

Level 9  
89 York Street  
Sydney NSW 2000  
DX 722 Sydney  
Email: edonsw@edo.org.au  
Webpage: www.edo.org.au

21 June 2002

Tel: (61 2) 9262 6989  
Fax: (61 2) 9262 6998

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

and by facsimile: 02 6263 3939

Dear Secretary,

**SUBMISSION TO THE REVIEW OF THE COMPETITION PROVISIONS OF  
THE TRADE PRACTICES ACT 1974**

**TPA REVIEW**

1. The Environmental Defender's Office Ltd ("EDO") welcomes the opportunity to make a submission to the *Review of the Competition Provisions of the Trade Practices Act 1974* ("the Review").

**ENVIRONMENTAL DEFENDERS OFFICE**

2. The EDO is a community legal centre which specialises in environmental law, policy and community education.

**EXECUTIVE SUMMARY**

3. The EDO submits that the *Trade Practices Act 1974* ("TPA") could perform a valuable role in the implementation of ecologically sustainable development in Australia:
  - a. Recommendation 1: that the term "*benefit to the public*" in Part VII be defined as including steps to implement the principles of ecologically sustainable development and steps to protect the environment;
  - b. Recommendation 2: that a failure to include high environmental impact externalities in the price of goods and services be deemed to be a breach of the anti-competitive provisions of the TPA where the failure to include such externalities discriminates against competitors in the same market;



*An independent public interest legal centre specialising in environmental law*

- c. Recommendation 3: that a failure to disclose significant direct or indirect government subsidies to high environmental impact industries be deemed to be a breach of the anti-competitive provisions of the TPA.

## BACKGROUND

4. A healthy and sustainable environment is an essential component of a successful economy<sup>1</sup>, a fundamental truth recognised by the Council of Australian Governments when it endorsed the *National Strategy for Ecologically Sustainable Development* ("NSED") in 1992<sup>2</sup>. The guiding principles of the NSED included that "decision making processes should effectively integrate both long and short-term economic, environmental, social and equity considerations" and that "cost effective and flexible policy instruments should be adopted, such as improved valuation, pricing and incentive mechanisms".
5. However, difficulty has been experienced in implementing the guidelines requiring the integration of economic and environmental considerations and indeed the principles of ecologically sustainable development<sup>3</sup> generally. For example, the *Australia State of the Environment Report 1996*<sup>4</sup> noted that:

<sup>1</sup> *Australia State of the Environment 2001* noted at page 3:

... the state of the Australian natural environment has improved very little since 1996, and in some critical aspects has worsened. ... Improvements are still needed because the environment provides us with essential processes that are critical to life on Earth. These processes are known as ecosystem services ... and include soil formation, nutrient recycling, clean water supply, pollination and waste assimilation. Without these ecosystem services, the world's economy would grind to a halt.

*Australia State of the Environment 2001*, CSIRO Publishing on behalf of the Department of the Environment and Heritage, Collingwood Victoria.

<sup>2</sup> The NSED stated that the goal of ecologically sustainable development was "to meet the needs of Australians today, while conserving our ecosystems for the benefit of future generations". Its core objectives were: to enhance individual and community wellbeing and welfare by following a path of economic development that safeguarded the welfare of future generations; to provide for equity within, and between, generations; and, to protect biological diversity and maintain the essential processes and life support systems. A copy of the document is at <http://www.ea.gov.au/esd/national/strategy/index.html>.

<sup>3</sup> Section 3A of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) defines the principles of ecologically sustainable development as: (a) decision-making processes should effectively integrate both long-term and short-term economic, environmental, social and equitable considerations; (b) if there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation; (c) the principle of inter-generational equity—that the present generation should ensure that the health, diversity and productivity of the environment is maintained or enhanced for the benefit of future generations; (d) the conservation of biological diversity and ecological integrity should be a fundamental consideration in decision-making; (e) improved valuation, pricing and incentive mechanisms should be promoted.

<sup>4</sup> Executive Summary, page 9, *Australia State of the Environment 1996*, CSIRO Publishing, Collingwood Victoria.

Overall, economic planning appears to take little account of environmental impacts. It is assumed that the first priority should be a health economy, and that problems can always be solved using the wealth created. The economy is a subset of human society which, in turn, is part of the environment. Progress towards sustainability requires recognition of this fundamental truth, and a willingness to build environmental thinking into our economic planning.

