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Minter Ellison Legal Group

Submission to *Trade Practices Act* Review Committee

June 2002

MinterEllison
LAWYERS

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Introduction

1. Scope

This submission identifies specific proposals to improve the operation and administration of the *Trade Practices Act* (***TPA***) and focuses on several narrow, yet important, topics as follows:

(a) media activities of the ACCC;

(b) the issue of section 155(2) (search and seizure) authorisations;

(c) ACCC litigation practice; and

(e) section 87B undertakings.

2. Executive Summary

2.1 Media activities

The ACCC's use of the media as a deterrent and enforcement tool should be qualified:

(a) statutorily by specifically empowering the ACCC to issue press statements on investigations and enforcements for certain purposes and thereby rendering its decisions administratively reviewable; and

(b) in a code of practice by requiring a procedure for press releases including the following components:

(i) at least 48 hours notice (excluding weekends and public holidays) should be given by the ACCC to affected parties prior to the release of the relevant material;

(ii) the proposed text of the release should be sent by facsimile or email to the affected parties;

(iii) the affected parties should have the opportunity of preparing and releasing their own media materials at about the same time as the ACCC releases its materials; and

(iv) the affected parties would have the opportunity of applying for any necessary injunctions.

2.2 Section 155(2)

Before a section 155(2) authorisation can be issued judicial approval should be required in the same way as a warrant sought by the police is issued by a Court. The threshold for a section 155(2) authorisation should be raised so that it is only used where there is a reason to believe that documents would otherwise be destroyed. Amendments to the TPA would be required.

2.3 ACCC litigation practice

A code of practice should require the ACCC to act in accordance with the Model Litigant Directions, particularly in relation to:

(a) acting consistently in the handling of claims and litigation;

(b) endeavouring to avoid litigation, wherever possible;

(c) where it is not possible to avoid litigation, keeping the costs of litigation to a minimum;

(d) not taking advantage of a claimant who lacks the resources to litigate a legitimate claim; and

(e) instituting legal proceedings in the Court closest to where the alleged breach of the law occurred or to where the affected party has its principal place of business.

2.4 Section 87B undertakings

The use of undertakings should be qualified in a code of practice to require the ACCC:

(a) to publish a draft of any proposed section 87B undertaking (subject to confidential information obligations);

(b) to consider the interests of third parties;

(c) to allow a period of time for public comment before accepting an undertaking under section 87B;[1]

(d) to seek admissions of a breach of the TPA as part of an undertaking under section 87B only in circumstances where such an admission has substantive relevance to ensuring the party in breach does something to remedy the breach; and

(e) not to seek any general requirement to comply with the TPA, and in particular provisions that have not been breached, as part of an undertaking under section 87B other than in exceptional circumstances.

2.5 Overview - a code of practice for TPA administration

The improvements suggested in this submission could best be achieved by incorporation into an ACCC code of practice or service charter on the administration of the TPA. Development of a code of practice should be through a consultative process involving government, the ACCC, the business community, consumer representatives and others.

The ACCC currently has a service charter (available on www.accc.gov.au) which has a limited consumer focus.

Development of an expanded code of practice or service charter would allow stakeholders and, in particular, the ACCC (which has the greatest practical experience of the issues faced in administering the TPA) to fine-tune aspects of administration of the TPA to improve the transparency of the ACCC's activities and remove sources of controversy which have the potential to undermine respect for the TPA and for the ACCC's administration of the TPA.

Compliance by the ACCC with the code of practice should be required by the TPA.

3. Confidentiality

We do not wish to claim confidentiality for any part of this submission.

4. Minter Ellison Legal Group

4.1 Experience

With over 280 partners and almost 1000 other lawyers, the Minter Ellison Legal Group operates through an integrated structure of legal, industry and client knowledge groups to provide a

[1] These recommendations endorse the comments of Frank Zumbo in 'Section 87B Undertakings: There's No Accounting for Such Conduct' (1997) TPLJ 121.

comprehensive range of legal services to business and government. One of Minter Ellison Legal Group's key practice areas is competition and regulatory law.

4.2 Independent submission

This submission is made by the Minter Ellison Legal Group and is not made on the instructions of any other person, entity or organisation. It is made on the basis of the combined experience of experienced private practitioners who advise on the operation of the Trade Practices Act on a frequent basis.

