

CHECKS AND BALANCES ON THE ACCC'S POWERS

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I INTRODUCTION

Since it was created in 1995, the Australian Competition and Consumer Commission ('ACCC') has come to be perceived as the most powerful regulator in Australia, and one that is now feared by many major corporations in the country.

The ACCC's abilities to generate critical headlines, to block mergers and to demand the production of wide-ranging information and documents have led to concerns regarding the scope of the ACCC's powers and, more particularly, the lack of practical checks and balances over the exercise of those powers.

In its report released in April 2003,¹ the Dawson Committee ('the Committee') has recommended a number of measures to address such concerns.

Given that the ACCC is a regulator charged, among other things, with the responsibility to prevent corporations with market power from misusing their market power, there is some irony (or symmetry) in attempts to prevent the ACCC from misusing its regulatory power.

Some checks and balances are certainly desirable, but care will be needed in implementing the Dawson Committee's recommendations. It will be important to ensure that the measures taken do not undermine the vigour and efficiency with which the *Trade Practices Act 1974* (Cth) ('Act') is administered and enforced by an independent ACCC.

This article will look at some possible impacts of the following recommendations of the Dawson Committee:

- (a) that consideration be given to the establishment of a single Joint Parliamentary Committee to oversee the ACCC's administration of the Act;
- (b) that a Consultative Committee be established to oversee the ACCC;

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1 Committee of Inquiry for the Review of the *Trade Practices Act*, Parliament of Australia, *Review of the Competition Provisions of the Trade Practices Act* (2003).

- (c) that a person be appointed as an associate member of the ACCC to handle complaints;
- (d) that limits be placed on the ACCC's s 155 investigative powers;
- (e) that a person applying for an authorisation of a merger should apply directly to the Australian Competition Tribunal ('Tribunal');
- (f) that the ACCC give reasons for some of its informal clearance decisions; and
- (g) that a person may apply to the ACCC for a formal clearance of a merger and, if denied clearance, may apply to the Tribunal for a review on the merits of the ACCC's decision.

II A JOINT PARLIAMENTARY COMMITTEE

At present, Parliament exercises some constraints over the ACCC through the tabling in Parliament of the ACCC's annual report and the ACCC's appearances before the Senate Estimates Committee and various other parliamentary committees. The Dawson Committee has recommended that consideration be given to the establishment of a single Joint Parliamentary Committee to oversee the ACCC's administration of the Act.

Although federal parliamentary committees are not an efficient control mechanism, they can be effective. There will usually be a considerable delay between an incident occurring and the matter being considered by a parliamentary committee. Hence, a parliamentary committee will not normally provide relief to a party who considers that they have been unfairly affected by the ACCC's administration of the Act. Also, such a party cannot be assured that the committee will raise a particular matter or, if it is raised, that it will be dealt with satisfactorily.

Fortunately, parliamentary committees generally command respect and can provide an effective means of control over the medium term. They can often focus the spotlight on a particular issue in a way that can cause a governmental body such as the ACCC considerable embarrassment, and lead to changes in the way similar matters are handled in the future. A recent example of the ability of a parliamentary committee to get at the truth and to focus public attention on a matter was the children overboard inquiry.²

A few years ago, the ACCC was criticised by the Senate Estimates Committee which investigated an arrangement involving the ACCC and the Australian Government Solicitor. Two lawyers were taken from a private law firm on secondment to work on a particular piece of litigation for the ACCC.³ The principal problem with this secondment was that it jeopardised the ACCC's independence as the law firm continued to receive 'top up' fees in respect of those lawyers from a client who had an ongoing interest in the subject matter of

2 See Select Committee for an Inquiry into a Certain Maritime Incident, Parliament of Australia, *Report on a Certain Maritime Incident* (2002).

3 Commonwealth, *Parliamentary Debates*, Senate, 4 December 1997.

the ACCC's litigation. Until the parliamentary committee criticised the arrangement, the ACCC and the Australian Government Solicitor had rejected complaints about the propriety of the secondment.

Despite the limitations of the processes involved with a parliamentary committee, this recommendation will provide a valuable check on the ACCC's exercise of its powers. It will be important, however, that this new parliamentary committee does not simply add to the administrative burden faced by the ACCC. In this regard, the Dawson Committee intended that there be a 'single' committee that replaced the others in dealing with the ACCC.