6. Similarly, the Productivity Commission's *Report on the Implementation of Ecologically Sustainable Development by Commonwealth Departments and Agencies* found that it was uncommon for ecologically sustainable development principles and objectives to be fully taken into account by Commonwealth departments and agencies through the decision-making, implementation and monitoring process<sup>5</sup>. That finding led to the inclusion of section 516A in the *Environment Protection and Biodiversity Conservation Act 1999*. That section requires Commonwealth departments, authorities and companies to report annually on, amongst other environmental matters, their implementation of the principles of ecologically sustainable development.
7. The EDO submits that the *Trade Practices Act 1974* ("TPA") could perform a valuable role in the implementation of ecologically sustainable development in Australia:
  - a. By regulating conduct in the terms set out in the executive summary and explored in further detail below;
  - b. Because the Australian Competition and Consumer Commission ("the Commission") is uniquely placed to play a significant role in the implementation of ecologically sustainable development and the protection of the environment in Australia:
    - i. The Commission has jurisdiction over the business activities of the Commonwealth, the States and Territories as well as most commercial organisations (and virtually all significant commercial organisations);
    - ii. It is an independent statutory authority and therefore not subject to the political imperatives that frequently lead Commonwealth, State and Territory governments to prefer short term economic advantage over long term environmental health;
    - iii. Its national jurisdiction could enable it to adopt a "best practice" form of environmental impact assessment rather than the inadequate forms of environmental assessment found in some States and Territories.

<sup>5</sup> Page 63. A copy of the Report is at <http://www.pc.gov.au/inquiry/esd/finalreport/index.html>.

**RECOMMENDATION 1: THAT THE TERM "BENEFIT TO THE PUBLIC" IN PART VII BE DEFINED AS INCLUDING STEPS TO IMPLEMENT THE PRINCIPLES OF ECOLOGICALLY SUSTAINABLE DEVELOPMENT AND STEPS TO PROTECT THE ENVIRONMENT**

8. Division 1 of Part VII of the TPA provides the Commission with the power to grant a corporation immunity in relation to contracts, arrangements or understandings that might otherwise breach provisions of Part IV (other than the misuse of market power). In the case of contracts, agreements or understandings that would or might have the effect of substantially lessening competition<sup>6</sup>, the applicant must satisfy the Commission that the contract, agreement or understanding would result, or be likely to result, in a benefit to the public which outweighs the detriment to the public constituted by any lessening, or likely lessening, of competition<sup>7</sup>. In the case of exclusionary provisions, secondary boycotts, third line forcing, resale price maintenance and mergers, the applicant must satisfy the Commission that the conduct results in a benefit to the public such that it should be allowed to occur<sup>8</sup>.
9. Division 2 of Part VII provides automatic and immediate immunity against liability for exclusive dealing, save in the case of third line forcing in which case the immunity arises after 14 days. The immunity may be revoked at any time<sup>9</sup> by the Commission giving notice in writing if it is satisfied that the conduct would or is likely to have the purpose or effect of substantially lessening competition and the conduct would not lead to a benefit to the public or that the benefit to the public would not outweigh the detriment to the public caused by the lessening of competition<sup>10</sup>.
10. The TPA does not define "benefit to the public" (or "public benefit"), other than in inclusive terms in s 90(9A), however the Commission, Tribunal and the Court have accepted that it is a term of wide ambit and that it extends, amongst other things, to "steps to protect the environment"<sup>11</sup>. That principal has received recognition on a number of occasions, including, for example, in the authorisation granted by the Commission in 1998 to the Association of Fluorocarbon Consumers and Manufacturers Inc for voluntary agreements to limit the imports of hydrochlorofluorocarbon gases and cease the importation or manufacture of disposable containers of hydrochlorofluorocarbon and hydrofluorocarbon gases<sup>12</sup>. In that decision the Commission noted<sup>13</sup>:

<sup>6</sup> Section 45.

<sup>7</sup> Section 90(6).

<sup>8</sup> Section 88(8) & (9).

<sup>9</sup> Subject to procedural requirements.

<sup>10</sup> Section 93(3) or in the case of third line forcing that the likely benefit to the public would not outweigh the likely detriment to the public: s 93(3A).

<sup>11</sup> *Re Rural Traders Co-operative (WA) Ltd* (1979) 37 FLR 244.

