Submission to the Review of the Provisions of the Trade Practices Act 1974 by BP Australia Pty Ltd

EXECUTIVE SUMMARY

BP makes the submissions set out in this document pursuant to the review of the operation of the competition and authorization provisions of the Trade Practices Act 1974 (Cth.) ("the Act"), specifically Part IV and VII. BP believes that the Act does not require substantial amendment.

In BP's view, the critical issues are that:

- the effect of proposed changes to Section 46 may result in a lessening of competition
- the reversal of onus of proof is contrary to the fundamental principle of 'innocent until proven guilty'
- the proposed 'cease and desist' powers could be harmful to Australian business, particularly if an alleged contravening action is proven to have been permissible
- the ACCC currently have sufficient investigative powers
- any introduction of criminal penalties is subject to criteria including applicable to all players, and "beyond reasonable doubt" legal
- the authorisation process should be streamlined and should provide for an exemption clause where an industry player is exiting the particular industry
- BP strongly supports introducing further accountability measures into the ACCC's administration of the Act

BP considers that amendments to s.50 are required to improve the competitiveness of Australian business internationally, but that s.46 and the rest of Part IV are sufficient to provide a balance of power between competing businesses, and to promote competitive trading, which benefits consumers. BP does not consider there is adequate protection for the commercial affairs and reputation of individuals and corporations. To paraphrase the words of Justice Finn, "the ACCC media statements may constitute good public theatre, but whether they represent good public administration is another matter". Regulation of the Regulator is required.

BACKGROUND

BP has substantial upstream and downstream businesses in Australia. BP supports the goal of "(e)ffective competition laws contribut(ing) to the productivity, efficiency and growth of an open, integrated Australian economy."[1]

Professor Fels comments in the ACCC 2000-2001 Annual Report support radical change to the Act to "deter big businesses from engaging in anti-competitive behaviour". This implies that radical change is needed to prevent big business from engaging in anti-competitive behaviour. BP refutes this view as it is simply unproven that big business as a matter of course engages in anti competitive behaviour.

The Business Council of Australia released its recommendations regarding changes to the Trade Practices Act in a media statement on 9th May 2002. BP shares many of these views.

1. Proposed Changes to Section 46 – Misuse of Market Power

BP understands these to be: -

(a) to reverse the onus of proof;

(b) to introduce an "effects" test;

(c) to introduce cease and desist orders;

(d) to introduce divestiture provisions.

BP's submission on this matter is generally speaking "If it's not broken, don't fix it". There have been a number of successful prosecutions under Section 46, testimony to the fact that the current system works.

The current legislation enables market to work in the most efficient manner. In relation to the downstream petroleum business, Australia enjoys the lowest pre-tax petrol prices in the OECD, which demonstrates that the current regime supports competition levels such that reasonably priced fuel is offered to Australian consumers.

[1] http://www.tpareview.treasury.gov.au/content/termsofref.asp

Reversal of Onus of Proof

To reverse the onus of proof undermines a basic common law principle of innocence until guilt is proved, and is quite unnecessary. The Commission enjoys extensive investigative powers under Section 155, sufficient to enable it to obtain the evidence to make out a case where one exists.

Effects Test

In arguing against an effects test, BP can do no better than quote the ACCC's own submission to the recent Senate Inquiry :-

> "Over the years there is no doubt that parliament and governments of all persuasions have not wanted to take the step of putting an effects test into the Act, because they have felt sure it would go too far. The purpose test, with all of its imperfections, is a way of making sure that Section 46 is not carried too far, because one always has the problem that it can deter genuinely pro-competitive behaviour. Just take the famous price cutting matter. There is always an issue as to whether price cutting is good for consumers. On the face of it, one would think so. But an effects test could take the edge off the incentive for firms to compete keenly on price and other dimensions."

and

> "It is also likely to create greater uncertainty for business. That is compounded by the fact that section 46 in its present form, because it has a purpose test, is far less likely to catch unintended behaviour. In other words, a firm may innocently be competing and unknowingly breaching a section 46 effects test. So firms may unintentionally do anti-competitive things – the big fish wags its tail and, without knowing it, wipes a small player and, in doing so, breaches the law. So there is that kind of consideration."

In other words, an effects test would simply preserve uncompetitive businesses, contrary to the philosophy of the legislation.

Furthermore, the impact of an effects test may be to deter businesses from competing, in fear of the effect it may or may not have. This would be a sub-optimal outcome for Australian consumers.

