The attached note is submitted by the Australian Delegation to the Committee on Competition Law and Policy FOR DISCUSSION at its forthcoming meeting on 24-25 October 2000.
I. Definition

Australia’s competition legislation

1. Australia’s national competition statute, the Trade Practices Act 1974 (TPA), covers joint ventures regulated by contract, and joint ventures defined by incorporation as well as effectively lifting the ‘corporate veil’ of an incorporated joint venture to encapsulate the purpose for incorporation.

2. Joint ventures are expressly defined under the TPA to provide that any reference in the TPA to a joint venture refers to … ‘an activity in trade or commerce:

   (i) carried on jointly by two or more persons, whether or not in partnership; or

   (ii) carried on by a body corporate formed by two or more persons for the purpose of enabling those persons to carry on that activity jointly by means of their joint control, or by means of their ownership of shares in the capital, of that body corporate’.

3. The definition also provides that the memorandum and articles of association or other constituting documents of the body corporate formed for the purpose of joint venture activities will be regarded as a contract, arrangement or understanding made for the purposes of the joint venture.

4. Reflecting the quite limited ‘special treatment’ of joint ventures under the TPA, there is no case law under the TPA relating to the definition of joint ventures.

Comparing mergers and joint ventures

5. The literature indicates that joint ventures should be distinguished from mergers because they generally involve less commitment than a merger. ‘In a merger, two or more companies combine all of their assets to create a new entity. In a joint venture, two or more companies combine less than all of their assets to create a new entity’. Kitch considers that a joint venture lies on a continuum between a cartel or ‘naked price fix’ and a single firm, so it involves less restraint than a merger and more benefits than a naked price fix. Since joint ventures involve less restraint than a merger, there is a consensus of opinion that they should be treated more leniently than a merger by antitrust authorities. Shapiro and Willig argue that ‘[t]o the extent that the production joint venture preserves the assets, the ability and the incentives of the parents to compete independently of one another and of the production joint venture, the venture will be recognised to pose less of a threat to competition than would a full merger of the parents’.

6. Joint ventures have therefore been viewed more favourably by legislators and antitrust authorities because they allow for the continued existence of the parents and potentially continued competition between the parents; and in comparison with a merger, joint venture agreements are more easily modified or dismantled at a later date.

7. A reasonable rule of thumb is that if the joint venture parents would be allowed to merge, then there should be little concern about the parents forming a joint venture. However there are two minor caveats to this rule. Kitch notes that there may be overlapping joint ventures within an industry and that these would need to be considered when analysing either the effect of a merger or of a new joint venture. Nye points out that if a joint venture leads to less cost reduction than a merger then a merger may actually lead to less of an increase in price than a joint venture. In this second case, if a merger was more efficient from the parents’ perspective and a proposed merger would pass the scrutiny of Australia’s competition
regulator, the Australian Competition & Consumer Commission (ACCC) then, all other things being equal, it would be rational for the firms to merge rather than form a joint venture.

**Incidence of joint ventures**

8. Anecdotally it is perceived that the incidence of joint ventures in Australia has increased over recent years.

9. Joint ventures are said to be particularly attractive to firms in highly dynamic industries, such as energy, health, information technology and financial services. Australian experience also points to a wide use of collaborative arrangements, such as tolling and co-production agreements in many traditional, so called “old economy” sectors. Food processing, cement, quarrying and building materials sectors provide examples of these types of ventures.

10. There is growing usage in the e-commerce environment. It is expected that alliances and collaborations in the e-commerce “new economy” will become increasingly widespread. Many of the alliances being contemplated and established are at the instigation of traditional companies facing increased competitive pressure and seeing alliances based on Internet platforms as a major cost saving opportunity.

**II. Treatment of joint ventures**

**Competitive restraints on joint venture activity**

11. Joint ventures are treated differently under the TPA to other potentially anticompetitive arrangements between firms. While price fixing is generally *per se* illegal under the TPA, some joint venture price fixing is not *per se* illegal.

