SUBMISSION BY

CSR LIMITED

TO THE COMMITTEE OF REVIEW
OF THE COMPETITON AND AUTHORISATION PROVISIONS
OF THE TRADE PRACTICES ACT

12 July 2002

INTRODUCTION AND SUMMARY

The CSR Limited group ranks as one of the world's ten largest building materials groups. It has operations in Australia, New Zealand, the United States and Asia. The group also has a large sugar business and an investment in aluminium in Australia. It has some 380 operating plants (including those of joint ventures in which it participates) and employs over 6,000 people in Australia. Its and its joint ventures' products include *Bradford* insulation, *CSR Emoleum* asphalt, *Gyprock* plasterboard, *Hebel* lightweight aerated concrete products, *Humes* concrete products, *Melcann* cement, *Monier* and *Wunderlich* roof tiles, *PGH* bricks, *Readymix* concrete and *CSR* sugar products.

CSR Limited supports the Trade Practices Act's (**Act**) objects to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection.

However, CSR believes that some of the competition and authorisation provisions of the Act require revision in the interests of the Act's objects and the efficient and fair administration of the Act.

CSR disagrees with proposals for extending the prohibitions under the Act, as it does not consider that the case has been made for such extensions. CSR supports the submission of the Business Council of Australia (**BCA**).

This submission concentrates on areas of particular concern to CSR. Those areas and CSR's proposals, in outline, are:

- **Mergers** — the definition of the "market" for the purposes of section 50 should be subject a minimum turnover threshold to exclude non-substantial markets. Further, as proposed by the BCA, the public benefits test should become part of section 50, such that a merger would not contravene section 50 even if it substantially lessened competition in a market so long as the public benefit outweighed the public detriment.
- **Exclusionary provision and price-fixing** — there should be a general joint venture exception to these prohibitions which would be subject to a substantial lessening of competition test.
- **Misuse of substantial market power** — first, in addition to the current anti-competitive purpose requirement there should be an additional requirement that the conduct result in a substantial lessening of competition, and second, the requirements for predatory pricing under US law should apply.
- **Third line forcing** — first this prohibition should be subject to a substantial lessening of competition test, and second, there should be an exemption from the prohibition where the suppliers are related companies.
- **Authorisations** — there should be time-limits imposed on the process for non-merger applications.
- **Section 155 investigations** — legal professional privilege should apply to such investigations.
- **Collective bargaining by dedicated suppliers** — the process for obtaining immunity for collective negotiation by persons who supply goods or services solely to one customer needs to be made quicker and cheaper.

MERGERS

Major corporations have a choice of investing in Australia or overseas. The fact that capital outflows now almost balance capital inflows indicates that the choice is increasingly offshore. This is a fact of globalisation but it is also spurred by the inability to rationalise domestic market participants. Section 50 has contributed to this flight of capital overseas.

CSR believes that greater recognition needs to given to the inability of the relatively small size of the Australian market to support the same number of competitors as exist in overseas markets. Given the size of the Australian economy relative to the more populous economies, the level of market concentration needs to be higher in order to realise economies of scale and efficiency. Price justification may, in some instances, be required to ensure that public interest is not impaired.

In CSR's view, it is not axiomatic that effective competition requires at least three competitors, particularly in small regional markets. Account needs to be taken of the fact that, while there may small local markets in many industries, many competitors are national. The readiness and ability of those national competitors to enter any local market ensures that the participants in those markets operate efficiently and charge competitive prices so as not to attract new entrants. The degree of involvement of the Australian Competition and Consumer Commission (**ACCC**) with transactions in small local markets appears excessively intrusive relative to competition regulators overseas.

CSR remains concerned about Australia becoming a branch economy (with capital being invested by Australian companies overseas rather than at home) and about Australian companies being vulnerable to takeover by foreign enterprises.

CSR therefore supports the BCA's proposal that the public benefits test, relevant to the authorisation of a merger, become part of section 50; that is, a merger will only be prohibited if will substantially lessen competition and the public detriments of the merger outweigh its public benefits.

Further, given the administrative costs of obtaining informal clearance under the Act, this process should not be required where the size of the market is not significant. While the Act states that a market in section 50 means a substantial market for goods or services, no additional guidance is given as to when a market is not substantial. CSR proposes that section 50(6) be amended such that a market is deemed not to be substantial if the combined annual turnover of all participants in the market is less than a prescribed amount (which CSR proposes would be at least $10,000,000).

