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

EXXONMOBIL AUSTRALIA PTY LTD

1. INTRODUCTION

ExxonMobil welcomes the review of the competition provisions of the *Trade Practices Act 1974* (TPA) as providing an important opportunity to consider the current operation and administration of the TPA, and to assess the potential costs and benefits of a range of proposed changes to these provisions of the Act.

ExxonMobil operates in Australia through wholly owned subsidiaries, principally Esso Australia Pty Ltd and Mobil Oil Australia Pty Ltd. As well as being a major producer of oil and gas, ExxonMobil is involved at all stages of oil and gas exploration in Australia and also operates a substantial refining and marketing business under the Mobil brand.

ExxonMobil acknowledges the need for a robust, fair and equitable legislative framework to govern commercial transactions and to promote competitive behaviour in the economy.

ExxonMobil submits that, in large measure, the existing competition provisions of the TPA (sections 45 and 46) are effective in promoting and protecting competition in the market.

In relation to the downstream oil industry, for example, retail competition is among the most intense in any market in the world, with Australian motorists benefiting from access to the cheapest petrol (pre-tax basis) in the OECD.

In ExxonMobil's view, several of the amendments proposed in relation to s46 of the Act in particular would have the effect of imposing considerable new risks and uncertainties on large corporations operating in the retail petroleum market, leading to a reduction in overall competitive activity. Such an outcome would not be consistent with the intent of the TPA to promote competition, and would clearly be adverse to the interests of Australian consumers.

In this submission, ExxonMobil addresses issues relating to the following aspects of the TPA and provides its views on relevant matters for the consideration of the Review Committee:

- Section 45;
- Section 46;
- Section 47;
- Section 50;
- Review processes relating to the competition regulator, the Australian Competition and Consumer Commission (ACCC).

2. SECTION 45

2.1 Introduction Of Criminal Penalties

ExxonMobil notes that some contributors to the debate on competition issues in Australia advocate the introduction of criminal penalties for the s45 offences of price fixing. Those advocating such a measure argue that Australia is out of step with other jurisdictions in this regard and criminal penalties are required to ensure sufficient disincentives for individuals or organisations to engage in activities which are in contravention of s45 provisions.

The introduction of criminal penalties for s45 breaches would be a very significant step and, in ExxonMobil's view, the proponents of this measure have to establish that there is a need for such a major shift in the emphasis and direction of the TPA in relation to s45 contraventions. The mere fact that Australia does not currently have such penalties while other jurisdictions do is not sufficient.

At present, s45 contraventions attract civil penalties and accordingly the standard of proof required is "the balance of probabilities". In ExxonMobil's view it would be highly inappropriate for s45 contraventions to be subject to criminal penalties without a corresponding increase in the standard of proof required to reflect that applying in criminal cases.

However, as noted above, ExxonMobil does not believe a case has yet been made for the introduction of criminal penalties for s45 contraventions. The very serious reputational damage that individuals and corporations sustain from accusation and prosecution under s45, together with the significant pecuniary penalties that apply, already constitute significant incentive against activities in contravention of s45 provisions.

3. SECTION 46

ExxonMobil notes that much comment in relation to the current Review of the TPA, and competition issues more generally, is focussed on s46 "misuse of market power" provisions.

While supporting the need to ensure that firms with substantial market share act in a competitive manner at all times, ExxonMobil is concerned that the introduction of further measures to tighten s46 may in fact mitigate against competitive behaviour, by creating significant new uncertainty and risk of prosecution for firms acting in a competitive manner.

In 3.1 to 3.3 below, ExxonMobil discusses the principal reform proposals that have recently been advocated in relation to s46, and sets out its position on each of these proposals.

3.1 Introduction Of An "Effects" Test

ExxonMobil strongly opposes any suggestion that there be a move away from the current legislative requirement that a misuse of market power must have the *purpose* of reducing competition, towards it having the *effect* of reducing competition, as has been advocated by some individuals and organisations.

ExxonMobil submits that the introduction of an "effects" test into s46 will have the opposite effect to that envisaged by the proponents of such a measure. Amending the TPA to provide for an "effects" test has the potential to create an offence by a corporation simply by virtue of the fact that the corporation may have a relatively large market share in a particular market.

Under an "effects" test, ExxonMobil believes many firms may adopt a more cautious approach to competitive activity in order to avoid potential prosecution, with a resultant net reduction in competition.

ExxonMobil does not believe that a reduction in competitive pressure in the Australian economy would be in the interests of either consumers or business.

In addition, ExxonMobil notes that, under the terms of the current s46(7) of the TPA, it is not necessary to produce evidence that a corporation had the purpose of contravening a provision or provisions of s46, but that such a purpose can in fact be *inferred* from the conduct of the corporation.

In ExxonMobil's view, the power contained in the TPA to infer a contravening purpose renders proposals to introduce an "effects" test unnecessary.

