Submission to the Dawson Review of the Trade Practices Act 1974 and its Administration

9 July 2002

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EXECUTIVE SUMMARY

ASX welcomes the opportunity to provide a submission in respect of the Review of the Trade Practices Act (the Act).

ASX supports a pro-competitive economy and a regulator of competition law, the Australian Competition and Consumer Commission (ACCC), which has available to it legislation that enhances Australia's prosperity by promoting competition and fair dealing. Effective competition policy and laws are an important component of the infrastructure for a well functioning developed economy. The Trade Practices Act should be able to adequately address anti-competitive behaviour without constraining Australian businesses from effectively competing in an increasingly global marketplace.

ASX considers that it is timely to review the operation of the Act to ensure that it continues to be effective in the context of an evolving commercial environment and new business challenges, while preserving the interests of consumers.

This review raises many important issues that require careful consideration. The Business Council of Australia (BCA) Submission comprehensively deals with these major issues and ASX fully supports their recommendations. Consequently, we have chosen not to deal with these matters comprehensively within this submission. Rather, we have decided to concentrate our submission on a number of specific problems that we believe largely represent administrative anomalies, required clarifications or the need to update the Act to allow for consistent treatment. We consider these problems ought to be readily addressed as a matter of priority. In particular:

- Sections 45 and 45A relating to anti-competitive conduct and price fixing were drafted well before Dual Listed Company (DLC) structures were envisaged, hence their application to such corporate structures needs to be clarified to prevent technical breaches of the Act;

- Update the third line forcing provisions (sections 47(6) and (7)) to:

  – make them subject to the competition test (section 47(10)), rather than per se, in line with the rest of section 47;

  – eliminate an anomaly that arises under section 93(2) whereby pre 1995 authorised third line force conduct is precluded the option of notification, an option that is open for post 1995 conduct; and

- Legal Professional Privilege should also apply in respect of documents requested under section 155 Notices.

1. Introduction

Australian Stock Exchange Limited (ASX) welcomes the opportunity to make a submission to the Trade Practices Act Review, in respect of both the competition provisions of the Trade Practices Act (the Act) and the way the Act is administered by the Australian Competition and Consumer Commission (ACCC).

ASX considers that this Review provides the Australian community with the opportunity to consider the Act and its administration in the context of ensuring that competition law and policy are up to date with an ever changing and global market place, as well as ensuring that community needs and expectations are met. The Act and its administration has not been reviewed in such a comprehensive manner for almost a decade which makes this Review timely in assessing whether Australia's competition law and policy is appropriately able to deal with the challenges faced by Australian business while preserving the interests of consumers.

It is important to maintain and promote an environment that encourages investment in the Australian market and allows companies to grow globally without the need to move their domestic domicile. As part of this, Australia's future prosperity should be considered in the context trends towards globalisation of commercial activities.

The effects of regulatory failure reach well beyond issues of corporate competitiveness and profitability, to impact upon employment (both in the quantity and quality) and the quality of life in Australia. The broader economic and political cost to over-regulation expands not just to those companies to whom the over-regulation applies, but may have far reaching effects upon a broad range of industries and the connection between quality of life, economic performance and the viability of the corporate sector must always be borne in mind.

We have had the opportunity to review the submission made by the Business Council of Australia (BCA) and fully support their recommendations. Accordingly, we will not be addressing the issues raised by them, except to the extent that we consider it appropriate to elaborate upon them. We have instead taken this opportunity to highlight three particular areas of the Act which provide anomalies in application and therefore ought to be amended expediently.

In particular:

- Sections 45 and 45A relating to anti-competitive conduct and price fixing were drafted well before Dual Listed Company (DLC) structures were envisaged, hence their application to such corporate structures needs to be clarified to prevent technical breaches of the Act;

- Update the third line forcing provisions (sections 47(6) and (7)) to:

  – make them subject to the competition test (section 47(10)), rather than per se, in line with the rest of section 47;

  – eliminate an anomaly that arises under section 93(2) whereby pre 1995 authorised third line force conduct is precluded the option of notification, an option that is open for post 1995 conduct; and

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2. Dual Listed Companies

DLCs are created by entities that wish to merge their businesses, but for commercial, legal or tax-related reasons maintain separate corporate identities in their respective countries. The DLC structure allows the merged businesses to exploit commercial opportunities that may otherwise not be available while enhancing access to foreign capital markets.