III CONSULTATIVE COMMITTEE

The Dawson Committee has also recommended that a consultative committee be established to advise the ACCC on the administration of the Act. It should be convened by an independent chairperson appointed by the Treasurer and should report to Parliament by way of a dedicated section in the ACCC's annual report.

The Trade Practices Commission ('TPC'), under the chairmanship of Professor Bob Baxt, established a Consultative Committee in about 1990. This committee was made up of representatives of peak industry and professional bodies. After Professor Fels became Chairman of the Trade Practices Commission, the Committee met less frequently and became more of an ad hoc committee.

The Committee had some influence, but it was limited. It was a committee formed by invitation from the Chairman of the TPC or, subsequently, the ACCC. It operated as a sounding board and provided feedback to the TPC or the ACCC on particular issues. However, there was no sanction if the TPC or the ACCC ignored the views of the Committee.

Under the Dawson Committee's recommendation, the proposed Consultative Committee will be more independent – its chairman would be appointed by the Treasurer and its other members would be appointed by its independent chairman 'in consultation with' the ACCC. Also, the Committee would report to Parliament through the ACCC's annual report.

The proposed committee, no doubt, would meet more frequently and be able to react more promptly than the proposed Joint Parliamentary Committee, but the Consultative Committee would still be unlikely to constitute an effective avenue of appeal for a party aggrieved by an ACCC decision. In fact its role should not be to 'second guess' ACCC decisions in particular matters. Its role should be to debate and advise the ACCC on principles, rather than specific matters.

The Consultative Committee should not address policy issues arising under the Act, as such issues should instead be handled by Treasury. The reluctance of Treasury over the last decade to take a strong stance on policy issues has allowed the ACCC to assume a policy role that has contributed to questions relating to the ACCC's administration of the Act. The ACCC should worry less about policy and concentrate more on enforcing the Act as it is.

With regard to the remainder of the role of the proposed Consultative Committee, it may be asked whether there is need for both the Joint Parliamentary Committee and the formal Consultative Committee. The creation of both bodies would be a duplication which would impose an unnecessary administrative burden on the ACCC.

Industry bodies and individual corporations or consumers should be able to voice their concerns as to the administration of the Act either through the ACCC's own improved complaints handling procedures (see below) or, if they fail to obtain satisfaction through that avenue, by raising them with the Joint Parliamentary Committee.

As the Joint Parliamentary Committee would replace other parliamentary committees in this area, and as it would have greater practical power than the proposed Consultative Committee, it would seem that the Joint Parliamentary Committee is the more effective option and there is no need to also have a Consultative Committee.

IV APPOINTMENT OF AN ASSOCIATE MEMBER TO HANDLE COMPLAINTS

The Dawson Committee also recommended that an associate member of the ACCC be appointed to receive and respond to individual complaints in respect of the administration of the Act. This associate commissioner should also report each year in the ACCC's annual report.

This is an eminently sensible and unobjectionable recommendation, although it is an indictment of the ACCC that the Dawson Committee considered it necessary to make such a recommendation.

The importance of this recommendation is that, unlike the proposed Joint Parliamentary Committee or the proposed Consultative Committee, the complaints commissioner should be able to respond in a timely manner, arranging an administrative reconsideration of the ACCC's decision in the matter. This recommendation, therefore, should be a valuable practical remedy to parties who believe that the ACCC has acted inappropriately.

At present, this avenue does not exist. If the ACCC (or a member of staff) makes an administrative decision on a matter, often the only practical option is to complain to the ACCC. As most decisions are initially made with the authority of at least one commissioner, it is easy for a party to feel that their complaint has not received a fair and impartial consideration. A special associate commissioner for complaints should assist in ensuring that complaints are, and are seen to be, handled fairly and promptly, and given proper consideration.

V SECTION 155 POWERS

One of the subjects which has given rise to many complaints over the years is the ACCC's use of its powers under s 155 of the Act. That section allows the ACCC to issue notices demanding information and documents. These powers include the power to cross-examine a person under oath and the power to enter premises to inspect and copy documents.

Complaints were made over the ACCC's decision to treat s 155 as overriding legal professional privilege. This issue was resolved last year by the High Court in *Daniels Corp International Pty Ltd v Australian Competition and Consumer Commission*⁴ when it found against the ACCC's interpretation of the section and against the Full Federal Court's decision.⁵ The Dawson Committee has recommended that s 155 be amended to provide expressly for the protection of legal professional privilege.