3.2 Reversal Of The Onus Of Proof

ExxonMobil is aware of suggestions that the reversal of the onus of proof would assist in allowing a greater number of prosecutions for misuse of market power, by requiring that accused firms prove that they were not engaging in conduct in contravention of some or all of the s46 provisions.

Many proponents of this suggestion argue that the relatively small number of successful prosecutions for breaches of s46 is evidence that the current legislative framework is not adequate in preventing misuse of market power.

Such a statement is contingent on the belief that there is widespread misuse of market power in the economy, which cannot be addressed under the current s46 provisions. However, the counter argument to this position is that most firms in fact conduct their affairs in a highly competitive and lawful manner. Therefore, the relatively small number of contraventions of s46 which have been established indicates that misuse of market power is not occurring with the frequency that proponents of such changes to the legislation claim it to be.

Further, ExxonMobil believes that a fundamental tenet of the Australian legal system is the presumption of innocence. Proposals to reverse the onus of proof under the TPA or any other legislation must be treated with the utmost gravity, as they are fundamentally at odds with the most basic principle underpinning the rule of law.

ExxonMobil does not believe that a case has been made by proponents of reversing the onus of proof that such a proposal is justified on practical grounds, or that such a fundamental change to the rule of law in an Act so central to Australian economic life is justified.

3.3 "Cease And Desist" Orders

ExxonMobil notes that some organisations and individuals believe the ACCC should be empowered to issue "cease and desist" notices to firms it believes are acting in a manner in contravention of the TPA.

Such a power would, in ExxonMobil's view, represent a *de facto* introduction of the reversal of the onus of proof by an alternative means. The issuing of a "cease and desist" order could effectively force a firm to cease much of its activities pending judicial review of the order, at significant cost and disruption to the firm. In addition, as with the proposed "effects" test, ExxonMobil believes many firms may effectively reduce their competitive behaviour to avoid being served with a "cease and desist" order.

ExxonMobil submits that existing provisions within the TPA render the introduction of additional "cease and desist" provisions unnecessary. s80 of the Act provides for the ACCC, or any other person, to apply to the Federal Court for an injunction to prevent an individual or corporation from engaging in or attempting to engage in activities that would contravene the competition and other provisions of the TPA.

Given the relative speed of the injunction process and the discretion available to the Court in relation to the terms and duration of any such injunction, ExxonMobil sees no need to introduce an additional "cease and desist" power into the TPA.

4. SECTION 47

4.1 Third Line Forcing

Currently, the practice of third line forcing is subject to a per se prohibition within the TPA. ExxonMobil submits that there are circumstances under which third line forcing in fact constitutes competitive and innovative conduct by a corporation.

In ExxonMobil's view, the current third line forcing provisions in the TPA act to prevent reasonable and not anti-competitive commercial arrangements.

A particular example concerning the petroleum products industry is where a company may offer discounted petrol if the purchaser buys goods or services from a certain third party.

There is a notification procedure, but this requires that each retailer operating under a particular company's brand must lodge an individual notification. This is a cumbersome and unwarranted administrative burden.

ExxonMobil submits that the third line forcing provisions should be amended so that third line forcing is not a per se breach of the TPA, and that a more efficient notification procedure be introduced.

5. SECTION 50

5.1 Divestiture

There has been considerable recent focus on the possible introduction of further divestiture provisions into the TPA. Under such proposals, the ACCC would be able to apply to the Federal Court for a divestiture order where a firm or firms have concentrated market power.

At present, the TPA provides for divestiture orders to be made where the Courts believe that there would be a "substantial lessening of competition" arising from further acquisitions by a particular firm.

The proponents of additional divestiture powers believe that such powers should be available for utilisation where a firm achieves additional market share by means other than acquisition, for example where competitive activity such as product innovation has generated additional market share, or where a competitor has failed and exited the market.

In ExxonMobil's view, a divestiture power of this nature would mitigate against competition in the economy, as many firms would moderate their competitive behaviour to ensure they did not become subject to forcible asset divestment.

It is of particular concern to ExxonMobil that the proposals for additional divestiture powers appear not to require that such divestment be linked to a contravention of the TPA. This enhanced power could be invoked simply because of the degree of market share of a firm or firms in a particular market.

ExxonMobil submits that such a power could result in a firm being penalised for being particularly efficient or innovative, or because of the failure of a competitor, as opposed to it having conducted any activity that would constitute an actual breach of the TPA. This would be contrary to natural justice.

5.2 Mergers

ExxonMobil believes the TPA is overly-restrictive in relation to both formal and informal merger proposals.

In ExxonMobil's view, there may be circumstances where a corporation needs to be able to merge with a competitor, either to gain a critical mass in the domestic market in order to expand into overseas markets, or to effectively compete against other local manufacturers or importers.

However, under the current authorisation provisions, the ACCC is restricted to a relatively narrow definition of "public interest" when assessing authorisation proposals.