Furthermore Section 46 (7) essentially provides the benefits of the effects test by giving the ACCC considerable powers by way of inference of purpose, which are; "…after all the

evidence has been considered, the existence of that purpose is ascertainable only by inference from the conduct of the corporation…"[2]

Cease and Desist Orders

To introduce cease and desist orders is unnecessary as injunctive relief can be obtained and the ACCC would still need to investigate and afford procedural fairness. Lengthy investigations following a cease and desist order could result in considerable harm to the investigated business, which is later found to have acted appropriately. The effect on that business could create unfair advantage to others operating in the market place.

Professor Fels has argued that injunctive relief is difficult to obtain, because "…to produce evidence that is going to get past a judge on section 46 is often difficult…"[3] BP's view is that, if there isn't enough evidence to satisfy a court then relief ought not be available on a mere suspicion. It is inappropriate for the Commission to wield such unfettered power, with the potential for damage to business being enormous.

Divestiture

Divestiture would create commercial uncertainty and may result in the break-up of a company that had not acted un-competitively, but simply grown organically by efficiency and innovation.

General

BP has compliance programs in place to ensure that all of its staff understand and comply with the Act.

2. Section 50 – Mergers and Acquisitions

More flexibility is required within Section 50 to allow for efficiencies, and to take account of the "failing firm" takeover or rationaliation of operations.

BP believes the authorization process needs to be streamlined, as the current process is marked by delays and uncertainty, which can be detrimental to the business involved.

[2] Millers, annotated Trade Practices Act, 23rd edn, 2002
[3] Hansard, Senate Economics Committee, 21st February 2002

There should be direct applications to the Australian Competition Tribunal for merger/rationalisation authorizations within strict time limits to avoid appeals and opportunity to delay generally – delay and its potential being a most effective deterrent to a merger.

Section 50 and the Problem of Exit or Rationalisation

The authorisation process constitutes a barrier to industry restructure because it represents a very real barrier to exit from the industry. This can be illustrated by reference to the petroleum industry, which is characterised by:-

- heavy competition and efficiency improvements over a sustained period
- amongst the lowest consumer petrol prices in the OECD over this period (source: International Energy Agency quarterly data)
- improvements in efficiency which have largely been passed on to the consumer
- provision of fuel efficiently, competitively, and safely in a very large country with a small population.

At the same time, the financial performance of the industry has been very poor, over a similar time span. In 2000 and 2001, the industry made heavy losses. Its returns have been poor for many years – being well below the long-term bond rate.

Thus, while the industry has achieved two of the three pillars of a sustainable contestable market – ie efficiency and competition - resulting in low prices, it is not achieving the third pillar, industry viability. One key option for achieving viability is restructure. That is, the closure, merger, or sale of assets such as one or more player exiting the industry, or merging operations.

Section 50 in its present form presents an obstacle to restructuring because it makes it difficult to exit the industry or to rationalise assets.

If a major player wished to exit the industry (either refining, marketing, or both), then it could seek to sell or merge its assets to attain the maximum return for the shareholder. However, there are few if any potential buyers or merger partners for these assets beyond the current players in Australia.

The problem here is that sale or merger to an existing player would almost certainly require authorization by the ACCC under Section 50 as it stands. And past history (eg the Caltex/Ampol merger of 1994) has shown the ACCC has been prepared to intervene in the

market in this process. The impact of this 1994 merger was a lessening of the benefits to the merger partners, and, arguably, a contribution to the chronic continuation of poor viability in this industry over the ensuing years. BP is concerned that this process empowers the ACCC to engineer the market rather than allowing the economic effects of restructuring to flow through to the industry. In part, the nature of S 50 requires this.

We support the need for competition. But equally, industry viability needs to be taken into account. Presently the authorisation process does not address the issue of the failing firm.

The potential exiting player therefore has Hobson's choice:-

1. does it dispense with sale to or merger with the existing majors and thus reduce or eliminate the market into which it can sell to the detriment of its shareholders.
2. does it seek a sale or merger with the existing major players, knowing that it is highly likely that the benefits of the sale will be significantly reduced by ACCC intervention, or
3. does it forestall making a decision, thus preventing real and what might be very necessary structural reform.

We submit that this is a very unsatisfactory state of affairs. We further submit that it can be addressed by amendment of Section 50 so as not to impede the genuine exit of a player from an industry, and so not impede needed restructure. The section only takes account of competition – it takes no account of a company or industry that is incurring major difficulties and drastically in need of restructure. The failing firm has genuine and legitimate responsibility to make provision, as far as possible, for stakeholders, be they shareholders, employees, or suppliers such as banking institutions.

