State Chamber of Commerce

TRADE PRACTICES ACT REVIEW SUBMISSION

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STATE CHAMBER OF COMMERCE (NSW)

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EXECUTIVE SUMMARY

The Trade Practices Act is a key pillar of the Australian market place. This timely review of the Act is an opportunity for the business community to examine the effectiveness of competition regulations and their enforcement.

The State Chamber of Commerce, which represents approximately 70,000 businesses across metropolitan and regional New South Wales through the Chamber Network, believes this review should not be about "big" business versus "small" business. The Chamber is interested in finding workable solutions that ensure a competitive, yet fair, market place for all business.

In developing this submission, the Chamber has considered the terms of reference of the review. The main points of our submission are as follows.

- The Chamber believes Section 50 (Acquisitions) does not inhibit Australian companies from competing internationally. We believe the "national champions" argument, often used by parties in favour of relaxing merger law, is invalid. In addition, we are concerned any lowering of the merger hurdles could be unduly detrimental to smaller domestic-orientated firms operating in the same industry.
- The Chamber believes Section 46 (Misuse of Market Power) provides sufficient protection for businesses from the behaviour of competitors that have *"a substantial degree of power in the market".* We believe the *"for the purpose of"* clause is strong enough, when considered together with Ss46(7), which allows the Court to infer purpose based on the evidence at hand. In our opinion, changing to an *effects test* would not provide additional protection for smaller operators but could make competitive decisions more uncertain for those that have a substantial degree of power in the market.
- The Chamber is concerned about the "trial-by-media" trend that has emerged in the daily operation of the ACCC. By releasing details of investigations, companies are often viewed to be guilty until proven innocent. The Chamber is proposing the ACCC and other interested parties be restricted from publicly releasing details of investigations until the inquiry has been completed and a company is charged. The ACCC could still gather information and investigate, but all parties would be bound not to comment on the case until it had proceeded to Court. Publicity should only be allowed if proved to be "in the public interest" (in a Court) or if the party being investigated gave permission.
- The Chamber does not support giving the ACCC the power to issue *cease and desist orders.* However, the Chamber recognises that often lengthy court cases can damage small businesses. The current injunction system is costly and beyond the reach of many smaller operators because they must agree to cover damages if the main case ultimately fails. In recognition of this difficulty facing small business, the ACCC has the power to represent business in an injunction hearing. The Chamber believes, however, that this power is being under-utilised and that the ACCC should be encouraged to use it either through more resources or better resource allocation.
- We do not support criminal sanctions for Trade Practices Act violations. The Trade Practices Act is about facilitating competition. Introducing criminal sanctions could deter businesses from making legitimate business decisions because they fear prosecution if their case is rejected. Trade Practices law is not a static, objective piece of legislation – so is unsuited to criminal sanctions. The accessorial liability provisions within the Act mean that there is already recourse for firms damaged by uncompetitive behaviour.

MERGERS AND ACQUISITIONS

The Chamber believes the Trade Practices Act, in particular Section 50 (Acquisitions), does not inhibit Australian companies from competing internationally. We are concerned any lowering of the merger hurdles could be unduly detrimental to smaller domestic-orientated firms operating in the same industry.

The current regime is clearly not unduly inhibiting mergers because the overwhelming majority of applications are approved. In 1999/2000, the ACCC examined 234 mergers and concluded that 9 would have breached Section 50. In 5 of those cases, the mergers proceeded after the Commission accepted court enforceable undertakings that addressed its concerns about competition. Of the 265 mergers announced in the 12 months to June 30, 2001, only 13 were opposed by the ACCC, and 10 of these proceeded after their terms were amended.

Much of the debate centres around the "national champions" argument that suggests only large companies can compete internationally and that it is worth sacrificing domestic competition to achieve these international gains. Proponents of this view favour the reinstatement of the mergers test that applied between 1977 and 1993 where mergers were only prohibited if they resulted in market dominance or a firm obtaining a 50% market share – rather than the effect, or likely effect, of substantially lessening competition which currently exists.

The Chamber's scepticism about the "national champions" view is based on two arguments.

- There are many examples of firms competing internationally without being the dominant firm in the domestic market. There are around 25,000 businesses engaged in exporting, with over 95% being small and medium enterprises (SMEs).
- Australia's small domestic market means that even if monopolies were created in certain industries, the size of the new mega-firm would still be too small to have a significant impact on the global market. Thus, even a huge Australian company would be no guarantee of international success. For example, if all of Australia's four major banks merged to one "mega-bank" the new combined entity would still not rank in the top twenty largest banks across the globe.

Despite several previous inquiries into mergers provisions, there is no empirical evidence to support the national champions view that there is a net benefit to the country if domestic competition is sacrificed so that big corporations can be internationally competitive.

The Chamber is concerned that a return to the *market dominance* test would be detrimental to the competitive environment that smaller, domestic-orientated businesses face. We believe the current *substantially lessening competition* test, together with the flexible checklist, does not inhibit merger activity amongst Australian businesses.