Complaints were also made about the ACCC's so-called 'dawn raids' on oil companies in April 2002. These complaints focused on the way the ACCC conducted itself with the media, but they did lead to the Dawson Committee recommending that s 155 notices to enter premises should only be permitted with a warrant from a Federal Court judge or magistrate.

This check on the ACCC's exercise of its powers has been brought about because of the ACCC's dealings with the media, rather than through any excesses in its use of its powers under s 155(2).

Although it is reasonable to bring such a power into line with procedures for other search warrants, the recommendation deals with only a very small proportion of s 155 notices (those under s 155(2)) and does lead to an anomaly between the power to enter premises and the s 155(1) powers which can be just as intrusive, especially with respect to a corporation's records or an individual's privacy.

The Dawson Committee's recommendations, however, are not all directed at restricting the ACCC's s 155 powers. The Committee has recommended that the ACCC's powers be expanded in certain respects, allowing it to search for and seize information when it enters premises, in addition to the current power to inspect and copy documents.

The largest body of complaints to the ACCC in respect of s 155 notices, however, would be in relation to the scope of notices demanding documents and the time allowed to fulfil the demands.

While the ACCC is often prepared to narrow its demands or to extend its time limits, a complainant has no practical recourse at present if the ACCC refuses to exercise this discretion. In such circumstances, a complainant may refuse to comply with the notice and either seek a declaration from the Federal Court that the notice is invalid or wait to be prosecuted. These options are not usually practical: first, court proceedings are very expensive; second, refusing to comply risks a criminal breach of the Act if the notice is upheld by the Court; and third,

4 (2002) 192 ALR 561.

5 *ACCC v The Daniels Corporation International Pty Ltd* [2001] FCA 244.

even if the challenge is successful, the ACCC would normally be able to issue a new s 155 notice, avoiding the problem with the original notice.

Also, where a party doubts the ACCC's or Chairman's 'reason to believe' upon which a s 155 notice has been based, a court challenge cannot readily be launched unless there is evidence which casts doubt upon the veracity of the belief being held.⁶

Under the Dawson Committee's recommendations, complaints about the scope or deadline, or the 'reason to believe', of a s 155 notice, will be able to be made to the complaints commissioner with the prospect of a speedy and more impartial assessment of the grounds for the complaint.

VI MERGER AUTHORISATION APPLICATIONS TO THE TRIBUNAL

In recommending that authorisation applications for mergers be made directly to the Tribunal, the Dawson Committee aimed to fast-track authorisations of mergers because the current potential two-level process often takes too long from a commercial perspective. Of course, this recommendation does not alter the need to show a net public benefit, which is often an even more important consideration than timing.

This recommendation is likely to alter the status quo in a number of respects.

First, it would place an onus upon the Tribunal to administer first instance investigations of merger proposals. Although the ACCC would undoubtedly do this on behalf of the Tribunal, the ACCC would be doing this under the direction of the Tribunal.

Second, it would present complications where a joint venture or other arrangement involves related applications for authorisation of a merger and authorisation of another agreement. It is not clear whether both would then be handled by the ACCC, or whether the merger application would still have to be made to the Tribunal while the other application is dealt with by the ACCC.

Third, time is also important in many non-merger matters. It must therefore be asked whether the urgency of mergers justifies creating different procedures for their authorisation, compared with the authorisation of other conduct.

Fourth, the proposal would eliminate the ability to apply for review. By applying directly to the Tribunal, neither the applicant nor any other interested party will be able to have the decision reviewed on its merits. The only appeal would be to the Federal Court and only on a point of law.

Although it would improve the attractiveness of a possible authorisation of a merger by reducing the time taken to make a final determination, authorisations of mergers are still likely to be few and far between. The truncated procedure will still take some time, it will still be a public contest and it will still only be available where there is a net public benefit. Indeed, as an authorisation is likely to be sought only where a merger might substantially lessen competition, the

6 See, eg, *Melbourne Home of Ford Pty Ltd v TPC* (1979) 36 FLR 450.

public benefit normally needs to be quite substantial to outweigh the likely lessening of competition. Hence, the number of merger authorisation applications is unlikely to increase dramatically.

It may then be asked whether the potential advantage is sufficient to justify creating a different procedure for the authorisation of a merger compared with the authorisation of other conduct under the Act.

