Review of the Competition Provisions of the Trade Practices Act, 1974

Submission to the Committee of Inquiry

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Introduction

This submission will focus on four sections of Part IV of the Trade Practices Act, 1974 ("**the Act**") which fall for examination under the terms of reference for this Inquiry announced by the Commonwealth Treasurer on 9 May 2002.

They are:

- sections 45/45A - Price Fixing;
- section 46 - Misuse of Market Power; and
- section 50 - Mergers.

The submission will also touch upon Part VI, and Part VII.

The submission will draw upon the experience of the writer as a practitioner in competition law which might be said to have commenced with the *Frozen Vegetables* case [(1971) 18 FLR 197], a decision of the then Trade Practices Tribunal which concluded that certain price fixing arrangements between manufacturers of frozen vegetables in Australia were contrary to the public interest and therefore illegal under the then restrictive Trade Practices Act, 1965. The practice has continued uninterrupted since then save for a period of 3 years between 1985 and 1988 when the writer was Chairman of the then Trade Practices Commission.

As the Treasurer pointed out when announcing this Inquiry, *"there has not been a comprehensive review of Part IV, since the Hilmer Committee reported in 1993"*. Necessarily, however, he acknowledged that there had been reviews of particular provisions of the Act "in recent years"; indeed, there have not been many periods since 1974 when one or other of its provisions have been free of attention.

Whether the resulting benefit has been commensurate with the level of such attention is open to question, but if one is to measure that by shortcomings which both regulated and regulator continue to claim exist in some provisions of Part IV, the answer is in the negative.

Fundamental Proposition and Underlying Principles

The fundamental proposition of this submission is that no need, or no sufficient need, has been shown for amendment to the sections to which reference has been made despite views to the contrary expressed forcefully by the Australian Competition and Consumer Commission (ACCC) and some special interest groups.

The submission also proposes that there should be no departure from the legislative policy which applied to the Act when first introduced and was expressed by the then Attorney-General in his second reading speech for the Trade Practices Bill (No. 2) 1973 (Senate Hansard 15 November 1973) in the following terms:

> *"Legislation of this kind is concerned with economic considerations. There is a limit to the extent to which such considerations can be treated in legislation as legal concepts capable of being expressed with absolute precision. Such an approach leads to provisions which are complex in the extreme and give rise to more problems than they remove. The present bill recognises the futility of such drafting. Many matters have, of course, had to be stated in detail. But* ***other provisions, particularly those describing the prohibited restrictive trade practices, have been drafted along general lines using, wherever possible, well understood expressions****. I am confident that this will be more satisfactory. The courts will be afforded an opportunity to apply the law in a realistic manner in the exercise of their traditional judicial role." (emphasis added)*

It is submitted that, in its deliberations, the Committee should accept that the possession and exercise of market power is not the prerogative of large corporations. Of "market power", Scherer, in the Third Edition of Industrial Market Structure and Economic Performance said at page 18:-

> *"The power over price possessed by a monopolist or an oligopolist depends upon the firm's size relative to the market in which it is operating. It is entirely possible for a firm to be very small in absolute terms, but to have considerable monopoly power. The physician in an isolated one-horse town is an excellent example … On the other hand, a firm may be enormous in absolute terms, but possess little monopoly power in its principal markets … To postulate a 1-to-1 relationship between monopoly power and absolute size is like confusing pregnancy with obesity. Some superficial manifestations may be similar, but the underlying phenomena could hardly differ more."*

It is submitted that, by and large, Part IV of the Act as presently drafted, is capable of fulfilling its objective - "To enhance the welfare of Australians through the promotion of competition and fair trading and provisions for consumer protection" (section 2).

It is unrealistic to believe that it is possible to legislate for competition. The phenomenon is incapable of precise definition, whether in economics or law, and the attempt should not be made. Rather, should one heed the wisdom of Bowen CJ and Fisher J in *Outboard Marine v. Hecar* (1982) ATPR 40 - 327 at 43,983:

> *"The comments of Dr Norman and Mr Nettleship are, in a sense, reconcilable in that they both refer to aspects of competition in the market and do not attempt an exclusive definition.* ***The economic meaning must be applied in a practical way to accommodate the concern of the Act with business and commerce.****" (emphasis added)*

The submission now proceeds to examine the sections referred to in the Introduction.

