CHARTERED SECRETARIES
AUSTRALIA

Keeping good companies

12 July 2002

Secretary
Trade Practices Act Review
C/- Department of the Treasury
Langton Crescent
PARKES ACT 2600

Dear Secretary,

Chartered Secretaries Australia (CSA) is pleased to make this submission to the Committee which is asked

- to review the operation of the competition and authorisation provisions of the Act, specifically Parts IV (and associated penalty provisions) and VII

- to identify, where justified, improvements to the Act, its administration and/or additional measures to achieve a more efficient, fair, timely and accessible framework for competition law.

CSA is the Australian Division of the Institute of Chartered Secretaries and Administrators, an international professional association with over 46,000 members worldwide.

CSA is Australia's peak membership body for corporate governance, and is fully qualified to respond to the Senate's inquiry. In Australia there are over 8,000 members representing the majority of public companies listed on the Australian Stock Exchange. Members of CSA deal on a day-to-day basis with the ASX, ASIC and the ACCC and have a working knowledge of the operations of the markets, the ASX Listing Rules and the law and regulation dealing with continuous disclosure and market practices. In addition, representatives from the ASX, ASIC and the ACCC regularly address members at our seminars and conferences.

Given the nature of the role of a Company Secretary and the professionalism of Chartered Secretaries we believe our members are ideally placed to contribute to this inquiry. We would welcome the opportunity to appear before a public hearing if these are conducted.

Executive Summary:

CSA has had the opportunity to consider some of the existing submissions plus the stated position of ACCI, BCA and others. It is not the intention to seek significant amendments to the Act but to address the following areas. Some of which are raised because it is the wish of the ACCC to have the changes made to the Act and the others because it feels that its membership (detailed above) would wish it to comment.

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(i) **Section 46**:

Terms of Reference 1(b) – balance of market power

The CSA last year made a submission on the proposed changes by the ACCC (in particular the "effects test"). A copy of CSA's submission to the Senate Legal & Constitutional Reference Committee 2001 review of s46 is annexed..

(ii) **Cease and Desist Orders**:
These constitute an attempt by the Commission to change the onus of proof and are not to be condoned. These are merely a form of summary judgement.

It is also unacceptable because there are no checks and balances in place before the Commission can do this. To argue that this is necessary because of time delays from the Court process is not justified.

A preferable solution would be to implement CSA's suggested governance proposals.

Such orders are available only in a few places in the world but rarely used as there are injunctions, mareeva or otherwise which are equally effective.

(iii) **Trial by Media**:
CSA will not make any comment in this area.

(iv) **Legal Professional Privilege**:
Irrespective of the outcome of Daniel's case, Legal Professional Privilege should be available under the Act. In particular, if the courts are not prepared to acknowledge it, then it should be enshrined in the Act that internal legal advice should also attract Legal Professional Privilege. Many of CSA's members have the dual role of Head Solicitor and that of Company Secretary, especially in the small to medium sized firms. Boards should be able to receive advice, in writing, which can be reviewed and assessed prior to and during a Board meeting without that advice losing its Legal Professional Privilege rights.

(v) **Authorisation**:
This should be expanded to cover price fixing and should be faster. This dovetails into the discussion below on governance.

(vi) **Governance**:
The Commission has moved away from its core territory – one could say in the interests of attracting more media attention (see the quote that Warren Pingelly has used from "Backchat").

Loss of reputation because of the perceived conflicts of interest with those diverse areas of influence and some of these areas are not relevant to its principal area of operation.

It could almost be said that the ACCC has become a monopolist in many areas and thus is in breach of its own legislation.

There appears to be too many masters so that the perception is that the Commission is accountable to no-one. For the ACCC to say that they are accountable to the Courts is to disregard the rationale for why they were set-up namely to assist those that couldn't afford to counteract the powers of monopolists, price colluders or business that disregards the interests of the consumer. The Court system is expensive and for those people to have taken action against the monopolist or price colluder it would have been prohibitive. The Court costs are no less now than what they used to be, therefore the

likelihood of there being any counteraction of the Commission's decisions and attitude is unlikely. Or if it is it will be run by big business as opposed to all parties that the Commission is supposed to represent.

