found that, if a firm cannot recoup its losses by supra-competitive pricing, it cannot be said to have market power and, accordingly, cannot take advantage of that market power.[16]

The ACCC subsequently outlined its view in a submission to the Senate Economics Reference Committee's *Inquiry into the effectiveness of the Trade Practices Act 1974 in protecting small business*[17] that section 46 should be amended to provide that, in cases involving allegations of

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[14] *ACCC v Eurong Beach Resort Ltd* [2005] FCA 1900.

[15] *Boral Besser Masonry Ltd v ACCC* [2003] HCA 5.

[16] *Boral Besser Masonry Ltd v ACCC* [2003] HCA 5. See paragraphs 278, 289 and 290.

[17] ACCC (2004), Submission to the Economics Reference Committee *Inquiry into the effectiveness of the Trade Practices Act 1974 in protecting small business.*

predatory pricing, a finding that a firm expected to, or had a likely ability to, recoup losses is not required to establish a contravention of section 46. As previously mentioned, the Senate Economics Reference Committee made this recommendation and the TPA was amended accordingly with the inclusion of section 46(1AAA).

Comparison of anti-dumping and predatory pricing investigations

39. As highlighted above, one of the questions posed by the issues paper is whether dumping could be addressed under the anti-competitive conduct provisions of the TPA. In considering this issue, the ACCC observes that, as outlined above, the TPA's focus is on promoting and protecting the competitive process, not individual competitors or sectors, and the ACCC acts to resolve contraventions of the TPA with this in mind.

40. Additionally, the ACCC is of the view that there are a number of ways in which the TPA's scope and application diverge from the approach established by the existing anti-dumping regime.

Timeframes

41. The ACCC notes that dumping investigations under the present system are subject to set time frames for actions such as *prima facie* screening (20 days), investigation (up to 155 days), Trade Measures Review Officer review (60 days) etc.[18] In contrast, and as can be seen by some of the case examples listed above, investigations and court processes for section 46 matters under the TPA, which are not subject to set time frames, can be time consuming. For example, the time from institution of legal proceedings to the conclusion of litigation can take a matter of years.

Transparency

42. Dumping investigations under the present system are subject to a high level of transparency with documents including interested party submissions, preliminary affirmative determinations and statements of essential facts placed on the public

[18] See process of dumping investigations set out at p 4 of the issues paper.

record maintained by the Australian Customs and Border Protection Service (**Customs**).[19]

43. In undertaking its activities, the ACCC is similarly guided by principles of transparency, confidentiality, timeliness, consistency and fairness. There are two aspects to transparency. Firstly, the ACCC's decision-making takes place within rigorous corporate governance processes and is able to be reviewed by a range of agencies, including the Commonwealth Ombudsman and the courts. Secondly, the ACCC does not do private deals and every enforcement matter that is dealt with through litigation or formal resolution is made public.[20] However, the ACCC is also guided by the principle of confidentiality, and in general, investigations are conducted confidentially and the ACCC does not comment on matters it may or may not be investigating. Indeed, subject to specified exceptions, section 155AAA of the TPA prohibits the disclosure of protected information including information provided in confidence to the ACCC in the course of such an investigation or information obtained by the ACCC in the course of an investigation using its compulsory information gathering powers under section 155.[21]

Scope of conduct

44. In terms of the substance of the section 46 prohibitions under the TPA, some of the key elements to be established include 'market power', 'take advantage of that power', 'purpose', 'relevant cost', and 'substantial market share'. These are complex concepts, the assessment of which will often require access to highly sensitive information.

45. The current anti-dumping regime would appear to apply to a wider scope of conduct than section 46 of the TPA. Under the current anti-dumping regime:

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[19] http://www.customs.gov.au/site/page.cfm?u=4227

[20] See the ACCC's *Compliance and enforcement policy* available at http://www.accc.gov.au/content/index.phtml/itemId/867964

[21] Section 155(1) of the TPA provides the ACCC with certain information gathering powers. If the Commission, Chairperson or Deputy Chairperson has reason to believe that a person is capable of furnishing information, producing documents or giving evidence relating to a matter that constitutes, or may constitute a contravention of the TPA, a member of the Commission may, by written notice, require that person to provide information, produce documents or give evidence.