Sections 45/45A - Price Cutting and other Collusive Conduct

The ACCC has recommended that Part VI of the Act be amended to introduce criminality to "price fixing, bid rigging, market sharing and, possibly, collective exclusionary boycotts". This recommendation appears in the ACCC's annual report for 2000/2001 at page 8 where it is contended that it should not apply to small businesses or trade unions. It has been widely promoted since by the Chairman of the ACCC.

Certainly it must be acknowledged that none of these practices is acceptable according to proper standards of business behaviour to which the substantial majority of corporations subscribe.

Such conduct, however, is not limited to "big business" even though that is the focus of the ACCC's views. At least, so far as price fixing and, in many cases an incidental consequence, market sharing, are concerned, small business is, if anything, more often the transgressor.

Of the eleven "price fixing and cartel" cases reported in the ACCC's annual report to have been instituted during 2000/2001, five were against or involved large corporations, the remainder (the majority) being small to medium enterprises.

And on 24 May 2002, the ACCC announced that it had commenced proceedings in the Federal Court against seven companies and seven individuals for fixing the prices of petrol in the Victorian country region of Ballarat. None of the companies would appear to qualify for the title of "big business".

The ACCC's annual report notes that the practices "are not only dishonest but they directly affect prices and seriously impair the operation of free markets".

That must be so but, save for scale, these consequences will flow just as much from the conduct of small as from large businesses.

Whether or not criminal sanctions are called for, however, is yet to be demonstrated. It is insufficient to say that they are because a number of countries with which we trade or have common legal systems and fundamentally similar laws which outlaw collusive anti-competitive conduct treat them in that way.

The ACCC also proposes that the conversion of penalties for price fixing and hard core cartel activity from civil to criminal should make provision for gaol sentences where considered appropriate.

The ACCC has not demonstrated sufficient justification for this. There is no evidence that such conduct is widespread. Indeed the cases involving large corporations would seem to show that they are exceptional.

Before such a dramatic step might be undertaken, the ACCC should be required to demonstrate that its submissions flow from a more objective policy in its administration of the Act than a mistrust of "big business" and zeal for medial headlines. The syndrome of "big is bad" is not sustainable for the substantial majority of corporations in Australia, which, in the writer's experience as a practitioner and a regulator, are concerned primarily with the efficient and profitable conduct of business operations, not with contravening the Act. It is insufficient to suggest that large, wealthy corporations, are well able to afford the most severe monetary penalties which might be imposed; contravention proceedings instituted by the ACCC are intrusive, disruptive and damaging to the public perception and internal management of such corporations penalties in themselves. It is also to be noted that, where large corporations have been penalised for such conduct, they have not shown any tendency for recurrent activity of that kind. Rather, in the writer's experience, such corporations have been at pains to insist upon the introduction of programmes for and compliance with the Trade Practices Act.

A more effective means of ensuring compliance would be to amend Part VI to require individuals to be personally liable for and to pay penalties awarded against them and, correspondingly, to make it illegal for their corporations/or related corporations to provide them with financial assistance to do so.

If the Committee of Inquiry should be persuaded by other submissions that there should be severe sanctions for non-payment of penalties by individuals, let the principles of section 79 be adapted so that non-payment of penalties for Part IV offences may be visited by imprisonment in appropriate circumstances.

Finally, it is submitted that, if (contrary to this submission) criminality were to be introduced, let it apply without exception to all business enterprises, whether large or small and let the nature of the penalty be adapted according to the severity of the conduct. That is a principle of our criminal law where the ultimate penalty is adapted to the conduct. Petty theft might result in the offender being placed on a bond where major larceny would fetch a lengthy sentence. Both are criminal offences but the penalty awarded is appropriate to severity of the crime.

Section 46 - Misuse of Market Power

The second of the Committee's Term of Reference calls for it to determine whether there is an appropriate balance of power between competing businesses, particularly between small and large businesses.