JOINT VENTURE EXCEPTION TO EXCLUSIONARY PROVISIONS AND PRICE-FIXING

There is uncertainty and inconsistency in relation to the application of the per se prohibitions in sections 4D and 45A of the Act to joint ventures. This stems from:

- the restriction of the joint venture exception to price-fixing by production joint ventures (in section 45A); and
- the recent Full Federal Court decision in *South Sydney District Rugby League Football Club v News Limited* (2001) FCA 862 which has expanded the categories of conduct which had previously been thought to be prohibited by section 4D.

One particular difficulty faced by CSR in relation to sections 45A and 4D can be illustrated by the following example. On occasions, tenders for the supply of construction materials are sought which are too large for CSR to supply by itself — CSR simply does not have the production capacity to fulfil the tender as well as continue to supply its regular customers. Ideally, it would join with one or more of its competitors to supply product to the job. That is, CSR would agree to supply a certain proportion of the job and the competitor the balance. Alternatively, CSR and the competitor would agree jointly to supply the job (but would contribute agreed proportions of their products).

While this is a joint endeavour, it may not fall within the joint venture exception in section 45A (because each supplier would be supplying an agreed portion of the job with its own product) and there is no exception for any type of joint venture under section 4D. Such a risk of contravention and lack of clarity does not exist under US anti-trust law due to the doctrine of ancillary restraints, and the Department of Justice Guidelines for collaboration between competitors. Similarly in New Zealand

amendments have been made to the collective boycott provision to bring it into line with current US law.

CSR's position is not unique. Loan syndicates are in a similar position. To spread the risk, each lender agrees to provide an agreed proportion of the total loan to the borrower. The argument that this type of arrangement is not an illegal collective boycott is based on the contention that the participants are not "in competition with each other" and therefore sections 45A and 4D do not apply. However, as far as CSR is aware, this contention has not been tested in the courts.

The *South Sydney* case is of concern since it suggests that, even though it has pro-competitive consequences, competitors cannot engage in a joint endeavour which restricts the goods or services supplied by them, limit the quantity supplied or confine the number of participants in the joint endeavour. The case has cast doubt on previously accepted views as to the correct approach to determining the purpose of a joint venture — there is now a substantial risk of contravention where the restriction is only an incidental effect of the joint venture.

In order to resolve the problems with the above sections, CSR proposes that there be a general joint venture exception to sections 45A and 4D, which would be subject to a substantial lessening of competition test. This would mean that joint ventures would not be subject to the per se prohibitions in section 45 of the Act, but that contracts, arrangements or understandings between joint venturers would still be prohibited under the Act where they had the purpose, effect or likely effect of substantially lessening competition in a market.

CSR notes that there have been calls for the introduction of criminal sanctions (including jail sentences) for contraventions of certain provisions in Part IV of the Act. In particular, CSR notes that the ACCC has proposed the introduction of criminal sanctions for "hard core cartels". The Commission has defined hard core conduct[1] to include contracts, arrangements or understandings between competitors which directly or indirectly:

- fix a price for a product or service;
- limit or prevent the supply or production of a good or service.

CSR is very concerned that, under the current structure of Part IV and the decision in the *South Sydney* case, pro-competitive joint venture activity as discussed above may expose the participants to jail sentences if the incidental effect of a joint venture was to technically limit or prevent (directly or indirectly) the supply or production of a good or service.

In CSR's view, the possibility of the introduction of criminal sanctions for contraventions of the per se prohibitions on price fixing and exclusionary provisions underlines the need for a clear joint venture exception to these per se prohibitions.

As an aside, CSR notes that while it did agree to the BCA's submission on the introduction of criminal sanctions, it did so reluctantly and only in response to strong community calls for them. CSR has reservations about the efficacy of such sanctions. CSR also notes that the BCA's submission proposed firstly a number of safeguards and secondly that the sanctions should apply equally to all offenders.

MISUSE OF SUBSTANTIAL MARKET POWER

CSR operates in some industries in which there are relatively low barriers to entry. Therefore, in many markets CSR competes with a number of established smaller competitors as well as with new entrants from time to time. It is not unusual, in those markets, for a competitor (often a new entrant) to seek to win market share by offering products at prices which must be unprofitable for the

[1] See section 2.4 of the Commission's Submission to the Trade Practices Act review dated June 2002.

competitor. In such circumstances, it is difficult for CSR to know just how vigorously it can compete with that competitor. There is a very fine line between what is legal (and competitively desirable) behaviour and conduct which is in breach of section 46.