We recommend that Section 50 be amended by inclusion of a clause exempting from authorization those corporate sales, which are part of a genuine exit from the industry.

3. Section 47(6) - Third Line Forcing

This should just not be treated any differently to any other form of exclusive dealing and should be subject to the same competition test.

There should be a related company exemption.

Given the current notification processes, it seems to BP that the continuation of third line forcing as a "per se" offence is simply a revenue-raising exercise on the part of the ACCC.

4. Authorisation Process (Part VII)

The current authorisation process is time-consuming and frustrating. There are no time limits except for merger authorizations, so the process becomes prolonged, and expensive. The limits should be imposed for all authorization applications with authorization being automatic after expiry of the time limit.

5. Criminal Sanctions

To introduce criminal sanctions may result in a lessening of competition. If major companies are unsure as to what the ACCC considers to be anti-competitive behaviour, they may be forced to act with such a degree of caution that the result would be to lessen competition. In any case, BP submits that the current penalties provide sufficient deterrence.

Furthermore, in the ACCC 2000-2001 Annual Report it is recommended that, "such a change in the law would not apply to small businesses or trade unions." BP is against any law, which discriminates against one type of entity in favour of another.

BP is not aware of specific proposals from the ACCC, but if criminal sanctions were to be introduced, it should be clear what practices they are to be introduced for, and there should be no exceptions for certain interest groups.

BP would have no objection to the introduction of criminal sanctions provided:-

- they apply to all – big and small, public and private – corporations and enterprises
- offences must be proven "beyond reasonable doubt" ,
- the responsibility for investigation is a police matter
- they apply only to price collusion and market sharing practices
- the individual is directly involved in the conduct.

6. General ACCC Accountability and Administrative Interpretation

Accountability

BP believes that further accountability and balance should be introduced into the administration of the Act by the ACCC. BP supports the BCA's recommendation of introducing checks and balances such as those operating in relation to Taxation, to strengthen the governance of the ACCC. There is also a need for procedural time frames and parameters within which investigations would be conducted to ensure fairness of process.

Trial by media

It seems to BP that the ACCC's media practices deliberately foster a view that major corporations, and in particular oil companies, are the consumers' enemy, consistently indulging in anti-competitive behaviour, and that it is simply inadequate legal powers that have prevented the ACCC proving their suspicions.

An example of such media practices was the front page photograph of "The Daily Telegraph" of 24th April showing ACCC investigators carrying large boxes out of Caltex's offices, the inference being they contained incriminating documents discovered as a result of the much publicized raid. The ACCC Chairman said the ACCC did not actually claim that was the case, however he also he did not say it wasn't. BP believes that, in certain circumstances silence can be just as much a misrepresentation as a deliberate mis-statement.

We understand that the investigation is actually into transactions concerning bitumen and lubricants. Nothing to do with BP, nothing to do with petrol pricing, but you would not gather that from the headlines or the ACCC. In the meantime, BP's reputation suffers, and the populist belief that oil companies "rip off" the motorist is actively promoted when the fact is the Australian motorist enjoys the cheapest petrol in the OECD.

It is a common perception that major corporations and oil companies are fair game, and big enough and powerful enough to look after themselves. The use of the media by the ACCC has been allowed to go too far, with public opinion being manipulated to the detriment of Australia's business reputation worldwide. Furthermore, it seems to have become accepted practice by the ACCC to publicise investigations, with the corollary trial by media, but to avoid "setting the record straight" in the media when it is found that no wrongdoing has occurred.

In order to curb the damaging trial by media that seems to be a favoured policy of the ACCC, BP proposes that the ACCC be prevented from making public statements regarding its investigations prior to instituting proceedings. Should criminal sanctions for offences be

introduced, the ACCC should not be able to make any pronouncements at all pending outcome of the case. Individuals in the ACCC should themselves be subject to criminal sanctions for any breach of a no public statements rule.

Acceptance of court's decision

In the past twenty years there have been innumerable investigations of collusion on petrol pricing. Yet each investigation into alleged anti-competitive behaviour by BP has found that there has been no case to answer. Rather than accept the "no case to answer" verdict, the ACCC adopt the line that they just couldn't find enough evidence, and therefore need further powers to assist them to prove that price collusion does take place. The ACCC use the media to support a view, which has no sustainable legal basis. The ACCC's stance is self-serving and contrary to all the tenets of common law.

Signed for and on behalf of BP Australia Pty Ltd, by

Mike McGuinness
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Dated