This calls for an examination of section 46, which proscribes a corporation which possesses substantial market power from taking advantage of that power to eliminate or inflict damage upon competitors, to deny opportunity for new entry or to inhibit competitive conduct, in each case whether in the market in which the corporation has that power or in another market.

In any examination of this section and its impact, it should be recognised that the possession of market power, substantial or otherwise, is not the prerogative of the large corporation (see the above extract from Scherer), nor should the legitimate, albeit aggressive pursuit of its business by such a corporation be labelled a misuse of its market power if a smaller corporation is unable to match it in the market place.

That is too simplistic a proposition which is inimical to the objective of the Act and ignores commercial reality. It would impose a penalty upon growth and the attainment of size through efficiency were it accepted.

Section 46 cases in the Federal Court demonstrate that proceedings under of section 46 have not been limited to claims against large corporations. Two of them are:

Mark Lyons, a small discount retailer, successfully used section 46 against Bursill Sportsgear, a moderate sized wholesaler of ski gear, for denying him supply of a particular brand of ski boots of which Bursill was the exclusive Australian agent without which Lyons satisfied the Court he could not offer a competitive range of such gear. [(1987) ATPR 40-809

Papersave, a relatively small corporation, was found to possess substantial market power but to have engaged in its conduct for a commercial rather than for a proscribed purpose when it pre-empted Williams in obtaining a lease of premises which Williams needed to establish a competing business. [(1987) ATPR 40 - 871]

There are others such as *Eastern Express v General Newspapers* [(1992) 35 FCR 43] (predatory pricing) *Robert Hicks v Melway Publishing* [(2001) 75 ALJ 600] (refusal to supply)

The most vocal of the critics of section 46 has been the ACCC, whilst small retailers and certain buying groups have been prominent in their calls for the section to be amended to provide particular sanctions against large retail chains and groups.

The ACCC has criticised the "purpose" test as imposing too difficult a task of proving a breach of the section.

In submissions made recently to a Senate Committee on the subject, the ACCC emphasised its concern at the difficulty it faces in prosecuting the section because of having to prove a proscribed purpose. It canvassed the possibility of reversing the onus of proof so that, on a showing of a prima facie case, it would be for the respondent to disprove the allegation. The ACCC was prepared to vacate that proposal if the section were amended to cause the section to be contravened if conduct of the corporation were to be shewn to have had the **effect** of damaging a competitor, denying entry, or inhibiting competitive conduct.

This amendment would be added as an alternative to rather than a replacement of the present purpose test and is supported by a major retailer association as preferable to a reversal of the onus of proof.

The ACCC also expressed support for a "cease and desist" power so that the interregnum between the commencement of proceedings and their completion might provide interim relief alleged but not proved.

As for that one must point out that such a power could be tantamount to adjudging proscribed conduct to have taken place before it has been proved and to stifling the relevant part of the business of the subject corporation for an indeterminate period.

It should not be supported, leaving aside whether such a power in the hands of a administrator would be constitutionally valid

The ACCC criticises the "purpose" test as too onerous. The cases do not support this and the problem with an "effects" test would be that it could call into question legitimate albeit aggressive competitive conduct by corporations possessing the relevant degree of market power, power which, of itself, in not unlawful. As Mason CJ and Wilson J observed in QWI, "Competition by its very nature is deliberate and ruthless" [(1989) ATPR 40-925 at p50,010], whilst Deane J said at pp50,011,2 that

> *"The objective (of section 46) is the protection and advancement of a competitive environment and competitive conduct…".*

It is simplistic to suggest that, if the conduct of a corporation having the requisite degree of market power results in a loss of business by a competitor or one of the other outcomes stipulated in subsection 46(1), it must have achieved that result by having taken advantage of its power for that purpose.

To incorporate an effects test in section 46 would put ordinary competitive conduct at risk if engaged in by corporations with a substantial degree of market power.

No compelling case has been made for section 46 to be changed. Recent of cases in the Federal Court and the High Court have provided or will provide authority on the interpretation and operation of the section.

Examples are:-

- Refusal to supply – High Court - Queensland Wire Industries [(1989) ATPR 40-925], refined in Melway [(2001)ATPR 41-805].