In Australia, the interest in DLC's appears to be on the increase. DLC structures have long featured in Europe as an alternative form of corporate structure mainly driven by the difficulties associated with affecting mergers across jurisdictions.

There can be considerable benefits to entering into a DLC, including:

- Reduction in investor "flowback" (i.e., the extent to which shareholders can be expected to shift their investments away from a post-merger entity);
- The benefits of scale, merger synergies and continuity of franking can be provided, without the need for disposal or transfer of shares;
- No capital gains tax or stamp duty issues;
- No shareholder is forced to sell or exchange their shares;
- No loss of national identity or corporate structure for either DLC entity;
- Improved access to capital markets and a choice of currencies for future global acquisition opportunities;
- It reduces the instances of Australian listed companies moving their headquarters offshore.

A DLC is entered into by a series of contractual arrangements between the two listed entities under which they operate as if they were a single economic enterprise. A DLC does not involve disposal of shares by the shareholders of either company and does not require the transfer of assets between the companies, and hence does not fall within the Act's definition of a "merger", however, the same practical result is achieved, allowing two companies to operate as a single economic unit, while at the same time allowing each to retain its separate legal identity, tax residency and stock exchange listing and avoiding the difficulties associated with effectively changing jurisdictions.

DLC structures are subject to different tests under the Act compared with those applying to other types of merged entities or "related parties". Basic acquisitions of assets or shares are subject to the competition test under section 50. While DLC's are equivalent to a merger, they are not treated by the Act as a merged entity or "related parties". They may technically be deemed competitors engaging in an agreement, arrangement or understanding that relates to price (price fixing) or other anti-competitive conduct and be caught by the provisions of sections 45 or 45A.

The Act at present does not allow a DLC to conduct its business in the same manner as it would if the parties merged through an alternative structure or were "related parties". It is therefore essential to ensure that companies that enter into DLC arrangements do not unintentionally breach the provisions of the Act. For example, an entity that is party to the DLC arrangement could find itself in breach of either sections 45 or 45A of the Act without having engaged in anti-competitive conduct or price fixing. This is because the conduct of the entities acting as one, essentially a "virtual merger", is not recognised by the Act and therefore the parties' conduct, acting in the best interests of the DLC, could technically be considered an illegal activity between competitors.

A fundamental premise is that cases ought to be treated the same where for all practical purposes they are the same. Distinctions that are not based on appropriate grounds must be removed from the Act in order to allow for economically equivalent structures to be subject to the same test.

Transactions between bodies corporate that are related to each other and transactions between joint venture partners are specifically exempted from section 45[1] and s45A[2]. A "related party" for the purposes of section 45 is defined in section 4A(5) as:

- the holding company of another body corporate;
- a subsidiary of another body corporate; or
- a subsidiary of the holding company of another body corporate.

Entities entering into a DLC with each other will not ordinarily fall within this definition.

For the purposes of receiving the joint venture exemption of section 45A(4), there must be a provision of a contract, arrangement or understanding, or a proposed contract, arrangement or understanding, which is a provision:

(a) in relation to the price for goods or services to be collectively acquired, whether directly or indirectly, by parties to the contract, arrangement or understanding or by proposed parties to the proposed contract arrangement or understanding; or

(b) for the joint advertising of the price for the re-supply of goods or services so acquired.

The very nature of the DLC would suggest that the parties would be entering into conduct that extends beyond the scope of the protection afforded by this provision. A DLC structure is a legal means by which to give effect to a merger. It should therefore be recognised as such under the Act.

Recommendation: ASX supports the review of sections 45 and 45A to address the anomaly.

3. Third line forcing

Change to Substantial Lessening of Competition

ASX supports the introduction of a substantial lessening of competition (**SLC**) test for the third line forcing provisions contained in Part IV of the Act. Further, ASX also supports an amendment to the provision which would treat third line forcing involving related companies in the same manner as forcing by a single corporate entity. We note that in a recent discussion paper[3] Treasury also raised the consideration of this amendment.