Because of the enhanced activities of the ACCC there should be another body to whom the ACCC seeks approval for action in much the same way that the ASIC seeks approval from the DPP. However, CSA is not advocating a complete restructuring but merely the creation of a body similar to the Takeovers Panel and for increasing the expertise on the Commission. Governance dictates a body comprising business, academia (currently there is too much of this in the Commission and one could argue too much of one persons thinking about what constitutes competition) representation from various interested parties e.g. some leading corporate figures and generally other parties that can be called upon on short notice to assist. CSA does not feel that it is appropriate to expand the role of the AAT as that is already overworked.

A further body could be created along similar lines to the Takeovers Panel, created under the Corporations Act. There would be a similar cross section of business and business interested people appointed to the body. This body would receive references to it from either business or the ACCC to review the ACCC decisions or where the ACCC felt that it needed assistance. The idea would be that decisions could be achieved without the need to involve protracted court processes. It is not envisaged, however, that injunctions or cease and desist orders would be referred to this body.

Whilst it is acknowledged that the ACCC has a charter, this is felt to be inadequate and that a more detailed charter should be developed and the ACCC asked to comply with it. This would also assist with its governance.

GOVERNANCE

In this part of the submission reference is made to the Terms of Reference 1(d) and 2 – Processes of ACCC.

The Core territory of the ACCC is enforcement of the Trade Practices Act. Originally the ACCC had nothing to do with setting prices, the Telecommunications Industry role (Section 11 etc.) reviewing Broadcast services or other roles. It has now expanded to cover these areas but by doing so has moved away from its core territory and thus created a perception that is trying to be all things to all people. That is not possible with an organisation the size or with the experience the ACCC has.

CSA submits that the ACCC's current governance of its powers and processes does not "provide adequate protection for the commercial affairs and reputation of ….corporates".

Allan Fels himself makes the point that they are expected to comment on the areas that the Government has passed to them like GST pricing. Yet they could have done what the ACCC did in the past and that is to refuse to accept those referrals by the Government. There appears to be a fear that to not take on a reference from the Government will remove the power that the ACCC has to administer the Act or the esteem that business will hold them in. On the contrary, the esteem is earned when the ACCC performs its function well, but to keep expanding and entering into new areas means that the scarce resources that are available will not be adequately used in looking after its main core territory namely administration and enforcement of the Act to provide protection for the affairs and reputation of corporations.

CSA supports calls for a supervisory body to oversee the governance of the ACCC and the administration of its powers. Please see comments below, which set out how this could work.

Also there should be a Charter for the ACCC (much the same as what is used for the ATO). This would set out performance levels in terms of time taken to respond to letters, time to complete various stages of investigations, etc. It should include criteria regarding publication of activities in the media, which would:

(i) allow advertising for public submissions in relation to particular investigations, but

(ii) subject to (i), prohibit publication of any details until charges have been laid or, preferably, until an offence is proved.

The TPA is more complex now than when it was when first created and for that reason alone the ACCC should retain its current powers rather than expand them.

Some of the areas of expertise which it is arguable should not be the province of the ACCC:-

Broadcasting experience because of the Broadcasting Services Act as ACCC administers new licences.
Oil industry experience because of the Moomba Sydney Pipeline System Sale Act.
Airline Industry experience because it sets prices for the services charged by the SACL (Sydney Airports Corporation Limited).

These different areas of expertise create a perception of actual or potential conflicts of interest as they are not strictly anything to do with the fundamental objective of the ACCC namely "to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection".

If the perception is there that a party's actions are being misinterpreted, not understood or for reasons of conflict not corrected or countermanded (different political attention or intentions) then the strength of the body carrying out the review is compromised.

It is no different to the corporate conglomerate. The share market does not like them because it doesn't understand them or their intentions and as such, it downgrades the share price. As with conglomerates the reality of lack of direction or a clear understanding of the fundamentals of all businesses is irrelevant. The perception is there that they are not doing their jobs properly in each of the areas and so the share price is not reflective of the true cumulative value of the parts of the business.

The ACCC wants the power to apply best practice. “Sticking to ones knitting” is applying best practice especially if the application of that is done to the best of the ability of the party that is doing it.