PURPOSE VERSUS EFFECT

The Chamber would like Section 46 (misuse of market power) left unchanged with the purpose test not replaced by an effects test. We believe S(46) provides sufficient protection for businesses from the behaviour of competitors that have *"a substantial degree of power in the market".* In our opinion, changing to an effects test would not provide additional protection for smaller operators but could make competitive decisions more uncertain for those that have a substantial degree of power in the market.

Much of the debate about S(46) has surrounded the purpose versus effects test. But in practical terms this section of the Act is focused on three other features.

- Firstly, a plaintiff must successfully define the market involved. How big is it? Does it incorporate overseas competition?
- Secondly, the plaintiff must prove that the defendant has a substantial degree of market power. This is often difficult to prove. For example, there is one company in the market and a new entrant starts-up. If the existing company changes its behaviour in response to the new entrant then this can be sufficient to prove that the existing company did not have substantial market power – because they were forced to alter behaviour to stay in business.
- Finally, the plaintiff must prove that the defendant misused its market power. This is more than simply proving the defendant's behaviour hurt the plaintiff. It must be proved that the change in behaviour took place because of a misuse of market power not simply a normal competitive decision.

Once these three key points are proved, then Ss(7) means a Court can infer purpose from the actions of the defendant. It is not necessary to have written or oral evidence that the action was done on purpose – you do not need a "smoking gun."

This process means that in practice there is little difference between an effects test and a purpose test and the issue is a small one within a very complex piece of legislation which has many components that need to be first proved.

Supporters of an effects test have argued that such a system is in place in Europe. However, in that jurisdiction an effects test is accompanied by a market dominance test not just a substantial market power test – so comparison of how the Australian system would operate is difficult. An effects test, without a dominance test, could have potentially harmful implications for SMEs and regional businesses.

While we believe there is little practical difference between an effects test and a purpose test, the Chamber is concerned there could be a perceived difference which would result in a damaging outcome for all business sizes. Meeting the criteria for an effects test sounds much easier than passing a purpose test, because most businesses are not aware of Ss(7) which allows purpose to be inferred by the Court.

- For smaller businesses, shifting to an effects test could lead firms to believe it is now easier to achieve a prosecution under S46. This could result in a raft of misguided, costly and ultimately unsuccessful litigation by businesses.
- For those businesses that have a substantial degree of market power, an effects test may make them more wary about potential prosecution when changing behaviour. They could believe they are now more prone to prosecution.

The final advantage of a purpose test, over an effects test, is that it allows defendants to explain to the Court what they see as legitimate market practices. For example, in the Melway Publishing vs Robert Hicks case (2001), Melway avoided prosecution because it's was able to convince the Court that its distribution methods were acceptable business practice for that market, despite having an "effect" on a potential customer.

In summary, the Chamber believes shifting to an effects test would be misleading and ultimately damaging to all sizes of business. We argue that changing to an effects test would not provide additional protection for smaller operators. At the same time, a widespread misunderstanding of this complex law could make competitive decisions more uncertain for those that have a substantial degree of power in the market.

ACCOUNTABILITY & TRANSPARENCY

The fourth point in the Review's Terms of Reference deals with the damage to reputations that occurs when a business is linked to an ACCC investigation. The Chamber would like stricter rules to be imposed that prevent any involved party, whether the ACCC or a competitor, from informing the media about investigations.

The influence of the media is considerable, usually leaving a company "guilty" before the matter even gets to Court. At the time of the initial investigation there is often considerable media exposure. But if the case is not proved then there is no guarantee this will also be reported in the press.

In criminal cases it is often ruled that the defendant's details cannot be released and reports of the trial are restricted to ensure a fair trial. However, there is no such protection for companies being investigated, let alone charged, under the Trade Practices Act. We would like this discrepancy corrected to prevent businesses' reputations being destroyed by unproven innuendo. This could perhaps involve using the existing provisions against a prejudicial fair trial more forcefully in Trade Practices cases.

The Chamber is proposing the ACCC and all other involved parties should be restricted from publicly releasing details of investigations until the inquiry has been completed and a company is charged. The ACCC could still gather information and investigate, but all parties would be bound not to comment on the case until it had proceeded to Court. Publicity would only be allowed if proved to be "in the public interest" (in a Court) or if the party being investigated gave permission.

The Chamber would also like the Committee to investigate the accountability of the ACCC. Possible models that the Review could look at are:

- Installing an overview Board made up of both business and legal experts that are constantly reviewing the activities of the ACCC and its implementation of the Trade Practices Act.
- Creating a role similar to the role of the proposed Inspector General of Taxation, that investigates if the fair trading system is working.

Whatever method is adopted, the business community feels the ACCC needs to be held more accountable for its actions and that the shift towards the use of the media to drive investigations needs to be arrested.

