

7 June 2002

The Secretary
Trade Practices Act Review
C/- Department of the Treasury
LANGTON CRESCENT PARKES ACT 2600

Dear Sir/Madam

REVIEW OF THE COMPETITION PROVISIONS OF THE TRADE PRACTICES ACT 1974

Thank you for the opportunity to provide comments in regard to the review of the competition provisions of the Trade Practices Act 1974 (“the Act”).

Summary

Amoco Chemicals Pty Limited is cognisant of both the objects of the Trade Practices Act as well as its obligations under it and the need to avoid anti-competitive behaviour. This submission is in response to any proposed change to Section 46 of the Act. In particular, it is aimed to address the foreshadowed submission of the ACCC that Section 46 should be amended to include an “effects” test.¹ Amoco is of the view that it is not in the interests of competition or business in Australia for Section 46 to be so amended.

Background – purpose and effects tests

As the law stands, to establish a breach of Section 46 of the Act it is necessary, amongst other things, to show that a corporation has taken advantage of its market power for one of the purposes proscribed by Section 46 (“the purpose test”).

Amoco understands that under the proposed effects test, rather than requiring that the purpose of the corporation be identified as anti-competitive, all that would be required would be an inquiry as to whether the impugned conduct had the required substantial negative effect on competition.

Effects test – the negatives

The fundamental argument against the adoption of an effects test is that it broadens Section 46 unnecessarily, to the extent where legitimate competitive behaviour may be stifled.

Having regard to the Committee’s terms of reference, Amoco is of the view that to change to an effects test would inappropriately impede the ability of Australian industry to compete locally and internationally. Further, it would not necessarily promote competitive trading to the benefit of consumers in terms of service or price. This is because it has the potential to group what is anti-competitive conduct with normal aggressive competitive conduct (the encouragement of which is one of the goals of the Act). By relieving the ACCC of the burden of having to prove an anti-

¹ ACCC media release 114/02 - Trade Practices Act Review “major opportunity”: ACCC.

competitive purpose, such an amendment would potentially catch behaviour which was strongly competitive, conducted with the purpose of being competitive, but which unintentionally had an anti-competitive effect.

It is an essential feature of a competitive economy that successful competitors will succeed at the expense of unsuccessful competitors. This does not necessarily mean that the successful competitor was engaging in anti-competitive conduct. Rather, it could be the result of the successful competitor being more efficient in its production or distribution. Under the ACCC's proposal, a highly efficient competitor who is able to drop its price, by virtue of its inherent efficiencies, to a level where an inefficient competitor can no longer compete in that market, would be found guilty of breaching Section 46 of the Act. Amoco submits that it is not in the interest of Australian businesses or consumers for the law to be changed in such a way that would result in an efficient competitor being penalised for its own efficiency, and an inefficient competitor being protected by legislation which was never designed to protect it. Such an outcome would not be of any benefit to the Australian consumer.

Amoco's position

An "effects" test has the potential to be particularly damaging for Amoco (and for other companies in a similar position). This is not because Amoco is engaging in any anti-competitive conduct rather, it is because of the size of Amoco's share of the market.

Amongst other things, Amoco is a producer of carpet backing to carpet manufacturers in Australia. Amoco has a substantial share of that market, in fact it is the only manufacturer of carpet backing in Australia (the rest of the market is supplied by imports)². Australian Customs has identified the market as having two distinct sectors of prominence. The first sector or tier of the Australian market, comprising over 70% thereof, has been found to be under the control of the two largest carpet manufacturers, or so-called first tier producers in Australia, namely Godfrey Hirst Australia Pty Limited ("Hirst") and Shaw Industries Australia Pty Limited ("Shaw"), both being subsidiaries of multinational companies. The second sector or tier producers operating in the Australian market comprise nine carpet manufacturers, each of whom are individually much smaller than Hirst and Shaw, but who make up collectively about 25% of the carpet supply market in Australia³. There is also a third tier of manufacturers that is irrelevant for present purposes. For the financial year ended 30 June 1998, the Australian industry (ie Amoco) supplied approximately 72% of the market for carpet backing in Australia⁴.

It would be easy to assume that this large market share translates to a substantial degree of market power. Any such assumption would however ignore the substantial countervailing power exercised by the purchasers of carpet backing in Australia (ie Shaw and Hirst)⁵.

By way of example, it is easy to contemplate a hypothetical scenario where Amoco may be forced to cut its price to make sales to Shaw and Hirst. This move would not be as the result of an anti-competitive purpose on Amoco's part, rather, it would be a reflection of the power of Shaw and

² For a detailed summary of the market for carpet backing in Australia, see the decision of his Honour Conti J, in *NV Beaulieu Real v The Minister for Justice & Customs*, unreported, Federal Court of Australia, 22 April 2002.

³ *Ibid* paragraph 4.

⁴ *Ibid* paragraph 7.

⁵ *Ibid* paragraph 17.

Hirst in the market (which in turn arises partly due to the competitive restraints of imported product). However, an effect of that cutting of price could be to harm an existing competitor in the market or unduly affect a new or potential new entrant into the market. If the effects test were applied to that scenario, Amoco could find itself defending an allegation that it had breached Section 46, the penalties for which include fines of up to \$10 million for Amoco and up to \$500,000 for the officers found to be involved in contravention. While Amoco is confident that it would be able to convince the ACCC that it was not engaging in anti-competitive conduct at an early stage should that scenario arise, Amoco's management would still have had to divert its attention from its core function in order to deal with the allegation. Another concern for Amoco would be the relative ease with which one of its competitors could make a complaint to the ACCC that Amoco has engaged in anti-competitive conduct. This again would distract Amoco's management from its core function.

Given its market share Amoco is also concerned that should an effects test be implemented, every move it makes in the market would need to be first scrutinized by lawyers and, perhaps, economists, to determine whether it breaches the section. This would stifle Amoco's ability to conduct its business and again, divert management time and resources from the main issue, which is supplying product to Australian business.

Conclusion

It is Amoco's contention that the introduction of an effects test would have the two following potential effects:

- 1 Enlarge the scope of activities that are caught by Section 46 to include activities that are not anti-competitive; and
- 2 Result in management being hampered in the running of their business by requiring it to:
 - (a) second guess whether an action taken in the ordinary course of business will have an anti-competitive effect on the market (whatever the relevant market is, the determination of which would further distract management); and
 - (b) respond to allegations of anti-competitive conduct arising out of competitive actions taken in the ordinary course of business.

As such, it is Amoco's submission that no such change should be made.

Yours faithfully

Andrew Amer

Managing Director

Amoco Chemicals Pty Ltd