<sup>12</sup> Authorisation A9068.

<sup>13</sup> At paragraphs 6.5 & 6.7.

*The Commission notes that the effects of increased levels of greenhouse gas emissions are well known and well documented, as are the consequences for public health and the environment of a damaged ozone layer and an increased potential for global warming.*

*In addition, the Commission holds the view that a scheme or arrangement which contributes to limiting the risk to human health and the improvement of the environment would benefit the Australian public, and may also benefit the total world population and environment. ...*

11. The Commission has also noted that measures to encourage ecologically sustainable industries may constitute a benefit to the public. For example, in *Tasmanian Oyster Research Council*<sup>14</sup> the Commission granted authorisation to an agreement which required purchasers of oyster spat to pay a research levy because it accepted that, amongst other things, the money would be used to develop new export and employment opportunities in an "environmentally-friendly" industry.
12. The Commission and Tribunal have granted authorisations, or declined to revoke the immunity for exclusive dealing, in numerous cases where the conduct proposed, or the business associated with the conduct proposed, was or was likely to have a significant impact on the environment. Such cases include authorisations relating to aluminium smelters<sup>15</sup>, electricity generation, transmission and supply<sup>16</sup> and gas recovery, transfer and supply<sup>17</sup>, amongst others<sup>18</sup>.
13. The EDO submits that the TPA should be amended to require the Commission to consider the principles of ecologically sustainable development<sup>19</sup> and the protection of the environment in the course of considering whether to grant, refuse, vary or revoke authorisations under Division 1 of Part VII or to give notice under s 93(3) or (3A), and to require the Tribunal to consider those principles in reviewing a decision of the Commission. That could be achieved by, amongst other things, defining the term "public benefit" in Part VII as including:
  - a. Steps that would, or would be likely to comply with the principles of ecologically sustainable development, in particular, by encouraging or enhancing:

<sup>14</sup> (1991) ATPR (Com) 50-106.

<sup>15</sup> *Re Comalco Ltd* (1994) ATPR (Com) 50-142.

<sup>16</sup> See numerous authorisations reproduced on the ACCC website at <http://www.accc.gov.au/electricity/elec.htm> or in the authorisation indexes.

<sup>17</sup> See numerous authorisations reproduced on the ACCC website at <http://www.accc.gov.au/gas/gas.htm> and the authorisation indexes.

<sup>18</sup> For example, A30204 proposed joint venture of 11 Sydney Councils with a recycling contractor.

<sup>19</sup> As defined in s 3A of the *Environment Protection and Biodiversity Conservation Act*.

- i. Capital investment in ecologically sustainable industries;
    - ii. Research into ecologically sustainable industries;
  - b. Steps that would, or would be likely to, protect the natural environment or items and places of significant cultural heritage value.
14. The EDO further submits that the TPA should be amended to provide the Commission, in cases where the corporation seeking authorisation or giving notice is engaged in development that does not, or is unlikely to, comply with the principles of ecologically unsustainable development or has, or is likely to have, a significant impact on the natural environment or significant cultural heritage, with the power to invite the corporation to agree to conditions requiring it to:
- a. To identify and measure the extent of unsustainability or impact; and,
  - b. To take steps to cause the development to comply with, or to reduce the lack of compliance with, the principles of ecologically sustainable development, or to reduce its impact on the natural environment or significant cultural heritage; and,
  - c. To take into account in considering whether or not to grant the authorisation or give notice under s 93, whether or not the corporation giving notice, has agreed to such conditions.
15. The steps referred to in the preceding paragraph might include an agreement by the corporation to participate in an environmental offset or trading scheme.

**RECOMMENDATION 2: THAT A FAILURE TO INCLUDE HIGH ENVIRONMENTAL IMPACT EXTERNALITIES IN THE PRICE OF GOODS AND SERVICES BE DEEMED TO BE A BREACH OF THE ANTI-COMPETITIVE PROVISIONS OF THE TPA**

16. Some corporations (or industries) benefit from the failure to include externalities which have a high environmental impact in the price of the goods or services produced by them. The failure to include externalities provides such corporations or industries with a substantial commercial advantage over producers who include, or cannot exclude, the externalities (or the cost of them). For example, the coal-fired electricity generating industry benefits from the failure to include the cost of consumption of a finite resource and the cost of release of large quantities of greenhouse gases into the atmosphere in the price of the electricity sold by it. The failure to include those externalities provides coal-fired electricity generators with a substantial commercial advantage over renewable energy generators, such as solar and wind generators, and even over less environmentally harmful conventional sources

of energy such as natural gas. As a consequence of that unfair advantage, ecologically sustainable forms of electricity production, and less environmentally harmful forms of electricity production, find it difficult to compete on price, or to achieve the economies of scale that might make their product less expensive.