ExxonMobil believes that it is appropriate for the Parliament, through amendment to the TPA, to more clearly stipulate the general conditions for allowing mergers to proceed, with a view to encouraging rather than discouraging merger proposals that would improve the viability of industry in Australia.

6. SECTION 155

ExxonMobil acknowledges the importance of appropriate information gathering powers to assist the ACCC in fulfilling its responsibilities to ensure compliance with the TPA.

Current provisions under s155 of the TPA provide the ACCC with extensive powers to search premises, obtain information and documents, and require persons to answer questions under oath, with a s155 notice able to be issued where the Chairperson or Deputy Chairperson of the ACCC has reason to believe that it is required under the terms of s155(1) and s155(2) of the TPA.

In ExxonMobil's view, the Review Committee should consider whether it is appropriate for the ACCC, as the investigating body, prosecutor and over-arching competition regulator, to continue to have the ability to issue s155 notices without seeking the endorsement of an independent third party, such as the Federal Court.

ExxonMobil submits that consideration be given to requiring that judicial authorisation be necessary to give effect to such notices. This would align the ACCC's investigative powers with those of other consumer protection agencies at the State level.

7. ADMINISTRATION OF THE TRADE PRACTICES ACT

7.1 Review Procedures for the Competition Regulator

ExxonMobil acknowledges the need for an impartial and effective national competition regulator to administer the TPA. Equally, given the fundamental importance of the TPA to national economic activity and consumer welfare, ExxonMobil believes it is both reasonable and appropriate for the competition regulator, the ACCC, to be subject to open and transparent oversight.

ExxonMobil acknowledges that some aspects of the ACCC's activities are currently subject to administrative and judicial review, through the role of the Australian Competition Tribunal in reviewing certain ACCC decisions under Part IIIA of the TPA, and through the fact that ACCC decisions are subject to review by the Federal Court, under the *Administrative Decisions (Judicial Review) Act 1977.*

However, ExxonMobil submits that it is appropriate for the activities of the ACCC to be subject to more general review processes by a permanent body established for that purpose.

ExxonMobil does not recommend a particular oversight model, but notes that other regulatory, investigative and/or prosecutorial bodies are subject to review by Standing Committees of the Commonwealth Parliament. For example, the Australian Securities and Investments Commission (ASIC) is overseen by the Joint Standing Committee on Corporations and Financial Services, and the National Crime Authority (NCA) by the Joint Standing Committee on the National Crime Authority.

As an alternative to Parliamentary Committee oversight consideration could be given to the establishment of an independent statutory authority to advise the Federal Government on TPA administration issues.

In this regard, ExxonMobil notes that the Government is currently considering the establishment of an Inspector General of Taxation, with powers to review the administration of the taxation system by the Australian Taxation Office. A similar position may be appropriate in relation to administration of the TPA.

7.2 Public Disclosure Of Ongoing Investigations

ExxonMobil appreciates the importance of general public awareness of the rights and protections afforded by the TPA and the responsibilities of all corporations and individuals participating in the economy to act in a lawful manner at all times.

ExxonMobil believes there is a legitimate role for the ACCC to publicise successful Court actions against corporations and individuals convicted of TPA breaches, as this may have a significant deterrent effect.

However, ExxonMobil also believes that the ACCC should not utilise the media to publicise the fact that it is merely investigating allegations of TPA breaches by individuals or firms. Such publicity can have a very significant negative impact on the reputations of individuals and firms under investigation, in circumstances where there has been no proof of illegal conduct.

In ExxonMobil's view, it is fundamental to the integrity of the operation of the TPA that all participants in the economy - whether large business or small - have confidence that the regulator will act at all times in a responsible and objective manner. This extends to the use of the media by the regulator, and the importance of according natural justice to those under investigation for alleged breaches of the TPA.

8. CONCLUSION

This paper sets out ExxonMobil's position on matters that are likely to come before the Review Committee for consideration. In summary, ExxonMobil's views on the issues raised in this submission are:

- There is no evidence to support the need for the introduction of criminal penalties for contraventions of s45 of the TPA;
- The introduction of an "effects" test, the reversal of the onus of proof and the introduction of "cease and desist" orders under s46 are unwarranted and would be likely to mitigate against, rather than enhance, competition;
- The provisions dealing with third line forcing should be amended to remove the current per se prohibition on such activities;
- The introduction of further divestiture powers creates significant uncertainty for business and may inhibit competitive behaviour;
- The merger provisions of the Act should be reformed to assist business to better compete in domestic and international markets;
- Judicial authorisation should be necessary to give effect to s155 notices;
- Consideration should be given to the establishment of a review body to oversee the decisions and general activities of the ACCC;
- The ACCC should not utilise the media to publicise its investigations into alleged breaches of the TPA.

ExxonMobil is available to discuss this submission with the Review Committee.