12. This arises because subsection 45A(2) excepts some pricing activities of joint ventures from *per se* illegality. These activities are contracts, arrangements or understandings for the purposes of a joint venture to the extent that they relate to:

   a) the joint supply by 2 or more parties to the joint venture, or the supply by all the parties to the joint venture in proportion to their interests in the joint venture, of goods jointly produced by all the parties in pursuance of the joint venture;

   b) the joint supply by 2 or more of the parties to the joint venture of services in pursuance of the joint venture, or the supply by all the parties to the joint venture in proportion to their interests in the joint venture of services in pursuance of, and made available as a result of, the joint venture; or

   c) in the case of a joint venture carried on by a body corporate:

      (i) the supply by that body corporate of goods produced by it in pursuance of the joint venture; or

      (ii) the supply by that body corporate of services in pursuance of the joint venture, not being services supplied on behalf of the body corporate by a shareholder or a related body corporate.
13. The overall effect of s 45A(2) is that where joint venture parties enter contracts, arrangements or understandings which fix the price for supply of goods or services from the joint venture, they are not deemed illegal *per se* under section 45A(1). However the effect of such joint venture activities continues to be regulated by section 45 which prohibits contracts, arrangements or understandings which have the effect of substantially lessening competition.

14. Parties to an incorporated joint venture are not treated as favourably under s 45A(2)(c) as are parties to a contractual joint production agreement under s 45A(2)(a) and (b). This is by virtue of the fact that shareholders in a joint venture company receive no immunity from section 45A(1) where they acquire goods from the joint venture company and seek to fix the price of re-supply between themselves. In contrast, joint venture parties who have jointly agreed to produce goods may also agree to set the price at which they will individually re-supply those goods.

15. However, section 4J completely lifts the ‘corporate veil’ to examine the motivation of the shareholders for incorporation, and thus allow some scope for examining the competition effects of establishing such an enterprise. Section 45A(2)(c) reduces this intrusion somewhat by allowing that the price set by the joint venture company for goods and services it supplies will not be regarded as *per se* price fixing (although these activities can be outlawed if they are found to substantially lessen competition). As far as the resupplying activities of the shareholders are concerned, this is a completely separate business activity from the production and supply arrangements engaged in by the joint venture company, and must therefore come under separate scrutiny. The way around this application of section 45(2) is for the shareholders in the joint venture company to form a separate joint venture partnership for re-supply of goods and services produced by the company.

**Evaluation of joint venture arrangements**

16. Joint ventures are otherwise subject to the normal operation of the TPA and if they are likely to contravene the TPA, they may be authorised by the ACCC where it can be established that they result in a net public benefit. Both of the issues described in the paper are factors that the ACCC would take into consideration during its consideration of any application for an authorisation. Moreover, if the same benefits from the joint venture could be achieved through less anti-competitive means, the ACCC has the power to impose conditions when granting authorisation. The benefits from the arrangement must also be ‘public’ benefits that directly accrue from the activity or arrangement in question. Other factors that the ACCC may consider in deciding whether to grant authorisation include:

- fostering business efficiency, especially when this results in improved international competitiveness;
- industry rationalisation resulting in more efficient allocation of resources and in lower or contained unit production costs;
- expansion of employment or prevention of unemployment in efficient industries or employment growth in particular regions;
- promotion of industry cost savings resulting in contained or lower prices at all levels in the supply chain;
- promotion of competition in industry;
- promotion of equitable dealings in the market;
• growth in export markets;
• development of import replacements;
• economic development, for example of natural resources through encouraging exploration, research and capital investment;
• assistance to efficient small business, for example guidance on costing and pricing or marketing initiatives which promote competitiveness;
• industrial harmony;
• improvement in the quality and safety of goods and services and expansion of consumer choice; and
• supply of better information to consumers and business to permit informed choices in their dealings.

17. The competition issues that would be considered include:

• Concentration, import competition, barriers to entry, countervailing power, supply elasticities of parties, market demand elasticity etc.
• Both unilateral and the co-ordinated effects of the joint venture.
• Need to consider the counter factual: would the joint venture partner(s) have entered/left the market in the absence of the joint venture? This will alter the effect on output and competition. The answer seems likely to differ in markets which are static, declining or growing and according to whether technology and minimum efficient scale requirements are changing.

Conditions placed on joint ventures

18. The ACCC has the power to accept court enforceable undertakings in relation to conduct or activity that might otherwise be anti-competitive. Such undertakings may be given by the parties involved to remove the ACCC’s concerns about the behaviour such that it is no longer considered to be in breach of the TPA. In accepting s 87B undertakings, the ACCC strongly favours the acceptance of structural, as opposed to behavioural, undertakings. Structural undertakings are easier to establish at the outset, are easier to monitor and in any event may often require less or no monitoring after the fact.