17. The EDO submits that the TPA should be amended to require a sum representing the fair value of externalities associated with the production of a good or service to be included in the price of that good or service, at least where the production of that good or service involves a significant impact on the environment and the failure to include the cost of those externalities is, or is likely to be, preventing ecologically sustainable, or less environmentally harmful, forms of production from competing in the same (or similar) market.
18. It is to be noted that, if this recommendation was adopted, it would lead directly to the implementation of one of the most important principles of ecologically sustainable development, namely, the promotion of improved valuation, pricing and incentive mechanisms<sup>20</sup>.

**RECOMMENDATION 3: THAT A FAILURE TO DISCLOSE SIGNIFICANT DIRECT OR INDIRECT GOVERNMENT SUBSIDIES TO HIGH ENVIRONMENTAL IMPACT INDUSTRIES BE DEEMED TO BE A BREACH OF THE ANTI-COMPETITIVE PROVISIONS OF THE TPA**

19. Many high environmental impact industries receive significant undisclosed direct and indirect government subsidies. For example, forestry industries continue to receive direct and indirect government subsidies which are not publicly disclosed, usually on the basis that such arrangements are commercial-in-confidence, and there are continuing concerns about whether the 70% of native forests and 60% of softwood plantations which are publicly owned are operated in accordance with the principles of competitive neutrality<sup>21</sup>. The payment of direct or indirect subsidies, particularly ones that are not disclosed, provides the recipients with a substantial commercial advantage over competitors and is likely to inhibit the formation of a more ecologically sustainable industry.

<sup>20</sup> NSESD guiding principle "*cost effective and flexible policy instruments should be adopted, such as improved valuation, pricing and incentive mechanisms*", s 3A(e) of the *Environment Protection and Biodiversity Conservation Act*.

<sup>21</sup> Chapter 3, Commonwealth Competitive Neutrality Complaints Office (CCNCO) 2001, *Competitive Neutrality in Forestry, CCNCO Research Paper*, Productivity Commission.

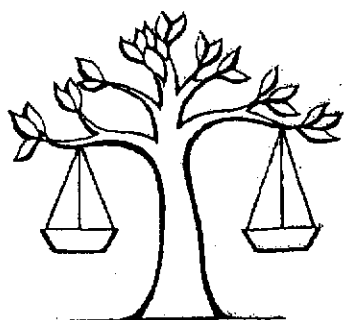
20. The EDO submits that the TPA should be amended to require the disclosure of all direct and indirect government subsidies to high environmental impact industries, whether or not those industries are public or privately owned.

Yours sincerely  
Environmental Defender's Office Ltd

A handwritten signature in black ink, appearing to read 'Paul Toni', written over the typed name.

Paul Toni  
Principal Solicitor





## environmental defender's office

### Submission on Trade Practices Act

June 2002

#### The EDO Mission Statement

*To empower the community to protect the environment through law, recognising:*

- ◆ *the importance of public participation in environmental decision making in achieving environmental protection.*
- ◆ *the importance of fostering close links with the community*
- ◆ *that the EDO has an obligation to provide representation in important matters in response to community needs as well as areas the EDO considers to be important for law reform*
- ◆ *the importance of indigenous involvement in protection of the environment.*

#### Contact Us

Environmental  
Defender's Office Ltd  
Level 9, 89 York St  
SYDNEY NSW 2000

DX 722 SYDNEY

**freecall 1800 626 239**

tel. (02) 9262 6989

fax (02) 9262 6998

email:

[edo@nsw.edo.org.au](mailto:edo@nsw.edo.org.au)

website: [www.edo.org.au](http://www.edo.org.au)

Become a Friend of the EDO and receive *Environmental Defender and Impact*

ABN 72 002 880 864

**For inquiries on this matter contact Paul Toni on [paul.toni@nsw.edo.org.au](mailto:paul.toni@nsw.edo.org.au)**