- Predatory pricing - Boral – Full Federal Court [(2001) ATPR 41-803] awaiting judgement in the High Court.

- Elimination of a competitor – prevention of new entry - Rural Press – Single Judge Federal Court [(2001) ATPR 41-804]. The decision has been appealed and judgement of the Full Federal Court is awaited.

- De-listing of product, "abuse" of market power - Safeway – Single Federal Court Judge [(2002) ATPR 46-215] awaiting appeal to a Full Federal Court.

Section 46 is evolving, as it should, by case law, not by perceptions of inequality by special interests.

Much of section 46 remains to be explored. Subsection 46(1A) for example which, because it permits subsection (1) to be read as though "competitor" and "person" were expressed in the plural, might extend to damage to (a substantial lessening of) competition in the relevant market, whilst subsection 46(7) might yet be found to incorporate what in substance is a surrogate for an effects test by permitting "purpose" to be inferred from the conduct of the corporation and "other relevant circumstances". Here "conduct" is not limited to an isolated item of behaviour but might reasonably extend to a course of conduct over time.

The suggestion that section 46 should contain an "effects test to overcome the difficulty perceived by the regulator of proving great purpose" is not at all novel. Indeed, one might suggest that it is something of a fetish of the ACCC in that it sought unsuccessfully to have the same test written into section 46 when it made its submissions to the Senate Standing Committee on Legal and Constitutional Affairs (the Cooney Committee) which reported in December 1991.

The subject is treated at some length in the Cooney Committee's Report commencing in paragraph 5.14 on page 81 running through to paragraph 5.31 on page 86.

Its conclusions are set out in paragraphs 5.62 to 5.65, a relevant extract from paragraph 5.64 being as follows:

> *"The Committee accepts that purpose is an essential element of the contravention. To prohibit the taking advantage of market power where this has, or is likely to have the effect of, for example, preventing a person from engaging in competitive conduct would unduly widen the*

operation of the prohibition. It would force corporations to evaluate the potential effect of their every action on their competitors and potential competitors."

It is also worthy of note that the Cooney Committee saw no merit in the suggestion of divestiture as a remedy for market power abuse. It distinguished (at paragraph 5.77) between the structural nature of divestiture on the one hand and the conduct issue involved in misuse of market power. The Committee recognised the difficulties of divestiture and finally recommended, in paragraph 5.80, that divestiture not be made available as a remedy but that "serious and persistent misuse of market power be dealt with by increasing monetary penalties".

Much will be written and more said about section 46 and whether or not it should be amended to satisfy the protagonists of change, but in the opinion of this writer, no, or no sufficient reason has yet been shewn to do other that let it remain as it for the foreseeable future.

In the meantime one might reasonably adapt to the interpretation and administration of section 46 the words of Deane J in QWI where he said of "take advantage of power" that -

"Read in context, the words…are simply inadequate to superimpose upon the economic notions and objectives which sec. 46(1) reflects some indefinite moral or public purpose qualifications requiring circumstances where the active or passive use of the relevant market power for one or other of the designated anti-competitive purposes is morally or socially undesirable".

Proposed Section 50AA

It has been suggested that a new section 50AA be inserted in Part IV to provide that:

"If a corporation:

(i) owns shares in the capital of a body corporate; or

(ii) owns assets of a person,

and the ownership has the effect of substantially lessening competition in a market, the ACCC may apply to the Court for an order that the corporation divest itself of the shares or assets."

Significant features of this suggestion have been that an application for its implementation may be made by the ACCC at any time regardless of when shares or assets have been acquired and further, that the Court may be requested to order that the corporation divest itself of particular shares or assets which are owned by the corporation whether or not it is the use of those shares or assets which has had the proscribed effect upon competition.

In substance, the proposal is ill-conceived and certainly much wider in its impact than could be justified.

The proposal is indiscriminate in its identification of particular shares or assets, and whether they are long held or recently acquired. Such a proposal would, catch a circumstance where, say, a corporation has consolidated all of its relevant market activities into a single subsidiary or the whole of its production into one plant where their efficient use has not been matched by smaller, less efficient entities.