> …[d]umping is said to occur when an overseas supplier exports a good to Australia at a price below its normal in the supplier's home market. If dumping causes, or threatens to cause, material injury to local producers of like goods, then remedial action—mainly the imposition of special customs duties—can be taken against the imported goods concerned. Similarly, countervailing duties can be imposed on imports which benefit from certain subsidies from an overseas government and which cause or threaten injury to a local industry producing like goods.[22]

46. In some circumstances, such conduct may fall short of what would be considered predatory pricing in breach of the TPA.

47. Additionally, there are threshold issues which must be established when seeking to apply section 46. For example, parties seeking to invoke section 46 with respect to allegations involving dumping, would need to show that the firm engaging in the conduct has a 'substantial degree of power in a market' (where the application of section 46(1) and section 46(1AAA) is sought), or that the firm has a 'substantial share of the market' (where the application of section 46(1AA) is sought). In contrast, the current anti-dumping regime does not require such characteristics relating to market power or market share to be established with respect to the relevant firm.

48. Parties alleging predatory pricing conduct under section 46(1) and 46(1AA) would also need to establish that the conduct was engaged in for a proscribed purpose (see paragraphs 17 and 20 above)—again, this is not required under the existing anti-dumping regime.

Overseas application

49. Another aspect to section 46 investigations involving dumping activity is that such investigations are likely to involve assessing the conduct of firms based outside of Australia. Factors that would need to be established include showing that the foreign firm with substantial market power or market share supplied or offered to supply, goods or services for a sustained period at a price that is less than the relevant cost to the corporation for a proscribed purpose. Apart from the practical

[22] PC (2009), *Issues paper,* p 2. See elements set out in *Customs Act 1901*.

difficulties of obtaining evidence from a firm located in a foreign jurisdiction, the issue of establishing jurisdiction under the TPA may also arise where the relevant conduct is engaged in outside of Australia.

50. Section 5(1) of the TPA extends the application of Part IV (and certain other parts of the TPA) to conduct that is engaged in outside of Australia if the party engaging in the conduct is:

    - an Australian incorporated entity
    - a body corporate carrying on business in Australia
    - an Australian citizen or
    - a person ordinarily resident within Australia.

51. Of the four conditions listed above, the test of 'carrying on business in Australia' provides the broadest jurisdictional reach. It brings within the ambit of the TPA foreign corporations engaging in conduct outside of Australia, provided they were 'carrying on business in Australia' at the time the contravention occurred.

52. Some guidance on the concept of 'carrying on business in Australia' is provided in the interlocutory judgment in *Bray v F Hoffman-La Roche Ltd.*[23] This case related to cartel conduct. The judgment indicates that a foreign corporation may be regarded as carrying on business in Australia if it is carrying on business through an Australian subsidiary, or if its Australian subsidiary is acting on behalf of, and therefore as agent of, its foreign parent. Factors relevant to such determinations may include, among other things, whether the profits are treated as profits of the parent company; the persons conducting the business are appointed by the parent company; the parent company is the 'head and brain' of the trading venture; the parent company was in effectual and constant control.[24]

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[23] [2002] FCA 243.

[24] *Bray v F Hoffman-La Roche Ltd* [2002] FCA 243. See discussion at paragraphs 59 – 81.

53. It should also be noted that private litigants are subject to additional requirements under sections 5(3) and 5(4) of the TPA. Under section 5(3), private litigants seeking damages are required to obtain the consent of the Minister before relying upon the extraterritorial application of the TPA conferred by section 5(1). Under section 5(4), private litigants are not entitled to make an application for other orders in respect of extraterritorial conduct to which the TPA applies by virtue of section 5(1), without the consent of the Minister. However, the Minister is required to give consent unless the laws of the jurisdiction in which the conduct concerned was engaged in required or specifically authorised the conduct, and the consent would not be in the national interest.