Third line forcing is the practice whereby a corporation supplies goods or services on condition that the purchaser acquire further goods or services from another person. This is prohibited per se under sections 46(6) and (7) of the Act. The per se prohibition operates differently to most of the other prohibitions in Part IV of the Act, and indeed, including section 47 itself. Section 47 provides that a corporation shall not, in trade or commerce, engage in the practice of exclusive dealing, and this is subject to the substantially lessening competition test.

The historical reasons concerning the anti-competitive nature of third line forcing, which were raised initially in the Swanson Committee Report (1976) and related to lending institutions insisting on borrowers using a nominated insurer, is now no longer relevant. The competition and consumer concerns of the mid 1970's no longer apply, as markets in general, and the financial services markets in particular, are more competitive today than they were a quarter of a century ago. Not all third line forcing is necessarily anti-competitive, and in fact some forms of third line forcing are actually of benefit to consumers and end users.

[1] Section 45(8) of the Act
[2] Section 45A(4) of the Act
[3] Discussion Paper, Possible Amendments to the Trade Practices Act 1974, 2001

In 1993, the Hilmer Report recommended that the provisions relating to third line forcing should be made consistent with the other provisions dealing with vertical restraint arrangements, with the replacement of the per se prohibition with the competition test.

Immunity from court action, on net public benefit grounds, has been available under the authorisation process since August 1975 and the notification procedure has been available since August 1995. With notification, immunity from court action for third line forcing conduct is obtained automatically 14 days after lodgment, and continues unless and until the ACCC issues a notice removing the immunity. Whilst authorisation and notification immunity may be obtained, the anomalous situation arises whereby a range of conduct that is not anti-competitive must be notified or authorised otherwise the corporation would be in breach of the provision. In the continuation of the per se offence for sections 47(6) and (7), an administrative burden is unnecessarily placed upon companies and the ACCC with respect to the need to lodge applications for notifications and authorisations for third line forcing conduct. The requirement for authorisation or notification of conduct also has financial considerations for corporations.

Related parties to be treated as one entity

ASX also supports the treatment of related companies as effectively one business entity for the purposes of sections 47(6) and (7). We note that this did actually apply between the years 1977 and 1978. If the same conduct were to be undertaken by a single corporate entity, rather than by related entities, the relevant test would be the substantially lessening of competition test. Most group company structures are established in such a way that products and services may be provided through different entities within the group, however for all intents and purposes, the products and services are in reality provided as if by one entity. Allowing for related companies to be treated as a single corporate entity would substantially reduce the administrative burden upon group companies and the ACCC in respect of the lodgement of notifications or authorisations for the conduct.

Recommendation: In relation to the Third Line Force provisions:

- Sections 47(6) and (7) should become subject to a substantially lessening of competition test; and
- Related parties should be treated as one entity for the purposes of these sections.

Anomaly in relation to pre 1995 conduct: Authorisation not Notification for Third Line Force Conduct

An anomaly exists in respect of the application of section 93(2) of the Act to third line forcing conduct that was the subject of an Authorisation prior to 17 August 1995 and continues beyond that date.

Section 93(2) provides:

A corporation *may not* give a notice for conduct or proposed conduct if:

(a) the corporation applied for an authorisation for the conduct or proposed conduct; and

(b) the Commission or the Trade Practices Commission made a determination dismissing the application or granting an authorisation (whether or not the authorisation is still in force); and

(c) either:

  (i) the Tribunal or the Trade Practices Tribunal made a determination on an application for a review of a determination described in paragraph (b); or

  (ii) the time for making such an application for review has ended.

This provision became effective on 17 August 1995[4]. Whilst the Explanatory Memorandum to the Act does not shed any light as to why the provision was drafted in this manner, it is possible to suggest that the provision is intended to prevent a corporation from first lodging an application for authorisation, and while

[4] Competition Policy Reform Act 1995 , No 88 of 1995, assented to 20 July 1995.

the ACCC is reviewing that application, the corporation obtains a notification, thereby requiring the duplication of efforts by the ACCC and allowing the corporation to have "an each way bet". Alternatively, it is also possible to see that the provision serves to prevent companies from obtaining a notification where either the ACCC or its predecessor the Trade Practices Commission saw fit not to grant the application in the first place.