As Warren Pingelly said "a hiving off of the ACCC's non-prosecuturial functions would also do much to assuage the concerns expressed in a recent parliamentary report that many believe that the ACCC with its varied and perceived conflicting functions "increasingly seem to be accountable to no-one". (Competing Interests: Is there a balance? Review of the Australian Competition and Consumer Commission Annual report 1999-2000 (House of Representatives Standing Committee on Economics, Finance & Public Administration (D. Hawker:Chairman) Sept 2001p5)

ALTERNATIVE GOVERNANCE STRUCTURE – CHECKS AND BALANCES

To say that the Court System is a valid review process is to miss the point.

Allan Fels on one hand says that there is a problem with the speed with which the Courts deal with matters, implying that it is not quick enough so they need cease and desist Orders. He then says that the ACCC is accountable to the Courts. Yet how can one's accountability be to a body that can take four years (a fast decision in Allan Fels own terms) to adjudicate something.

Business and the consumer cannot wait for that long to have the ACCC accountable. Certain areas should be dealt with by the Commission that is the body to whom the ACCC reports – this body should be able to veto actions proposed by the ACCC –CSA also agrees parties should be able to seek a prompt review of the ACCC's decision through taking a matter to a body similar to the Takeovers Panel ("TPA Panel"). It is envisaged that the proposed new panel will have similar powers to those of the Takeover Panel and a composition that is large and ever changing and capable of being quickly constituted.

The Commission must be expanded by the appointment of more assistant commissioners (not employees of the ACCC) so that it has a base of people that can be called upon to deal with particular issues on short notice. It would be not dissimilar to the Advisory Boards used by some companies. By using advisory boards it enables the Board to properly handle various specialist considerations that those groups can bring to bear on any decision making process. It will also mean that the ACCC must justify its actions before the matter is commenced and excessive funds expended.

TPA fines are the same as the criminal proceedings brought by the ASIC. The latter needs to obtain the approval of the DPP before commencing any of these actions, whereas the ACCC does not, it may commence civil action, which has the effect of creating penalties without a similar independent review.

None of what is suggested changes the effect of the Trade Practices Act, it merely ensures a fairer approach. Ensuring that justice is not only done but also seen to be done is crucial to the operation of the Trade Practices Act. Currently that is not the perception. CSA is not professing that that perception is right or wrong but saying it exists and this expansion of the Commission and creation of the Takeovers Panel type body will go a long way to ensuring that the perception is eliminated.

There is a widely held perception that the ACCC regards large organisations as the enemy, who are guilty until proven innocent (cease and desist orders reverse the onus of proof).

The ACCC can obtain cease and desist orders from the Court in the forms of injunctions. That is usually quick and if the case is strong enough to warrant the ACCC using a cease and desist order then an injunction will be granted. It will also mean that an independent party will have to be convinced that the actions proposed by the ACCC are acceptable. It is not proposed that the Commission of the TPA Panel should be given the power to approve the issue of injunctions or cease and desist orders, if those are approved (which CSA believes they should not be).

As a further tenet it will require that the ACCC should be very sure of its case before it seeks an injunction and should be open not only to penalties for inappropriate action and damages to a company's reputation, as would any other party seeking that type of summary remedy that is envisaged.

CEASE AND DESIST ORDERS

Terms of Reference 1(d) and 2 - proposed "cease and desist order".

It is understood that the ACCC seeks the power to make a cease and desist order, designed to immediately stop behaviour which the ACCC feels is anti-competitive. CSA opposes such a power on the ground that it would be another unfettered aspect of the ACCC's administration, hindering the commercial affairs of corporations without any review of the merits of the case.

There are two alternative avenues available:

(i) ACCC can make use of injunctive relief in the courts, which is readily available if an anticipated breach of the Act can be demonstrated.

(ii) An additional procedure could be created, making use of the undertakings provision in s.87B. If the ACCC perceives a breach of the Act is occurring, it could be authorised to issue a notice to a corporation requiring the corporation to negotiate an appropriate undertaking. An undertaking in these circumstances should be required to specify a limited period during which it would apply, which would be sufficient to enable the ACCC to conduct enough of an investigation to establish whether a prima facie case exists. Failure to agree on the terms of the undertaking and the period for which it is to operate could then be subject to an expedited reference to the Australian Competition Tribunal.

AUTHORISATIONS

Term of Reference 1(e) - allow businesses to readily exercise their rights and obligations consistent with certainty, transparency an accountability, and the use of authorisations.

The authorisation process is regarded as slow and results indicate a lack of commercial experience within the ACCC. The ACCC is perceived to be overly focused on price analysis, insufficiently transparent and overly difficult to convince regarding public benefit.