54. As can be seen, the requirements under section 5 of the TPA for establishing a jurisdictional nexus under the TPA give rise to additional evidentiary burdens.

55. The ACCC is currently involved in the Fine Paper litigation relating to cartel conduct which may provide further guidance on the jurisdictional reach of the TPA. While not a section 46 case, the Fine Paper litigation provides an example of a case being litigated against a number of respondents, including foreign corporations. In addition to section 5, the ACCC's pleaded case seeks to invoke two alternative grounds for jurisdiction under the TPA not covered or extended by section 5, that is:

- jurisdiction under State Competition Codes[25] and
- jurisdiction under section 6(2)(b) of the TPA.[26]

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[25] The state and territory Competition Codes are state/territory application laws that extend the reach of Part IV of the TPA to virtually all businesses, and under these codes the ACCC can institute proceedings for anticompetitive conduct directly against individuals. The jurisdictional reach of the Competition Code is set out in section 8 and is arguably wider than the jurisdiction conferred by section 5 of the TPA. In particular, section 8(1)(d) provides for the application of the Competition Code to persons otherwise connected with the jurisdiction.

[26] Section 6(2)(b) may operate to extend the operation of section 45 to capture contravening conduct of any person in the course of trade or commerce comprising moving goods from overseas and importing them into Australia.

56. The Fine Paper matter involves drawing a jurisdictional nexus under the TPA that is largely untested in the courts. The judgment for this case may address significant issues and may provide further guidance concerning the jurisdictional reach of Part IV of the TPA.

Remedies

57. A further matter for consideration is the appropriateness of applicable remedies for section 46 prohibitions involving dumping activities. The available penalties and remedies for section 46 conduct are set out at paragraphs 25 to 28 above. The ACCC notes that, under the present regime, remedies or measures may include the imposition of dumping duties on the importer or the acceptance of a price undertaking from the exporter, with such duties or undertakings usually applying for a 5 year period with scope for extension following further review. The nature of the remedies available under the TPA differs significantly from those available under the present anti-dumping regime. In particular, pecuniary penalties for contraventions of the TPA are set by the court with reference to a range of factors including for example the nature and extent of the contravening conduct, deterrence, and level of cooperation with relevant authorities, among others. The pecuniary penalty is also generally calculated for fixed amounts.

Merger related competition provisions

58. The ACCC recognises that mergers and acquisitions are important for the efficient functioning of the economy. They allow firms to achieve efficiencies, such as economies of scale or scope, and diversify risk across a range of activities. They also provide a mechanism to replace the managers of underperforming firms.

59. In the vast majority of mergers, sufficient competitive tension remains after the merger to ensure that consumers and suppliers are no worse off. Indeed, in many cases, consumers or suppliers benefit from mergers. In some cases, however, mergers have anti-competitive effects. Mergers which alter the structure of markets and the incentives for firms to behave in a competitive manner can result in significant consumer detriment.

Section 50 of the TPA

60. Section 50 of the TPA prohibits mergers that would have the effect, or be likely to have the effect, of substantially lessening competition in a market.

61. Generally, the ACCC takes the view that a lessening of competition is substantial if it creates or confers an increase in market power on the merged firm and/or other firms in the relevant market/s that is significant and sustainable. For example, a merger will substantially lessen competition if it results in the merged firm being able to significantly and sustainably increase prices.

62. The ACCC's assessment of the likely impact on competition is not limited to a consideration of the impact on price alone—the ACCC also considers a range of other potential manifestations of market power, including whether the acquisition would be likely to result in:

    - a reduction in the quality of products without a compensating reduction in price
    - less range or variety of products
    - lower customer service standards and/or
    - changes in any other parameter relevant to competition in the market.