Empirical research

19. No empirical research is known to have been conducted in Australia to determine or discuss whether Australia’s joint venture laws and policies are too liberal or not liberal enough.
**Measuring the benefits of joint ventures versus mergers**

20. In the authorisation procedure under the TPA – where public benefits are weighed against anti-competitive detriments – the ACCC uses the same ‘surplus’ test for both mergers and joint ventures. In order for either type of conduct to be authorised, and therefore exempt from the trade practices legislation, a net consumer surplus must be demonstrated.

**The future of joint venture regulation in Australia**

21. There are no plans in Australia to change the laws or policies relating to joint ventures.

**III. Case Study examples**

**Mobil / Caltex**

22. In August 1998 the ACCC considered a joint venture between Mobil Oil Australia Limited and Shell Australia Limited which proposed a joint venture of the refining assets of Mobil and Shell and a new company to be jointly owned by the two petroleum manufacturers.

23. In October 1998 the ACCC advised the parties that its preliminary view was that the proposed joint venture was likely to result in a substantial lessening of competition. Four key areas of concern were identified by the ACCC.

- **Efficiencies** – the joint venture parties claimed that the arrangement was motivated solely by anticipated efficiencies. The ACCC was cautious to ensure that the extent of these efficiencies were not overstated by the parties.

- **Concentration** – the market for the supply of refined petroleum products in Australia is limited to four manufacturers in competition with imports. This competition is further reduced if markets are identified according to States or regions. Accordingly, any joint venture between two of the manufacturers is likely to have an effect on competition at the refinery level and downstream in wholesale and retail markets. In particular, the ACCC was concerned that the joint venture would have foreclosed existing competition at the refinery level and would have significantly enhanced the scope for the refinery partners to engage in conscious parallelism and co-ordinated behaviour in downstream markets.

- **Import competition** – while petroleum imports to Australia have increased over recent years, the ACCC questioned whether imports were likely to remain a threat in the future. At the time of the proposal imports only represented 3 per cent of the market.

- **Market dynamics** – if the joint venture were to proceed it was expected that the two remaining refiners, BP and Ampol/Caltex, would have entered into a similar joint refining venture, taking the number of refining operators in Australia from four to two.

24. In January 1999 the parties announced that the joint venture would not proceed. In addition to the problems (and therefore delays) raised by the ACCC, Mobil further indicated that its world-wide merger with Exxon would have overlapped with the proposed Australian joint venture and created too many regulatory problems.
CSR / Mackay Refined Sugars

25. The ACCC considered a joint venture by CSR and Mackay Refined Sugars (MRS) in 1997. The two companies proposed to enter into a joint venture, encompassing their combined sugar refining, distribution and marketing assets, which would effectively reduce the number of refiners from four to three. The ACCC had refused to grant authorisation to an earlier proposed joint venture in 1993 at a time when imports were not considered to be an effective competitive constraint due to the existence of a $A 55 per tonne tariff on raw and refined sugar imports.

26. In 1997, the ACCC identified a number of significant changes which had occurred in the sugar refining industry since 1993. In particular, the tariff was to be eliminated from 1 July 1997 and there had also been a significant increase in world and regional refining capacity. This was considered likely to result in an increased threat of imports into Australia. The ACCC concluded that the proposed joint venture was unlikely to substantially lessen competition in the relevant market for the supply of refined sugar and thus granted the authorisation.

Elders / Wesfarmers Dalgety

27. In 1997 the ACCC also considered a proposal to establish a joint venture in the wool industry. The proposal involved the two largest wool broking firms in Australia, Elders and Wesfarmers Dalgety, setting up an entity called Global Wool designed to operate as a full range provider of merchanting and marketing services to the wool industry. The ACCC notified the parties that it was concerned that the venture may lead to a substantial lessening of competition due to a lack of potential or actual competition capable of constraining the exercise of market power by Global Wool through its substantial share of the Australian wool clip. The parties to the venture later announced that the proposal would not proceed due to commercial considerations.

Electric Lamp Manufacturers (Australia) Pty Ltd

28. Electric Lamp Manufacturers (Australia) Pty Ltd (ELMA) applied for authorisation of agreements for the joint manufacture of lamps in Australia, and notification of associated exclusive dealing arrangements.

29. The co-production agreement for which ELMA sought authorisation involved: agreement on the types of lamps to be produced; purchasing and selling arrangements; and setting the prices for the sale of lamps by ELMA.

30. The exclusive dealing arrangement which ELMA had notified the ACCC, provided that the joint venture parties would form a partnership for the sale of ELMA’s surplus manufacturing capacity to third party domestic customers.