It is ASX's submission, however, that this provision causes a distortion in the way the Act applies to like conduct. For example, in relation to third line forcing conduct in place prior to 17 August 1995 that is the subject of an authorisation, upon the expiry of the authorisation the corporation is required to continue to re-authorise the conduct if the conduct continues and is prohibited from seeking a notification for that conduct. On the other hand, a corporation that was not subject to an authorisation for third line forcing conduct prior to 17 August 1995, but sought to engage in third line forcing conduct after this date, would have the choice of whether to apply for authorisation or notification. For the most part, corporations choose to notify conduct as this is cheaper, less administratively burdensome and provides the corporation with immunity 14 days following lodgment. This anomaly does not provide a level playing field for corporations who are essentially engaging in like activity, but who are treated differently essentially because of the date the conduct commenced.

Recommendation: That section 93(2) is amended to allow a corporation with an authorisation that was granted for third line forcing conduct prior to 17 August 1995, to be provided the choice of notification for that conduct upon the expiry of that authorisation for third line forcing to which it is subject.

4. Section 155 and Legal Professional Privilege

Section 155 confers powers on the ACCC to obtain information, documents and evidence when investigating possible contraventions of the Act and in some of its adjudication work. Section 155(1) provides that where the ACCC, the Chairperson or Deputy Chairperson has reason to believe that a person is capable of furnishing information, producing documents or giving evidence about a matter that constitutes, or may constitute a contravention of the Act, or is relevant to a decision under **section** 93(3), a member of the ACCC may issue a notice requiring the person:

- to furnish information in writing within a specified time and in a specified manner (s. 155(1)(a));
- to produce documents specified in the notice to the ACCC or to a person specified in the notice (s. 155(1)(b)); and
- to appear before the ACCC at a time and place specified in the notice to give evidence, either orally or in writing, and produce documents (s. 155(1)(c)).

Section 155(2) empowers a member of the ACCC to authorise in writing a staff member to enter premises and to inspect any documents in the possession of, or under the control of, a person the ACCC, the Chairperson or Deputy Chairperson has reason to believe has engaged, or is engaging, in conduct which constitutes or may constitute a breach of the Act and to make copies of or take extracts from those documents.

Section 155(3) provides that s. 155(1)(c) evidence may be taken on oath or affirmation.

Section 155(5) imposes a legal obligation on a person to comply with a notice and s. 155(6A) makes non-compliance an offence punishable by a fine or imprisonment.

The Full Federal Court recently held unanimously that legal professional privilege is not a valid answer under section 155. This is presently under appeal to the High Court.[5] The ACCC is firm in its view that it should have access to the legal advice provided to a corporation, in instances where the ACCC itself has "reason to believe" that the advice might shed light on suspected breaches of the Act.

[5] ACCC v The Daniels Corporation International Pty Ltd & Anor 182 ALR 114

This view is contrary to the general doctrine of legal professional privilege. In fact, the High Court in Australia has been prepared to expand the scope of the doctrine of legal professional privilege because the availability of confidential legal advice is in the public interest. Confidential legal advice, readily available, actually promotes observance of the law. In particular, Trade Practices Act compliance programs are able to work best where businesses are able to ask frank questions and obtain answers without the fear of having that confidential information provided to third parties without the client's consent.

As a common law right, legal professional privilege may only be abrogated expressly in an act of Parliament. Most recently, in *R v Special Commissioner: Ex Parte Morgan Grenfell & Co Ltd [2002] UKLH 21*[6], the House of Lords decided that legal professional privilege is "a fundamental human right long established in the common law" and that although a statute may abrogate it by express words or by necessary implication, the circumstances in which a "necessary implication" will be found are very narrow.

Section 155 however does not expressly mention that legal professional privilege is *not* available in respect of notices issued by the ACCC. There ought to therefore be a presumption that, absent a direct reference in statute which states that a section 155 notice also applies to documents the subject of legal professional privilege, legal professional privilege ought to apply to those documents. This matter is presently before the High Court in the Daniels case, which is expected to hand down its decision during the course of this inquiry, and will therefore determine the position. Absent such clarification, the section should be amended to clearly state that legal professional privilege applies.

Recommendation: section 155 should be amended to clearly state that legal professional privilege is not overridden.

[6] decided on 16 May 2002