The merger review process

63. Unlike many overseas jurisdictions, there is no obligation on merger parties to seek a review from the ACCC before they proceed with a transaction.

64. The ACCC encourages parties to seek a review from the ACCC prior to completing a merger or acquisition if there is a risk that the transaction may affect competition. In practice, the ACCC finds that businesses generally do seek clearance from the ACCC.

Review by the ACCC

65. Parties seeking to acquire shares or assets have two avenues available to have the acquisition reviewed by the ACCC:

    - **On an informal basis:** Parties may seek the ACCC's view on whether a merger proposal is likely to breach section 50 and hence whether the ACCC would be likely to bring proceedings in the Federal Court of Australia to restrain the parties from proceeding with a merger.[27]

    - **By application for formal clearance:**[28] If granted by the ACCC, this will provide merger parties with legal protection from court action under section 50.

66. Both of the above avenues require an assessment by the ACCC as to whether the proposed acquisition is likely to substantially lessen competition.

67. The ACCC has the power to seek an injunction to prevent an acquisition if it considers that the acquisition is likely to breach section 50 of the TPA and the parties involved do not agree to abandon (or modify) the proposed acquisition. In the event that an acquisition proceeds without ACCC clearance, there is a risk of subsequent action, including divestiture and penalties, if the ACCC determines that the acquisition is likely to contravene section 50.[29]

68. The ACCC's procedural approach to merger assessments is set out in detail in the *Merger review process guidelines*[30] and the *Formal merger review process guidelines.*[31]

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[27] An informal clearance provided by the ACCC does not confer legal protection from court action under section 50 of the TPA. However, court action under section 50 in cases where informal clearance has been granted is rare.

[28] See subsection 95AC(1) of the TPA.

[29] Third parties can also apply for declarations and/or divestiture (including setting aside the acquisition is certain cases). Any person suffering loss or damage as a result of a merger in breach of section 50 can apply for damages. Only the ACCC can apply for an injunction and/or penalties for merger matters.

[30] ACCC (2006). Available at http://www.accc.gov.au/content/index.phtml/itemId/740765.

[31] ACCC (2008). Available at http://www.accc.gov.au/content/index.phtml/itemId/776055.

Addressing competition concerns: section 87B undertakings

69. During the course of conducting a merger review, the ACCC may identify competition concerns that, if not resolved, would lead to the ACCC opposing the proposed merger on the basis that it would substantially lessen competition in contravention of section 50. As indicated above, opposition from the ACCC may include it seeking an injunction to prevent the merger from proceeding.

70. In some cases, however, the competition concerns identified by the ACCC in the course of a review may be capable of resolution via the merger parties offering the ACCC a court enforceable undertaking under section 87B of the TPA to implement structural (such as divestiture of certain assets), behavioural (such as hold separate arrangements) and/or other measures. If such an undertaking adequately addresses the ACCC's competition concerns, the ACCC may accept the undertaking and not oppose the merger. It is important to note, however, that the ACCC cannot require a party to offer an undertaking under section 87B of the TPA.

71. The ACCC considers that section 87B undertakings play a critical role in administering and enforcing section 50 of the TPA. Accordingly, the ACCC carefully monitors compliance with all undertakings it accepts and will investigate if it identifies any potential non-compliance.

72. If an undertaking is breached, the ACCC may seek orders from the court directing compliance with the undertaking, giving up any financial benefit gained from the breach, compensation for any other loss or damage as a result of the breach or any other appropriate order. The ACCC will not hesitate to take enforcement action if it considers that an undertaking has been breached, and that court action is the most appropriate response in the circumstances.

Authorisation from the Tribunal

73. A third avenue available to merger parties is an application to the Tribunal for authorisation of a merger.[32]

[32] See subsection 95AT(1) of the TPA.

74. The test applied in considering an application for authorisation is different to the test outlined above as authorisation may be granted to a merger which would otherwise be likely to contravene section 50 on public benefit grounds. In making such an assessment the Tribunal is required to weigh the potential competitive detriment resulting from the merger against the potential public benefits.