Much of the support for such a draconian provision has emanated from small retailers who have complained about the growth of the large retail chains and groups but, much though one might sympathise with them, they have no case for seeking legislative protection from legitimate competitive conduct of corporations whose growth, after all, has resulted from consumer support for the services and shopping convenience which they offer.

Note that the proposal addresses itself to ownership rather than the use to which particular assets are put; and would appear to be another way of penalising the attainment of size by lawful means. This is not a supportable or sensible proposition.

The remedy for many of the complainants is to adapt their business to contemporary consumer demand by offering special attention to consumers who prefer personal service to mass, do-it-yourself, shopping. There are many examples of this having been done..

Overall, the history of divestiture powers in other jurisdictions is not one which shows that Courts have any liking for such a remedy. They realise the damage that can be caused to the efficient operation of business and to other difficulties which can flow from divestiture orders, a fact of business life which can be illustrated by orders made following a finding of a contravention of section 50 in *Trade Practices Commission v. Australia Meat Holdings Pty Limited and Ors.* [(1989) 11 ATPR 40-032].

Not surprisingly, Courts seek to avoid circumstances where they might be called upon to monitor compliance with their requirements. The matter was well articulated by Sheppard J in that case at page 50-932 where, quoting from an article written by Ms J R Levine, he recorded:-

> *"Once a merger has been completed, it is very difficult, costly and time consuming to "undo" it."* …

He went on to illustrate the difficulties.

Section 50 - Mergers

Since 1993, section 50 has proscribed the acquisition by a corporation of the shares or assets of a body corporate if it will result or be likely to result in a substantial lessening of competition in a market for goods or services. That test is substantially the same as it was when section 50 was first enacted in 1974 but replaced by the more liberal test of market dominance for almost 16 years from 1977 until 1993.

"Market" for section 50 purposes, now means a substantial market for goods or services in Australia, in a State, in a Territory or in a Region of Australia [sub section 50(6)].

The principal objection levelled at section 50 is that is constrains the ability of Australian corporations to achieve that mass which might fit them to compete in global markets, and that, in its administration of the section, the Australian Competition and Consumer Commission (ACCC) is unreasonably, sometimes said to be myopically, focussed on the adverse consequences of high levels of concentration in domestic markets. In this writer's opinion, the first proposition is not made out; there is substance in the second.

The then Trade Practices Tribunal (now the Australian Competition Tribunal) observed in the seminal case of QCMA in 1976, "other things being equal, significantly lower market concentration is preferable to a high level", but, it went on, "other things are rarely likely to be equal". [(1976) ATPR 40-012 at 17,246]

As the then Chairman of the US Federal Trade Commission observed in a speech to a seminar on "Regulating for Competition" conducted in Sydney by the Centre for Independent Studies on 29 February 1988

> *"Our approach to mergers is thus similar to the approach taken by our colleagues at the Trade Practices Commission. To the extent that the Australian statute might be considered more 'lenient' than ours, the difference might be explained by the relatively smaller size of most Australian markets and the unavoidably greater levels of concentration that result. But within the parameters established by statute, the methods of economic analysis that should be used, and the structural, behavioural, and performance factors that should be considered, are very much the same. Identifying the 'field of rivalry', considering competitive factors beyond market share, and paying special attention to the role of imports - in all these areas the US and Australia are fraternal, if not identical, twins."*

In an economy the size of Australia's, it is to be expected that levels of concentration of industry are high relative to those in more populous economies. That is not to say that Australian industry is not competitive. Consumers in Australia, as elsewhere, demand the best of goods and services and in order to satisfy that demand, industries must be equipped to produce goods and provide services which consumers will buy. To do that, they must not only invest in appropriate plant and technology – they must be in a position to offer their output at affordable prices – to compete with imports and, in the appropriate categories, to compete on export markets.

An example of very high concentration through merger which has successfully run the gauntlet of the Act because of effective competition from imports is the whitegoods industry. Where, some twenty or so years ago, there were more than six Australian based manufacturers, there are now but two, with sustained high levels of imports. One of the two manufactures only a limited range of products in Australia, importing much of what it sells in Australia from its substantial home base in New Zealand..