5. Further information

Please contact Dr Ross Patterson ((02) 9921 4482) or Paul Schoff ((02) 9921 4599) if you require any further information or elaboration of this submission.

Media activities

6. General

Although the matters considered below might be seen to be peripheral to the key focus areas of the Committee, they have in our experience placed affected parties at a considerable disadvantage where matters are contested. The changes suggested would not detrimentally affect the ultimate enforcement of the TPA but would temper the unrestricted use of media and which is otherwise in the hands solely of the ACCC.

7. Publicising investigations

7.1 Existing practice

When the ACCC investigates possible breaches of the TPA there is usually no public announcement. Two notable recent exceptions to that practice (the oil industry price fixing investigation and the Qantas misuse of market power investigation) have been explained as cases where a complainant advised the media and the ACCC confirmed the investigation.

7.2 Concern about possible public misunderstanding

The issue of concern is where the line should be drawn when publicising the investigation of allegations, either at the investigation or enforcement stage. In the recent oil industry investigation, for example, the ACCC went further than a press release confirming the investigation. The Chairman gave 'door stops' for television and interviews on radio to, amongst others, Jeff Kennett, John Laws, Philip Clark and Neil Mitchell. In a recent Federal Court judgment in *Electricity Supply Association of Australia v ACCC*, Justice Finn noted that 'as the agency responsible for policing section 52 of the Act, [the ACCC] properly can be expected to set the example of care in its own representations to the public' ((2001) ATPR 41-838 at para 139). There is a very real danger that however accurately an investigation is described by the ACCC, in some contexts, smoke may be confused for fire. When the Chairman is described on radio as 'the Elliot Ness in the price fixing, oil busting industry' immediately after giving an interview, the distinction in the public mind between an investigation of untested allegations, the commencement of a prosecution and a successful prosecution may be blurred, despite best efforts.

7.3 Existing power

Media activities are not only desirable for the ACCC but are provided for in section 28 of the Trade Practices Act which empowers the ACCC to disseminate information with respect to its functions and to 'make available to the public general information in relation to matters affecting the interests of consumers'. It is an important function of the ACCC to ensure that the community and business are aware of rights and obligations under the Trade Practices Act.

7.4 Accountability

The ACCC is not as accountable in its media activities as it is in performing its other functions. In the *Electricity Supply Association* case late last year, the Federal Court found that the ACCC's decision to publish a press release was not a 'decision' under section 28 of the TPA and therefore not subject to administrative review under the Commonwealth *Administrative Decisions (Judicial Review) Act*, even if an 'improper purpose' or other 'unreasonableness' could be shown. In issuing a

press release or giving an interview an officer of the ACCC is simply exercising an aspect of the ACCC's capacity as a legal person in the course of the performance of its functions. That leaves few options for a person aggrieved by the ACCC's media activities - civil liability for public misfeasance may result from a flagrant abuse of function but that is perhaps unlikely to be made out from media activities. Similarly, there may be tortious liability for negligent misstatement and an action for defamation may be possible.

7.5 Recommendation

The circumstances in which the ACCC can exercise its power to issue press releases and make statements to the media about investigations need to be defined. There is guidance from other jurisdictions such as the US, where the Federal Trade Commission's publications power is subject to a 'public interest' test (Title 15, Ch 2, sub chapter 1, s46(f)). In relation to investigations the ACCC should be required to take into account the interests of the company and individuals subject to investigation and weigh those interests against any public interest before publicising the investigation.

This would improve accountability for the ACCC's media activities because the ACCC's balancing exercise would be reviewable on normal administrative law grounds. These grounds have been developed over a long history to ensure that public agencies using public resources to perform public functions do not abuse or miscarry the performance of those functions.

On the other hand, the proposal would put beyond doubt the power of the ACCC, clarify its important role as a public educator and remove a source of controversy which has the potential to undermine the business community's respect for the TPA and for the ACCC as the administrator of the TPA.

8. Issuing media releases generally

8.1 Use of media

The ACCC has used the media in a strong and assertive fashion as an information, deterrent and enforcement tool, especially where issues have yet to be determined by the Court. Affected parties have found that wide media reporting has resulted in the formation of strong adverse public opinions and preconceptions prior to a legal contest on the issues.