75. Since amendments to the TPA were introduced in 2006 to establish the formal clearance process and amend the process by which merger authorisation applications are made, there have been no applications made under either process. In practice, the only avenue utilised by merger parties is the informal merger review process described at paragraph 65 above.

The analytical framework

76. As outlined above, the test which the ACCC must apply in assessing a merger is whether it is likely substantially lessen competition in a market.

77. The ACCC generally conducts its assessment of the effect of a merger prior to it being completed—the ACCC is in most cases not yet in a position to directly observe the competitive effects of a merger. Accordingly, in order to make an assessment of the effect on competition of a merger, the ACCC must conduct a forward-looking analysis which considers both:

- the competitive environment within which the merged firm would operate in the future and
- the competitive environment which would prevail in the absence of the merger.

78. Doing so makes it possible to isolate the competitive effects likely to arise as a consequence of a proposed merger from other influences and enables the ACCC to make a determination as to whether those effects attributable to the merger are likely to amount to a substantial lessening of competition.

79. While the current state of competition may provide a useful starting point for assessing the likely future competitive environment both with and without the merger, it will not always provide an accurate state against which to measure the

likely effect of the merger. It is important for the ACCC to consider the effectiveness of competitive constraints in the relevant market—for example, the extent of barriers to entry, import competition and the availability of substitutes—in the *foreseeable future* and whether the target firm would continue to operate or have been acquired by a different acquirer in the absence of the merger under investigation. Likewise, it is important for the ACCC to consider, for example, anticipated regulatory changes, as well as whether the merger would be likely to adversely affect other potential sources of competitive constraint or change the incentives for remaining firms to compete.

80. Further detail regarding the ACCC's analytical approach to merger review is available in the ACCC's *Merger guidelines*.[33]

The merger factors

81. In making an assessment regarding the likely competitive effect of a proposed merger or acquisition, the ACCC has regard to subsection 50(3) of the TPA which sets out a non-exhaustive list of matters (often referred to as the 'merger factors') that must be taken into account when assessing whether a merger would be likely to substantially lessen competition in breach of section 50 of the TPA.

82. The merger factors cover a broad range of possible direct and indirect competitive constraints relating to market structure and characteristics, and the behaviour of firms. The merger factors are:

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

[33] ACCC (2008). Available at http://www.accc.gov.au/content/index.phtml/itemId/809866.

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

83. These factors provide insight as to the likely competitive pressure the merged firm will face and the possible competitive effects of the merger. It is important to note, however, that it may not be necessary for all factors to indicate that a firm will be constrained post-merger—in some cases, a single constraint will be sufficient to prevent an increase in market power; in others, a collection of constraints may need to operate together to prevent a likely substantial lessening of competition.

Import competition in merger matters

84. Of particular relevance to assessing the potential impact of dumping activity and subsequent anti-dumping applications in merger analysis is merger factor 50(3)(a), which relates to the actual and potential import competition.

85. Actual or potential independent competition from imported goods or services can provide an important competitive discipline on domestic firms. Where the ACCC is satisfied that independent import competition—or the potential for such import competition—will likely provide an effective constraint on a merged firm, it is unlikely that a merger would result in a substantial lessening of competition.

86. While current or historic levels of imports may provide an indication of the competitive role of imports in the relevant market, as indicated at paragraph 79 above, of most relevance to the ACCC is whether imports could expand *in the future* if the merged firm attempted to exercise increased market power. Whether this is likely to be the case will be influenced by, among other things:

- the extent to which imports are distributed by parties independent of the merger parties and the proportion of sales that they have represented during the past three years
- whether barriers to expansion exist that would stifle effective competition from independent imports
- how close a substitute the imported product is to the product of the merged firm and
- whether the price of actual or potential landed imports is close to the domestic price of the product.