Another example is fine paper where the only two Australian manufacturers merged without objection from the ACCC against a background of sustained imports of at least 10% of the Australian market.

There are others where monopoly production operations have been authorised.

By contrast, the ACCC has rejected proposals by Australian based oil companies to rationalise their refining operations by reducing four to two, notwithstanding that there are imports. Critics suggest this is an example of over preoccupation with numbers, particularly as the companies supply each other on an exchange basis in States where they do not operate refineries, a practice of long standing well known to the ACCC.

In a controversial ruling, the ACCC objected to a merger between two relatively small paint companies because it would reduce the number of competitors from three to two, even though, it was argued, the merged entity would have been better equipped to offer effective competition to the market leader. Another example of competition being measured by the number of competitors?

In the context of section 50, one should mention an interesting article by Ross Gittins, the Economics Editor of the Sydney Morning Herald, in the Weekend Edition of March 2-3 2002 where he reported on the results of a survey by the Productivity Commission of offshore investment by Australian firms. With a focus on eight companies which have moved or might move their headquarters offshore, he reported that three of them say mergers law is a highly important factor inhibiting their local growth. Gittins went on:

> *"But if you change the question and ask the eight headquarters movers how important mergers law is in influencing their actual decision about relocation, you find the answer changes. Three say mergers law is of little or no importance and only one says it is of high importance."*

This Productivity Commission report, suggests Gittins, does not support the claim that Australia's statutory restrictions on company takeovers are a major problem for Australian big business.

The writer agrees.

One question which must be asked is whether it is in the interests of competition in Australia and its economy that businesses already highly concentrated should be permitted to become even more so to meet the stated objectives of their proponents of ability to grapple with global competition elsewhere in the World without demonstrating a commensurate benefit in Australia.

This question of international competitiveness was considered in some depth by the Cooney Committee and culminated in its recommendation in December 1991 that the then dominance threshold in section 50 revert to substantial lessening of competition, a recommendation accepted and passed into law effective January 1993.

When dominance was introduced in the 1977 amendments, it was accompanied by the prayer that there should be no legislative or administrative impediment to the ability of Australian corporations to compete internationally but, as already mentioned, the need for that lower threshold was seen to be required no longer as a result of the deliberations of the Cooney Committee and the subsequent amendment to which reference has been made.

Whether section 50 in its present form really inhibits the opportunity for Australian businesses to compete on global markets is at large, and, in the writer's opinion, not made out. Protagonists of that argument are few, albeit vocal, but to date, it is difficult to identify any empirical evidence of its validity.

Rather might it be said that, to the extent that particular Australian corporations have been able to establish operations offshore, their success of itself has not depended upon their relative size in Australia. Certainly it is difficult to identify those Australian businesses which have equipped themselves to enter offshore markets by or as a result of Australian mergers. Rather does it appear that their success offshore has been the result of the efficient and effective export of know-how, of product suitability, access to sufficient capital, and, particularly, good management and understanding the behaviour of and the need to adapt to the markets in which they have chosen to compete.

Conversely there are notable illustrations where corporations which have achieved growth by merger in Australia have not succeeded in their offshore expansion, leading to the reasonable deduction that growth in size within Australia is not of itself the determinant of globally effective competitiveness.

Leaders in the financial services industry in Australia represent perhaps the most vocal critics of section 50 as having given force to the so-called "Four Pillars"' policy of forbidding mergers between any two of the four major banks. The major complaint is that the inability of those banks to merge is constraining their ability to achieve that size which will enable them to compete globally. All are quite profitable.

It might perhaps be noted that the most vocal of those corporations has been a major (but not notably successful) offshore investor and that the Act has not inhibited its undertaking its investments.

It should also be noted that, if, as claimed, a merger of any two of the four major Australian banks would achieve those economies of scale and scope which would enhance their ability to compete globally, such that they could demonstrate commensurate benefits for the Australian economy – public benefits – it should be possible to obtain a formal authorisation for the merger without any softening of section 50. That, of course, provided that the Government abandons its Four Pillars Policy and the Treasurer consents to the merger under the Banking Act.