CEASE AND DESIST ORDERS

The Chamber opposes giving the ACCC the power to issue *cease and desist orders*. The Chamber believes the ACCC already has sufficient powers to obtain an injunction on behalf of small business. The ACCC, however, under utilises these powers. We would like small business to have better access to ACCC representation at injunction hearings, either via better resources for the ACCC or better allocation of current resources.

The ACCC is proposing that it is given the power to issue cease and desist orders while it is investigating a case. We are concerned that this will create a conflict of interest given that the ACCC is often an interested party in the case once it finally goes to Court. The ACCC should be an investigative body not policeman, judge and jury.

The ACCC argues that similar powers are available in other jurisdictions. But in the United States, for example, the cease and desist orders are issued by a Court, not the fair trading authority, so any comparison against the US system would be invalid.

There are currently two methods available to businesses to get relief from potentially harmful actions by competitors while Court proceedings and investigations are being conducted.

- Section 80 allows companies to apply for an injunction while a case is proceeding. When doing this, firms must agree to cover the commercial cost of their action if the ultimate case fails to get a Trade Practices Act prosecution.
- This can potentially involve substantial costs, especially if opposing a merger application. Consequently, this is not a viable option for small to medium sized businesses. To try to rectify this problem the ACCC was given the power to represent smaller businesses at an injunction hearing (Section 87(1B)) – protecting the SMEs from potential damages costs.

The Chamber feels that the powers under Section 87(1B) give adequate recourse to business operators while court cases are proceeding. The problem, however, is that there is a perception that the ACCC is not fully utilising this power and doing all it can to assist small business who are unable to fund an injunction hearing.

There are two potential reasons why Section 87(1B) is not being fully utilised.

- Insufficient resources, or
- poor allocation of resources.

The Chamber would like the Review Committee to examine which of these reasons is applicable and how the ACCC can best increase its use of Section 87(1B) to allow business short-term relief while cases and investigations are proceeding.

CRIMINAL SANCTIONS

The Chamber does not support criminal sanctions for breaches of the Trade Practices Act. The Act is about facilitating a fair trading environment, unlike criminal law that is about prosecuting those who deliberately commit an offence.

Legal convention states that for a criminal prosecution the law involved has to satisfy *mens rea* – that the person knew they were committing a guilty act. For example, under normal social rules stealing is considered wrong. In contrast, the subjective and often fluid nature of Trade Practices conventions is not something broadly known or agreed upon amongst the community. Consequently, *mens rea* is not satisfied.

The spirit of the Act is also more about facilitating fair trade, rather than punishing those who do wrong. It is an economic type of legislation not a criminal law. In many parts of the Act the legislation is about obtaining permission for certain activities rather than categorically preventing certain actions. This would be difficult to apply criminal sanctions for and could inhibit entrepreneurs from undertaking legitimate business decisions because of fear of criminal penalties.

The Trade Practices Act already incorporates accessorial liability if a director is found to have acted improperly. This does not involve criminal sanctions but allows for very heavy fines to be imposed on individuals. This component of the Act provides a deterrent for Trade Practices breaches without creating the problems associated with criminal sanctions in such a subjective legislation.

The Chamber acknowledges that the criminal sanctions proposals are aimed at large corporations found guilty of serious Trade Practices violations, such as collusion and price fixing – thus excluding the vast majority of business operators. Nevertheless, introducing criminal sanctions would be grossly against the spirit of the Trade Practices Act, which should be about facilitating fair trade not regulating competition.

OTHER RELATED MATTERS

Our submission has tried to address the main issues of this Review. But there are other areas of interest to business that may need to be examined.

This includes:

- **Does the ACCC have too many responsibilities?** The ACCC has many areas of competition policy to manage such as consumers, small business and large international firms. Sometimes these factions of responsibility can conflict creating a difficult situation for the organisation.
- **Can the ACCC juggle its investigative and judicial roles?** This problem is discussed under the cease and desist orders section, but is also prevalent elsewhere. For example, with respect to mergers the ACCC is both investigator and judge. Perhaps the ACCC is best qualified to deal with investigations of market impact, but that a Court should make the final judgement after hearing all the facts from both sides of the case.
- **Is there adequate certainty for business under the Trade Practices Act?** Businesses of all sizes, across all industries, need certainty. The balance needs to be found between having a sufficiently flexible competition law to allow adjustment to changing market practices but also give business some clarity on what is unfair competitive behaviour.

CLOSING STATEMENT

The Chamber believes the Trade Practices Act is about facilitating competition not regulating it. Any proposed changes to the Act need to be considered in this light. Any move to increase the compliance and regulatory burden on business would be strongly opposed.

In general, we believe the Trade Practices Act is a workable piece of legislation. The Chamber does not support moves to introduce an effects test into S46, give the ACCC powers to issue cease and desist orders, introduce criminal sanctions or change the mergers hurdle. Nevertheless, we believe there are some issues around the implementation of the Act with regard to the accountability of the ACCC and the tendency towards “trial-by-media” practices that need to be addressed.