VII ACCC TO GIVE REASONS FOR SOME INFORMAL CLEARANCE DECISIONS

The Dawson Committee has sought to impose checks on the ACCC's ability to block a merger by refusing an informal clearance.

At present, an applicant has little recourse in such circumstances. It may be able to offer s 87B undertakings to overcome the ACCC's concerns. It may seek to proceed, but the ACCC can easily obtain an interlocutory injunction. Alternatively, it may itself go to court and seek a declaration that its merger would not breach the Act.

Any court proceedings, however, are likely to spell the end commercially for most mergers.⁷

The recommendation that the ACCC be obliged to give written reasons where it accepts s 87B undertakings or refuses to grant a clearance will impose a degree of discipline on the ACCC, although it will not be overly burdensome for the ACCC to meet its obligations.

The next recommendation on formal clearances is likely to introduce much more effective checks and balances on the ACCC, but with an administrative cost.

VIII APPLICATIONS FOR FORMAL CLEARANCE TO ACCC AND REVIEW OF ANY REFUSAL BY TRIBUNAL

The Dawson Committee has recommended a new procedure of formal clearances of mergers. It seeks to meet criticisms that the informal clearance process is too slow and uncertain, and provides the ACCC with too much discretion.

The formal clearance procedure is clearly intended to impose some checks and balances on the ACCC by:

- requiring the ACCC to give reasons;
- requiring the ACCC to meet a tight deadline; and
- allowing the applicant to have an ACCC refusal reviewed by the Tribunal.

⁷ For example, litigation over the following mergers was discontinued as the proposed mergers did not survive commercially for the duration of the litigation: SANTOS/SAGASCO; Watty/Taubmans; and FOXTEL/Australis.

A strict time limit of 40 days is proposed by the Dawson Committee for the ACCC to determine an application for a formal clearance. This will be very tight and if the ACCC is unable to meet the time limit, the application will be deemed to have been refused.

Only the applicant will have a right to appeal to the Tribunal for a review on the merits – hence, an appeal will only lie from a refusal by the ACCC, including a deemed refusal. In the case of a deemed refusal, it is unclear if the Tribunal will necessarily have sufficient evidence to conduct such a review (particularly, if the ACCC has not completed its evidence gathering).

As a formal clearance will bind third parties (as well as the ACCC itself), the ACCC is likely to conduct a procedure quite similar to its current assessment of an authorisation application. The ACCC will need to give any interested third parties an opportunity to make submissions as to whether the proposed merger would be likely to substantially lessen competition.

In contrast to an application for authorisation where two levels are being compressed into one, the new formal clearance procedure may involve two levels, albeit only at the instigation of the applicant itself. It may be asked whether the denial of appeal rights to third parties is reasonable, or whether it would be fairer and simpler if they were not bound by a clearance.

In terms of the administration of the Act, the formal clearance procedure will be likely to involve a great increase in the workload of the ACCC as formal procedures require much greater time and resources than informal procedures. Also, formal clearances are likely to be popular due to their advantages (binding on third parties, the time limits and the right to appeal). Many applicants, however, are likely effectively to seek an informal clearance to ‘test the water’, before applying for a formal clearance, thereby increasing the ACCC’s workload.

There is a need for some checks and balances to be applied to the ACCC’s current ability to block mergers, virtually free of the need to prove that the merger would be likely to substantially lessen competition. However, it is also important to assess whether the formal clearance procedures, as currently recommended, will impose too heavy an administrative burden on the ACCC (and possibly the Tribunal). The balance could perhaps be refined.

IX CONCLUSION

It is in the community’s interest that the ACCC be able to focus on the enforcement of the Act, and that it be able to carry out this enforcement vigorously, efficiently and without political interference.

In implementing the Dawson Committee’s recommendations, therefore, care needs to be taken to implement them in a way which will deliver reasonable checks and balances on the ACCC’s powers without shackling the ACCC with undue administrative requirements.

In particular, any new Joint Parliamentary Committee should (as recommended) replace existing parliamentary committees’ roles with respect to the ACCC, while the proposed Consultative Committee may impose an

unnecessary administrative burden on the ACCC. In addition, it must be asked whether it is appropriate to increase the workload of the Tribunal and to remove appeal rights from third parties in the proposals for the authorisation and formal clearance of mergers. Finally, the administrative burden on the ACCC in processing formal clearances of mergers will be enormous and measures may be required to keep this burden manageable.