31. The ACCC accepted that the joint venture delivered significant cost savings and production efficiency by allowing the exploitation of economies of scale not achievable by the parties independently in smaller manufacturing plants. The ACCC considered that the effect of the joint venture manufacture of lamps was not substantial, due to effective competition between the joint venture parties at distribution level, and competition from independent imports in Australia.

32. One element of the joint manufacturing agreement required that ELMA obtain all its production inputs from Phillips and GEC (two of the joint venture parties). The ACCC did not authorise this provision of the agreement as there as there was no definable public benefit and had a substantial anti-
competitive effect by restricting the opportunity for competitors to supply ELMA wish machinery, equipment and materials.

33. The ACCC considered that overall, given the existence of import competition, forcing the joint venture parties to independently distribute lamps to third parties may deny them capacity to meet import competition. It also determined that import competition was effective.

**Pasminco Ltd, Australian Mining and Smelting Ltd**

34. In the Pasminco authorisation decision the ACCC was asked to approve the establishment of a jointly owned zinc and lead production entity to be owned initially 50-50 by CRA and North. The applicants proposed, however, that the companies would maintain independent marketing arms. The ACCC approved the acquisition, but at the same time recognised that a monopoly at the production level could lead to a monopoly at the marketing level, despite the independence proposed by the applicants, but was not prepared to make its determination conditional on maintenance of specific marketing arrangements.

35. The ACCC recognised several public benefits arising from the joint venture, including enhanced international competitiveness, rationalisation efficiencies, reduction of operating costs in a mature market through increased concentration and more integrated production.

36. The ACCC however considered that the joint venture would substantially lessen competition in the market for the supply of zinc, and that some users may suffer detriment notwithstanding the commitment to separate marketing by the two joint venturers. It noted that the arrangement would lead to a monopoly at production level, and hence may do so at the marketing level. Imports of zinc may influence the maximum price which the parties may set, but generally small users are unable to access imports, their availability fluctuates, and the availability of imports is unlikely to pose a serious check on the joint venture in individual circumstances.

37. The ACCC recognised that the situation raised the desirability for some form of price control to be imposed on the joint venture. However it did not consider that there was any remedy available which could effectively constrain the joint venture, and thus would be a token gesture. However the joint venture’s supply terms provided some incentive to the parent companies marketing arms to compete. Each parent was not to supply zinc direct to consumers. The ACCC considered that these arms length dealings may operate to benefit the domestic market, and that any collusion between the joint venturers in this regard could be examined for breach of the TPA.

**Gas**

38. Co-ordinated marketing of gas by joint venture partners is presently common practice in the Australian gas industry. This may be attributed to the fact that gas markets in Australia operate as ‘contract’ or ‘project’ markets, where gas is only produced to meet specific and often long-term contractual obligations. Such a market structure may create practical problems which currently make separate marketing not feasible.

39. On 29 July 1998, the ACCC approved an application for authorisation submitted by the North West Shelf Project in Western Australia. The applicants had sought an authorisation to enable parties involved to discuss and agree together the common terms and conditions, including price and methods for marketing and selling the gas produced by the project (co-ordinated marketing). While recognising that co-ordinated marketing may act as a barrier to entry to the gas market, the ACCC found that separate
marketing was not currently viable in an environment of few producers and buyers; a predominance of long term contracts; and the absence of spot and secondary markets.

40. Notwithstanding the decision to authorise the North West Shelf project, the ACCC is aware of the ongoing evolution of gas markets in Australia and has identified a list of market features which are present in other gas markets where separate marketing is the norm. These include:

- a large number of customers creating a diverse gas demand profile;
- a number of competitive suppliers;
- a range of transportation options creating a pipeline grid;
- storage close to demand centres;
- brokers/aggregators providing supply and/or demand aggregation services as well as bundled supply packages;
- gas-related financial markets; and
- significant short term and spot markets.

41. Clearly, where possible, separate marketing is more competitive than joint marketing and is to be preferred. By creating price competition between as many suppliers of gas as possible, separate marketing should result in lower prices and more choices for consumers and users of gas.

42. The ACCC is also currently considering an application for authorisation for a joint marketing arrangement by Papua New Guinea gas producers to market gas in Queensland, Australia.
NOTES

1. Section 4J


8. As well as third line forcing (s 47(6)) and resale price maintenance (s 48)


10. 1988 ATPR (Com.) 50-082.