Determining the likely effectiveness of import competition

87. In determining the effectiveness of actual or potential import competition as an ongoing competitive constraint, the ACCC will have regard to a range of factors, one of which is the impact and likelihood of future anti-dumping applications. Anti-dumping applications can hinder the effectiveness of future import competition in the following ways:
    - the threat of anti-dumping action being initiated may result in importers pricing goods less aggressively for fear of anti-dumping actions being initiated
    - anti-dumping actions may cause disruption in the supply of imported products and
    - in highly concentrated domestic markets, there may be a greater ability and incentive to lodge anti-dumping applications post-merger.

88. If imports are either unable to respond, or are only able to respond slowly or to a limited degree, to an increase in demand by Australian consumers, imports are unlikely to effectively counteract any increase in market power arising from a merger.

89. Whether this, in turn, is likely to lead to a substantial lessening of competition in breach of section 50 will depend on the significance and likely effectiveness of other potential competitive constraints—for example, the extent of ongoing constraint likely to be provided by remaining market participants, whether there

exist barriers to firms entering the relevant market and the extent of countervailing power held by customers.

90. The most significant anti-competitive consequences have the potential to arise where domestic markets are already highly concentrated, market concentration is increasing as a result of the merger, barriers to entry are significant and there are few (but significant) independent sources of import competition from a small number of regions. Together, these characteristics are likely to result in an increase in the ability and incentive to initiate dumping actions and may cause disruptions in downstream supply and/or higher prices without the ability for customers to switch to an alternative source. As a result of the highly concentrated nature of the domestic market, any benefits associated with the dumping action are likely to flow substantially to the applicant rather than dissipate across a large number of market participants.

91. In making a determination on the effectiveness of future import competition, the ACCC considers information provided by market participants including independent importers, historical information regarding dumping actions, the success rate of such actions and the impact of past actions (both during the assessment period and once a decision has been handed down). The ACCC will also consider whether there are any applications currently under consideration and whether there are measures which are being imposed or are about to expire. The ACCC contacts Customs to obtain historical information in matters where imports appear to be a significant potential constraint and, where appropriate, will liaise with Customs regarding any future applications in the relevant industry.

Previous merger matters considered by the ACCC

92. Import competition is often one of a number of constraints which together act to limit the ability of a merged firm to exercise market power. If this is the case, future anti-dumping actions may have only a limited effect on the overall level of constraint faced by the firm post-merger. Accordingly, the potential effect of anti-dumping applications is unlikely to be a significant determinant in the ACCC's assessment of whether or not a merger is likely to result in a substantial lessening of competition in breach of section 50.

93. In some cases, however, the principal constraining influence on the merged firm may be in the form of import competition—while such cases arise relatively infrequently, imports have considerable importance in these matters and the question for the ACCC becomes whether imports are likely to constrain the merged firm regardless of the ability to initiate dumping action:

    - If this *is* the case, then the ACCC will not oppose the proposed merger. The ACCC may, however, monitor the initiation and outcome of dumping actions post-merger.

    - If this *is not* the case, the ACCC has two options: first, it may oppose the merger; second, it may allow the merger to proceed with appropriate undertakings accepted under section 87B of the TPA (see discussion at paragraph 70 above).

94. The ACCC has, in a number of cases, accepted undertakings offered under section 87B in order to address competition concerns surrounding the likely future effectiveness of import competition. The most recent such case was the proposed acquisition by OneSteel Limited (**OneSteel**) of Smorgon Steel Group Limited (**Smorgon**) (2007).[34] In this matter, the ACCC accepted undertakings that OneSteel would, among other things, compensate parties adversely affected by unsuccessful anti-dumping applications made in respect of certain products.

Box 2: Case study - OneSteel's proposed acquisition of Smorgon[35]

On 7 June 2007, the ACCC announced that it would not oppose the acquisition of Smorgon by OneSteel, subject to section 87B undertakings.