8.2 Opportunity for comment

Affected parties should have an opportunity to issue a media release at the same time as the ACCC and the opportunity of contacting the ACCC prior to the release to correct any inaccuracies of fact. If the ACCC does not agree to change the terms of its release, then the affected parties should have the opportunity of addressing those issues in their own media release or by taking any necessary injunctive proceedings.

This process would provide the public and the media with the opportunity of seeing both points of view and 'balance the debate'.

8.3 Recommendation

The ACCC's use of the media as a deterrent and enforcement tool should be qualified in a code of practice as follows:

(a) at least 48 hours notice (excluding weekends and public holidays) should be given by the ACCC to affected parties prior to the release of the relevant material;

(b) the proposed text of the release should be sent by facsimile or email to the affected parties;

(c) the affected parties should have the opportunity of preparing and releasing their own media materials at about the same time as the ACCC releases its materials; and

(d) the affected parties would have the opportunity of applying for any necessary injunctions.

Section 155(2)

9. Existing power

9.1 'Reason to believe'

Section 155(2) gives power to the ACCC 'to enter any premises, and to inspect any documents in the possession or under the control of the person and make copies of or take extracts from those documents' where the Commission 'has reason to believe that a person has engaged or is engaged in conduct that constitutes or may constitute a contravention of the Trade Practices Act'.

9.2 Exercise of power

This power has been exercised recently in relation to the oil company raids. What may not be apparent from the media publicity is the devastating effect on ordinary employees of a company to be confronted with a large number of ACCC employees searching for documents, copying the hard disc of their lap tops and going through desks and files. The nature and the extent of the disruption on such employees is such that it is a power that should be exercised only on very rare occasions in specific circumstances where it is appropriate that such a power be exercised.

9.3 Threshold insufficient

It is submitted that the threshold in section 155(2) for the exercise of this power is inadequate. The ACCC need only have reason to believe the person has or is engaging in conduct that constitutes or may constitute a contravention of the TPA.

According to the ACCC's annual report for 2000- 2001 the powers under section 155(1) for the provision of information or the giving of evidence was exercised on 277 occasions, while the section 155(2) power were exercised only once. As a matter or law, however, it is likely that the section 155(2) power could have been exercised on almost all of those occasions, as a test for the exercise of power under section 155(2) is not far removed from that in section 155(1).

The ACCC's Chief Executive Officer made comments to the Senate Economics Legislation Committee on 6 June 2002 which suggest that the reason for the very rare use of section 155(2) compared to section 155(1) powers is that it is used where there is a concern that documents will be destroyed. That, however, is not a statutory requirement for the exercise of the power.

9.4 Recommendation

It is submitted that the power under section 155(2) should only be able to be exercised if the ACCC has reason to believe that documents will be destroyed, and that section 155(2) should be amended to make this a requirement of the exercise of their power.

Moreover, because the degree of interference with the affairs of citizens is so great an order should only be able to be made by the Federal Court or the Federal magistracy on application by the ACCC. A judge or magistrate would need to be satisfied that the ACCC had reasonable grounds to believe that documents would be destroyed before issuing an authorisation. This would result in appropriate balance between the ACCC's need to be able to move quickly in appropriate cases, and the public right to non-interference with confidential business affairs.

10. ACCC powers and functions as a Commonwealth model litigant

10.1 Model litigant guidelines

We recommend that the exercise of the ACCC's investigation and prosecutorial powers be explicitly conditioned by factors contained in the *Directions on the Commonwealth's Obligation to Act as a Model Litigant* ('Model Litigant Directions') (see Attachment).

The ACCC is already required to comply with the standards imposed by the Model Litigant Directions[2]. However, we note that the ACCC has raised issues with the practical operation of the Model Litigant Directions.[3]

We suggest that mandating adherence to the Model Litigant Directions via specified criteria in a code of practice, as suggested below, would enhance public confidence in the ACCC in its enforcement of the TPA.