The view seems widely held that corporations do not regard the authorisation process as balanced, with a consequent lack of confidence in the process.

Some form of review of this process is necessary, to make the process speedier and more certain, without having to appeal to the Tribunal. The use of the Takeovers Panel type of body in this review process would be of assistance.

LEGAL PROFESSIONAL PRIVILEGE

Business must be able to seek and obtain advice from their Lawyers about activities without fear that this will be used against them. The TPA is not the same as the Tax Act which is a revenue raising statute. TPA is designed to enhance competition and protect consumers. There is no philosophical bases for providing the same rights to the TPA as the tax office may have. There are more likely to be more breaches of the TPA, if Legal Professional Privilege is not available – business will not seek out advice and thus breach the Act because of this.

For example, if the company felt that it may have breached the Act and sought legal advice and then receives confirmation of a breach and what it can do to correct it. If there is no Legal Professional Privilege that advice could be used against it as it would be discoverable. As would the advice about how to defend itself against any action brought by the ACCC. In making this comment CSA has assumed that the company will adhere to the advice given namely that it has breached the Act and has corrected that action. Naturally if there is a perpetration of a guilty action then the company will be responsible for its own destiny and be subject to the full power of the Act. In other words that does not mean that the company's breach should not be prosecuted but it should be able to defend itself properly.

It is no different to the ACCC keeping confidential details of its whistle blower or the reason for its decision to block a monopoly acquisition.

Legal Professional Privilege is a very important common law right which should not be removed lightly.

Even if the High Court upholds the decision in Daniel's case the TPA should be amended to enshrine Legal Professional Privilege and, in particular, for the in-house legal counsel. This will ensure full and frank review of all perceived breaches of the Act by the corporation.

Yours sincerely,

Nick Burrows
PRESIDENT

ANNEXURE 1

CHARTERED SECRETARIES
AUSTRALIA

Keeping good companies

6 November 2001

The Secretary
Senate Legal & Constitutional Committee
Suite S1.108
PARLIAMENT HOUSE
CANBERRA ACT 2600

Dear Secretary,

Comments on Senate Legal and Constitutional References Committee
Inquiry into Section 46 of the Trade Practices Act 1974

Chartered Secretaries Australia (CSA) is pleased to make this submission to the Senate Legal and Constitutional References Committee Inquiry into Section 46 of the Trade Practices Act. CSA is the Australian Division of the Institute of Chartered Secretaries and Administrators, an international professional association with over 46,000 members worldwide.

CSA is Australia's peak membership body for corporate governance, and is fully qualified to comment on the Trade Practices Act. In Australia there are over 8,000 members representing the majority of public companies listed on the Australian Stock Exchange as well as non-listed public companies and proprietary companies. Members of CSA deal on a day-to-day basis with the ASX, ASIC, APRA and the ACCC.

Given the nature of the role of a Company Secretary and the professionalism of Chartered Secretaries we believe our members are ideally placed to comment on aspects of the Trade Practices Act. In addition, we would welcome the opportunity to appear before a public hearing if and when these are conducted.

We note that the Committee has been asked to consider whether:

1. Section 46 should be amended to provide for reversal of the onus of proof in relation to the "purpose" element, and

2. The ACCC should be given a power to order divestiture where an ownership situation exists that has the effect of substantially lessening competition ("SLC").

1. Reversal of the onus of proof in relation to the "purpose" element of Section 46

CSA understands that the proposal would reverse the burden of proof in relation to the "purpose" element. That is, if the plaintiff showed that the defendant had market power and had taken advantage of that power, the defendant would then be obliged to show that it did not have a prohibited purpose. We also note that a proposal of this kind was rejected by the Cooney Committee in 1989.

CSA concurs with the decision of the Cooney Committee and opposes the proposal. The reasons for this are:

(a) The presumption of innocence is an important principle of our legal system. Reversing the onus of proof in this part of section 46 presumes guilt. In any event the reversal is unlikely to achieve anything meaningful in terms of the law, because whichever way the onus lies, corporations are alerted to the need to generate records indicative of a proper purpose and to avoid generating records that could be interpreted as indicating a prohibited section 46 purpose. The most that the reversal could achieve would be to shift some of the costs of litigation from the small company plaintiff to the large company defendant.