When considered in light of the undertakings, the ACCC formed the view that the proposed

[34] The ACCC also considered the issue in PaperlinX Limited's proposed acquisition of Spicer Limited (2001) and in reviewing the arrangements between Nufarm Australia Limited (**Nufarm**) and Monsanto Australia Limited (**Monsanto**) for Nufarm to act as Monsanto's exclusive distributor of certain herbicides (2002). In both matters, the ACCC accepted undertakings from relevant parties not to make an anti-dumping application for three years, except in certain circumstances. In the Nufarm/Monsanto matter, the parties also agreed not to appeal a decision by the Minister for Customs not to apply dumping duties to glyphosate.

[35] Further detail can be found in the ACCC's Public Competition Assessment (22 June 2007), available at http://intranet.accc.gov.au/content/index.phtml/itemId/1030758.

acquisition would be unlikely to substantially lessen competition in contravention of section 50 of the TPA.

OneSteel and Smorgon both manufactured and distributed products commonly known as 'steel long products'. In most cases, OneSteel and Smorgon were the only domestic manufacturers of these products; however, some pipe and tube products were also manufactured by a third domestic supplier, Orrcon.

In this matter, the ACCC expressed concerns that, absent effective import competition, the proposed acquisition would remove the only source of domestic competition in the majority of steel long product markets, and would therefore be likely to result in a substantial lessening of competition. In particular, the ACCC considered that, while it appeared possible to import most types of steel products, the effectiveness of these imports as a competitive constraint may be limited by issues relating to quality, range and lead times. Responses from market participants resolved these issues, however, and the ACCC was ultimately comfortable that imports were significant and competitive with products offered by OneSteel and Smorgon.

The ACCC remained concerned that, in relation to some products, the ability of imports to constrain the merged firm going forward may be limited due to the potential impact of future anti-dumping applications. These concerns were supported by many market participants who submitted that anti-dumping applications caused significant disruptions, and created uncertainty and shortages during the assessment period. Market participants cited an inability to switch to alternative sources of imports and decreased import competitiveness for fear of being subject to anti-dumping applications.

In light of these concerns, OneSteel offered a section 87B undertaking in which it undertook to compensate importers incurring expenses or losses as a result of unsuccessful anti-dumping applications. Given that this undertaking would likely discipline OneSteel against making speculative anti-dumping applications and disrupting supply, the ACCC accepted the undertaking and did not oppose the merger.

Importantly, in respect of pipe and tube products—specifically steel hollow structural sections—the ACCC considered that imports of these products would be unlikely to be significantly hindered by anti-dumping applications. Evidence was presented to the ACCC that, despite a history of anti-dumping applications in relation to these products, imports had increased significantly. This, combined with competition from Orrcon, led the ACCC to conclude that OneSteel would not be able to raise prices in respect of these products post-merger. Accordingly, pipe and tube products were not covered by the undertaking.

Conclusions

95. The ACCC is of the view that, in Australia, an important element of the competitive environment in many markets is competition from imported products. In certain circumstances, however, the existing anti-dumping regime may give rise to outcomes which are inconsistent with the TPA's focus on promoting and protecting a competitive environment for the benefit of consumers.

96. Specifically, the ACCC considers that the existing anti-dumping regime applies to conduct beyond that which may be considered 'predatory' in breach of the misuse of market power provisions of the TPA and may adversely affect the potential for imported products to form part of the collection of competitive constraints which influence the competitive environment in Australia.

97. However, the ACCC also notes that there are some key practical implications which need to be considered when determining whether dumping could be addressed under the anti-competitive conduct provisions of the TPA. These include:

    - the time required for investigations and court processes
    - approach to transparency of investigations
    - potential jurisdictional hurdles and
    - whether applicable remedies are appropriate.

98. With the above issues in mind, and noting the importance of maintaining import competition, the ACCC would support changes to the existing anti-dumping framework. To this end, the ACCC considers that, in making anti-dumping determinations, the impact of anti-dumping applications on the competitive process (including the impact on downstream wholesale, distribution or retail markets and competition in related markets) should be taken into account together with the impact on an individual competitor or sector.