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Secretary
Trade Practices Review Committee
C/- Department of The Treasury
Langton Crescent
PARKES ACT 2600

BRIEF SUBMISSIONS OF GEORGE MASTERMAN

1. Terms of Reference 1(a)

The argument that Australian companies in order to compete internationally need increases in size through mergers having the effect of substantially lessening competition in their domestic market is fallacious. Strong competition in the domestic market primes a company for entry into foreign markets. Many examples could be given, including Westfield. The merger provisions of the Act should remain in their present form.

2. Terms of Reference 1(b)

The existing provisions do not provide an appropriate balance of power. One notable instance is the airline industry starting from Compass One and continuing. The Act should be strengthened by giving the Commission less restricted powers to search for and seize documents from businesses reasonably believed to be engaging in monopolisation or collusive price fixing. The success of the European Commission in Europe in utilising concerted unscheduled raids should be followed. In one such raid there was discovered in the drinks cabinet of the Board of one of the so called competing companies an agenda for a joint secret meeting in Switzerland setting out a series of agreed staggered individual price rises to the same ultimate level – headed “destroy on reading”).

Further, section 46 should be amended to enable courts to more readily draw inferences and make positive findings as to the existence of the necessary intent. A reversal of the onus of proof on this issue may be necessary.

3. Terms of Reference 1(c)

Collusive price fixing between competitors is more widespread, difficult to prove and damaging than generally believed (a recent example is the case of Sothebys and Christies which was revealed in Australia only by the results of investigations by overseas anti-trust authorities).

In addition to facilitating surprise searches by the Commission, the Act should introduce a new separate criminal section providing prison sentences for company directors and employees found guilty of participating in collective collusive price fixing.

Consideration should also be given to enabling consumers injured by breaches of Part IV of the Act to sue for exemplary damages or, alternatively, treble damages as in the United States.

Companies and their executives who engage in secret collective price fixing commonly lie about their involvement. The records of the European Commission provide examples of situations where one company unknown to the others in order to seek mitigation of penalty makes admissions and provides detailed evidence of secret meetings. The continuing denials in extensive correspondence from some of the world's leading law firms on behalf of the other conspirators make piquant reading. So much for their arguments of "price leadership", "oligopoly" or even "duopoly" pricing.

4. Terms of Reference 1(d)

Over time the successive Commissioners of the T.P.C. and A.C.C.C. have made industry and, importantly, members of the public as consumers more aware of the provisions of the Trade Practices Act and the situations to which it applies. This has occurred through speeches, court proceedings, and comments to the press on matters such as the reasons for allowing mergers to proceed or their refusals (subject to rights of the parties to institute formal authorisation proceedings or appeal). As an admirable result the Commission has become one of the best known and transparent public authorities in the country.

Particularly recently, industry leaders have complained at length about the extent of the publicity generated. The context has to be examined in each case. Take the seizure of documents. The A.C.C.C. has power by notice to demand documents from businesses relating to reasonably suspected breaches of the Act. It is well known that it is the general practice of lawyers for such companies concerned to scrutinise these notices minutely and seek to put constructions upon the words used which will yield the least numbers of documents and particularly if possible to exclude those which may provide evidence of a contravention.

It is, of course, impermissible for a company on receipt of such a notice to destroy or "mislay" documents within such a notice. However, more is now known about the so-called "Document Retention Policies" of some of our leading companies.

In cases of collusive price fixing, the advantages of the European “dawn raids” are obvious. The existence of this investigative tool and its use in any particular case is properly a matter of public knowledge and press comment.

5. Terms of Reference 2

Various suggested changes to the Act have been set out above and are not repeated here.

Additionally, it is submitted that there should be a special provision in relation to media mergers. In such cases there should be a provision requiring the Commission in its public interest consideration to pay particular attention to the effect of the merger on diversity and range of opinions.

6. Generally

The matters before the Committee are difficult and involve different types of expertise and knowledge. It is respectfully submitted the Committee should not unduly strive for unanimity nor give undue deference to the views of its chairman. Long experience as a distinguished High Court judge or even as a fact finding Royal Commissioner is not particularly relevant here. Further, a well reasoned minority report can be more persuasive than a majority report.

In view of the brevity of these submissions no executive summary is provided. There is no objection to this submission being made public or placed on the Committee’s web site.

Dated 18 June 2002

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