(b) The existing subsection 46(7) is a more useful tool than a formal reversal of the onus of proof, because it allows the court to infer a prohibited purpose from the conduct of the corporation or the surrounding circumstances. This provision can also operate as a de facto reversal of the onus of proof because, as the High Court has indicated, the court may draw inferences of a prohibited purpose if the corporation does not offer a "legitimate reason" as to why it engaged in the conduct complained of [1]. For example, in the Queensland Wire case, the fact that BHP could not give a valid business reason for refusing to supply the product to Queensland Wire was a major factor in the court's finding that BHP did have a prohibited purpose.

(c) Where new products and concepts are being developed, a company having market power should be able to utilise that market power, within reasonable limits, to commercialise the product of its research and development. A reversal of the onus of proof in the "purpose" element of section 46 could have a dampening effect on R and D and discourage companies from exploiting technological advances. As the High Court said in the Queensland Wire case:

> "The object of section 46 is to protect the interests of consumers, the operation of the section being predicated on the assumption that competition is a means to that end. Competition by its very nature is deliberate and ruthless… Competitors almost always try to 'injure' each other in this way… these injuries are the inevitable consequences of the competition section 46 is trying to foster" [2]. Note that despite the breadth of this endorsement of competition, the court was still able to find that a prohibited purpose existed in the circumstances of the case.

To implement this proposal would detrimentally affect the direction in which both political parties are currently headed (eg Knowledge Nation) - where both are seeking to improve the exploitation of new designs and concepts in Australia rather than have them moved overseas. Merely the bringing about of a new technological change could quite validly give a corporation a market advantage and likely dominance in the market place. This proposal if adopted, would enable the ACCC to take action against an innovative company or market leader and to then force it to defend itself even though all it had done was to exploit its invention.

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[1] Queensland Wire Industries v. BHP Co Ltd and Anor (1989) 167 CLR 177, per Mason CJ and Wilson J at 191.

[2] Queensland Wire op cit Mason CJ and Wilson J at 192-3.

There does not seem to be a similar reversal of onus of proof in overseas jurisdictions and there is no need for Australia to do so.

2. The proposal to give ACCC power to seek divestiture where ownership of assets has the effect of substantially lessening competition.

The proposal is that where it is proved that there has been a "substantially lessening of competition" then the ACCC should have the right to seek divestiture of the assets that are enabling the corporation to substantially lessen competition.

CSA opposes the proposal. The mere use of an asset, even if it results in a substantial lessening of competition, should not trigger this disposal right. If a right to divest is to be brought into existence it should only be permissible when other remedies under the Act would not be appropriate.

This proposal has very serious implications for corporations developing new products or making major plant acquisitions. In addition to the practical difficulties of divesting a company of an expensive asset, there are jurisprudential difficulties. For example, how will the divestment power reconcile with the law of patents. If the asset in question is a patented invention, is it intended that the ACCC's divestment power will remove the statutory monopoly granted by patent law? If the power is to permit this, how can innovative companies be sure that they will have a chance to commercialise their inventions? If major items of property or equipment are to be divested, what is to happen if an appropriate buyer cannot be found or appropriate price cannot be obtained? Is the government prepared for job losses that might accompany divestment of a major asset?

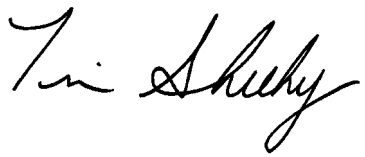
Again as mentioned in respect to (1) above there should be recognition that Australia is endeavouring to create assets and developments that will be able to be exploited within Australia and exported. The proposal has a serious risk that it will prevent corporations from exploiting the fruits of their research and development, or deter them from undertaking development.

There are already effective measures in Part IV of the Trade Practices Act to prevent a firm misusing market power that may flow from ownership of valuable assets to prevent two or more firms arriving at any competitive agreements and to prevent any acquisitions. There is no need to expand these safeguards further.

Such a measure would give the ACCC and the Courts too much discretion in determining how a firm acquires and uses it assets, and would cause uncertainty and discourage firms from acquiring assets or developing their facilities.

Part IIIA of the Trade Practices Act establishes a general access regime that allows facilities to be opened up for competitor access where such access would promote competition and is in the national interest. This has already been used in relation to Sydney Airport, various railway networks and other infrastructure.

Yours faithfully,



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CHIEF EXECUTIVE