As at present demonstrated, it would seem that there is no case for reverting to a test such as the dominance threshold which operated between 1977 and 1993 nor should exceptions be made for particular activities.

In other words it has yet to be shewn by the protagonists for change in the competition threshold in section 50 that their claims that it will assist of itself their competitiveness globally are valid. Their task now will be to convince the Committee of Inquiry that the Act should be amended to enable them to achieve those ambitions.

This submission does not support that proposition.

Some Suggestions.

It is clear that the writer does not believe that any serious defect sufficient to justify any significant change in the sections he has addressed has to date come forward.

On the contrary, it is submitted that they are quite capable of continuing to service to the objective of Part IV as found in section 2 in articulating rules of business behaviour the non-observance of which may be visited with severe monetary penalties.

However there are some procedural and behavioural issues which should be given serious attention and they include:

1. Limit the time which the ACCC might take to deal with authorisation applications other than mergers which already have their own limits by proclaiming the 4 months' limit in sub-section 90(10).

2. Provide for direct access to the Australian Competition Tribunal for all authorisation applications, but first ensure that the Tribunal will be provided with effective staff support, and that its procedures are streamlined to enable it to undertake this function ab initio within stated time limits.

If, as might be expected, the ACCC staff were to provide this support, they would have to be subject to the directions and supervision of the Tribunal and follow its procedures rather than the somewhat cumbersome procedures now employed, a factor which demonstrates that, despite its apparent attractions, careful thought would have to be given to the practicality of this suggestion before it could be adopted.

3. Require the ACCC to notify corporations seeking informal "clearances" for particular conduct of the results of enquiries undertaken in the course of ACCC investigations in sufficient detail to enable the corporation requesting clearance to respond. Confidentiality should continue to be awarded to the identity of the source of but not the details of those results. At present the corporations must rely on substantially paraphrased renditions of those results, thus severely limiting their ability to address the issues effectively.

4. Require the ACCC to reimburse the costs of a corporation incurred following ACCC threats of contravention proceedings which have not been commenced within 30 days after any public announcement of ACCC intentions unless the ACCC satisfies the Court that it had reasonable grounds for the announcement.

In this context, the Act might be amended to provide to a complainant a remedy along the lines of that available under section 129 of the Trade Marks Act 1995 to a person who has been the subject of groundless (unjustified) threats of legal proceedings.

Such a remedy is to seek from the Court a declaration that there were no grounds for marking the threat and an injunction restraining the continuation of the threats. A threat may be oral or in writing and may be made in circulars or advertisements and whether or not a threat is justified may be determined by what would ordinarily be understood by an ordinary reader. [See Lunar Advertising Co Ltd v Burham & Co (1988) RPC 58; Reymes - Cole v Elite Hosiery (1965) RPC 102]. Such a provision would ensure that the ACCC has supportable grounds for publishing material suggestive of contraventions or the likelihood of enforcement proceedings before doing so.

5. Preclude the ACCC from commenting on contravention proceedings undertaken by it other than the fact until they are concluded unless jointly with the respondent(s).

6. Preclude the ACCC from public comment on investigations of possible contraventions of the Act until they have been concluded without not less than 24 hours' prior notice to the corporation(s) to be investigated.

The ACCC practice of promulgating in the media alleged conduct which the ACCC is investigating or proposing to investigate without prior notice to the corporations concerned will be likely to put them at a significant disadvantage in their ability to respond meaningfully after the event..

"The stances so taken", as His Honour Justice Finn observed in Electricity Supply of Australia v ACCC (2001) ATPR 41-838", may constitute good public theatre. Whether they represent good public administration is another matter".

In the writer's opinion, it behoves the ACCC to demonstrate a more objective policy in its administration of the Act. The syndrome of "big is bad" is not sustainable for the vast majority of corporations in Australia and in continuing to press a contrary view, the ACCC is displaying substantial and unfair bias not appropriate to the substantial regulatory power it is able to exercise under the Act as presently drafted..

Sydney

9 July 2002