10.2 Choice of forum

Affected parties have experienced substantial difficulties where legal proceedings have been instituted by the ACCC, generally in Canberra, Sydney or Melbourne, without any regard to the

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[2] In its role as First Law Officer (responsible for legal services to the Commonwealth and its agencies), the Attorney-General has issued Legal Service Directions (**'Directions'**) pursuant to section 55ZF of the *Judiciary Act 1903 (Cth)*. The current Directions have been effective from 1 September 1999. They are available at: http://www.ag.gov.au/aghome/legalpol/olsc/legsvcsdirections/lsd.pdf. Paragraphs 1-11 of the Directions apply to Commonwealth agencies which are subject to the *Financial Management and Accountability Act 1997 (Cth)*. The *Financial Management and Accountability Regulations 1997* provide that the ACCC is a prescribed agency (**'FMA agency'**) for the purposes of that Act. The Directions therefore apply to the ACCC. Paragraph 4 of the Directions deals with claims and litigation by or against the Commonwealth or FMA agencies. Specifically, paragraph 4.2 provides that such claims are to be handled and litigation is to be conducted by the agency in accordance with the *Directions on the Commonwealth's Obligation to Act as a Model Litigant*.

[3] The Australian Law Reform Commission (**'ALRC'**)'s report *'Managing Justice: A review of the federal civil justice system,'* (Report No 89, 2000) states at para 3.140 that:

> *'The ACCC commented that if model litigant direction is to be accorded the status of law, then the requirement for the government and its agencies to act with complete propriety, fairly and in accordance with the highest professional standards leads to unrealistic assumptions in the mind of respondents about how the ACCC should behave, about the terms of the model litigant rules and in reviewing and enforcing standards of compliance with the rules.'*

Further, at para 3.146:

> *'The ACCC commented that trade practices litigation, especially restrictive trade practices matters, are often technically complex and there is considerable scope for allegations against the government agency based on a technical application of the model litigant rules.'*

fact that the affected party's principal place of business may not be in those cities and indeed may be situated in centres such as Perth, Brisbane, Adelaide and other more regional centres.

10.3 Disruption

This causes significant disruption, logistical problems and substantial extra expense for parties. It puts the affected parties immediately at a heavy tactical disadvantage.

10.4 Commence proceedings nearest to principal place of business

The proposal for a code of practice or an amendment to the TPA requiring that proceedings be instituted either closest to the place of principal business of the affected parties or nearest to where the alleged breach of the law took place (except where it is on a national basis) would even out this imbalance.

10.5 Recommendation

We suggest the development of a code of practice or service charter providing that in exercising its investigation and prosecutorial powers under the TPA, the ACCC must:

(a) act consistently in the handling of claims and litigation;

(b) endeavour to avoid litigation, wherever possible;

(c) where it is not possible to avoid litigation, keep the costs of litigation to a minimum;

(d) not take advantage of a claimant who lacks the resources to litigate a legitimate claim; and

(e) not institute proceedings in courts that are closest to the Commission's principal place of operations where this may cause undue inconvenience and expense to the affected parties.

11. Section 87B discretion

11.1 Unfettered ACCC discretion

The ACCC has wide discretion and no mandated guidelines when considering undertakings under section 87B.

The procedure by which the ACCC considers merger applications demonstrates the unfettered power of the ACCC with respect to the definition of the scope, content and ultimate acceptance of undertakings under section 87B.

In 2000-2001, the ACCC assessed 265 merger and acquisition proposals of which 13 raised 'major competition concerns' (*ACCC Annual Report 2000-2001*, p 3). Of the thirteen, ten of these merger proposals proceeded after the parties signed section 87B undertakings. The fact that the undertakings typically relate to merger proposals which raise 'major competition concerns' demonstrates that the impact of such undertakings can be significant.

The fact that the ACCC is the only party entitled to seek an injunction to prevent a merger which is likely to have the effect of substantially lessening competition in a market, coupled with the ACCC's unfettered ability to accept section 87B undertakings in relation to mergers, raises a real possibility that the ACCC can require undertakings that cover conduct that the ACCC may not have otherwise been able to regulate under the TPA.

11.2 Increased accountability

We submit there is a need for formal guidelines as part of a code of practice for the ACCC to use when considering, procuring and accepting undertakings.

Undertakings are a flexible, efficient, less onerous alternative to other means by which conduct which may otherwise amount to a contravention of the TPA can be sanctioned (eg.via authorisations). Nevertheless, we consider that, in order to develop sound business practice in accordance with the TPA's objects through the use of undertakings, the ACCC should apply public benefit and competition analysis similar to that used when it considers notifications (under section 93) and authorisations (under section 88). This public benefit/competition analysis should draw on public contributions and, more specifically, on any contributions from third parties affected by, but not subject to, the proposed undertaking.

A process that involves consultation with different parties with an interest in the particular transaction may be more time consuming. However, any delay would be more than compensated by an improved substantive result.

11.3 Recommendation

It is important that the ACCC only insist that an admission of a breach of the TPA be part of an undertaking under section 87B if such a requirement has substantive relevance to ensuring the party in breach does something to remedy the breach. Without this restraint, the ACCC has the potential to tailor undertakings relating to conduct beyond the realm of the TPA or the matter at hand.

We also submit that, in accordance with the obligations imposed on it by the Model Litigant Directions, the ACCC should not seek broad in-court undertakings from respondents requiring them to 'generally' comply with the TPA. This is not a proper use of court powers given that the undertakings have the effect of rendering a party who subsequently breaches the TPA liable to

contempt proceedings, thereby adding an additional layer of liability which is not contemplated by the TPA itself.

ATTACHMENT

DIRECTIONS ON THE COMMONWEALTH'S OBLIGATION TO ACT AS A MODEL LITIGANT

1. Consistently with the Attorney-General's responsibility for the maintenance of proper standards in litigation, the Commonwealth and its agencies must behave as a model litigant in the conduct of litigation.

Nature of the obligation

2. The obligation requires that the Commonwealth and its agencies act honestly and fairly in handling claims and litigation brought by or against the Commonwealth or an agency by:

   (a) dealing with claims promptly and not causing unnecessary delay in the handling of claims and litigation,

   (b) paying legitimate claims without litigation, including making partial settlements of claims or interim payments, where it is clear that liability is at least as much as the amount to be paid,

   (c) acting consistently in the handling of claims and litigation,

   (d) endeavouring to avoid litigation, wherever possible,

   (e) where it is not possible to avoid litigation, keeping the costs of litigation to a minimum, including by:

      (i) not requiring the other party to provide a matter which the Commonwealth or the agency knows to be true, and

      (ii) not contesting liability if the Commonwealth or the agency knows that the dispute is really about quantum,

   (f) not taking advantage of a claimant who lacks the resources to litigate a legitimate claim,

   (g) not relying on technical defences unless the Commonwealth's or the agency's interests would be prejudiced by the failure to comply with a particular requirement,

   (h) not undertaking and pursing appeals unless the Commonwealth or the agency believes that it has reasonable prospects of success or the appeal is otherwise justified in the public interest, and

   (i) apologising where the Commonwealth or the agency is aware that it or its lawyers have acted wrongfully or improperly.

Notes:

1. The obligation applies to litigation (including before courts, tribunals, inquiries and in arbitration and other alternative dispute resolution processes) involving Commonwealth Departments and agencies, as well as Ministers and officers where the Commonwealth provides a full indemnity in respect of an action for damages brought against them personally. Ensuring compliance with the litigation is primarily the responsibility of the

agency which has responsibility for the litigation. In addition, lawyers engaged in such litigation, whether Australian Government Solicitor, in-house or private, will need to act in accordance with the obligation and to assist their client agency to do so.

2. In essence, being a model litigant requires that the Commonwealth and its agencies, as parties to litigation, act with complete propriety, fairly and in accordance with the highest professional standards. The expectation that the Commonwealth and its agencies will act as a model litigant has been recognised by the Courts. See, for example, *Melbourne Steamship Limited v Moorhead (1912)* 15 CLR 133 at 342; *Kenny v State of South Australia (1987)* 46 SASR 268 at 273; *Yong Jun Qin v The Minister for Immigration and Ethnic Affairs* (1997) 75 FCR 155.

3. The obligation to act as a model litigant may require more than merely acting honestly and in accordance with the law and court rules. It also goes beyond the requirement for lawyers to act in accordance with their ethical obligations.

4. The obligation does not prevent the Commonwealth and its agencies from acting firmly and properly to protect their interests. It does not therefore preclude all legitimate steps being taken to pursue claims by the Commonwealth and its agencies and testing or defending claims against them.

5. The commencement of an appeal my be justified in the public interest where it is necessary to avoid prejudice to the interests of the Commonwealth or an agency pending the receipt or proper consideration of legal advice, provided that a decision whether to continue to appeal is made as soon as practicable.

6. The obligation does not prevent the Commonwealth from enforcing costs orders or seeking to recover its costs.

Source: Attorney General's Department, *Legal Services Directions*, Available: http://www.ag.gov.au/aghome/legalpol/olsc/legsvcsdirections/lsd.pdf