CSR is hopeful that the High Court, in its decision on the appeal in *Australian Competition and Consumer Commission v Boral Ltd & Ors* [2001] FCA 30, will provide guidance in this area. The Full Federal Court's decision in that case offers little practical guidance on how far a company with substantial market power can go in its pricing rivalry with a competitor.

The High Court's test of proper conduct under section 46 (as set out in *Queensland Wire Industries Pty Ltd v The Broken Hill Proprietary Company Ltd & Anor* (1989) 167 CLR 177 and *Melway Publishing Pty Ltd v Robert Hicks Pty Ltd* [2001] HCA 13) is not helpful. In those cases the test for whether or not a company had taken advantage of its market power was whether or not the company would have behaved in the same way in a competitive market. Specifically, in the *Boral* case, would Boral have acted differently if it had not had substantial market power?

The Full Federal Court found that Boral's misconduct was pricing designed to eliminate a competitor or keep a potential competitor from the market. However, such behaviour is consistent with the High Court's decision in the *Queensland Wire* case, namely that competition is "by its very nature deliberate and ruthless". Further, the Full Federal Court in the *Boral* case appears to have been considerably influenced, in its conclusion that Boral contravened section 46, by the so-called "smoking gun" evidence. In CSR's view, the focus should be less on the internal documents of the alleged offender and more on the effect of the conduct in the market place. CSR does not consider that conduct ought to be punished under the Act where such conduct does not have, and is not likely to have, any anti-competitive effect on the market.

CSR therefore proposes that section 46 should be amended in two respects:

- There be an additional requirement for conduct to be in contravention of the section, namely that the conduct has the effect, or likely effect, of substantially lessening competition in the relevant market.
- The dual tests under US law should also apply to a breach of section 46 for the specific case of predatory pricing: first the alleged offender must have sold its products at a price below its avoidable costs, and second, the alleged offender must have a reasonable expectation of recouping its losses by pricing above the competitive level of pricing after the elimination of the competition.

  Without clear guidelines on predatory pricing, the Act is likely to prevent companies from offering lower prices to consumers due to the perceived risk of contravening section 46, and therefore chill competitive conduct rather than promote it.

THIRD LINE FORCING

In CSR's view, there is no economic justification for the absolute prohibition of third line forcing. In fact, the ability of suppliers to bundle products can be pro-competitive by encouraging increased volumes and lower overhead costs. Under the present legislation smaller businesses are less able to supply a range of products unless they have the capacity to acquire those products or services for on-sale — which results in increased overhead and management costs — or to notify the proposed conduct, which is expensive and often impracticable.

Removal of the absolute prohibition of third line forcing would enable smaller businesses, which supply a few products or services, to combine and package their products and services with those of other suppliers, thereby allowing them to compete more effectively with large suppliers. Under the present law, the small businesses' conduct is absolutely prohibited, while that of the large

manufacturer is only prohibited if it is likely substantially to lessen competition in the relevant markets. The "shopper docket" petrol discount schemes are a case in point.

CSR notes that the Commonwealth Department of Treasury's Discussion Paper, *Possible Amendments to the Trade Practices Act* (July 2001), supported amendments to the third line forcing prohibition to address these problems.

The provisions are technical and discriminatory

In CSR's experience, the prohibition upon third line forcing is not well understood in the marketplace and is often ignored, particularly by smaller businesses operating in the same markets as CSR. Those businesses often do not understand how the provisions operate, or form the view that they are unlikely to be prosecuted. It is unfair that CSR, which has a rigorous compliance program, is disadvantaged by its observance of the law. As a result of these circumstances, the prohibition is not being enforced consistently, undermining efficient and fair administration of the Act.

In the vast majority of cases, the prohibited conduct does not have any adverse anti-competitive effect. In these instances it may be possible to avoid the prohibition on third line forcing by restructuring the conduct, for example so that one supplier acquires title to both types of goods or services and then supplies them both itself. The economic outcome of these restructuring arrangements is the same as if there had been third line forcing. However, those solutions are often impractical. They cause considerable unnecessary administrative cost and inconvenience and demonstrate that the prohibition is technical. It appears that, due to recognition of this technicality, the ACCC does not make enforcement of this prohibition a priority.

Section 46 affords adequate economic protection

CSR understands that the main economic argument in support of third line forcing being per se illegal is that it can be used to extend monopoly power. However, this argument also applies to the other types of exclusive dealing in section 47 which are subject to a competition test. Further, monopoly power can be regulated under section 46 of the Act, and by proper application of the competition test under section 47. CSR proposes that third line forcing would remain a contravention of the Act where it has the purpose, effect or likely effect of substantially lessening competition in a market.

Consumer protection concerns can be met

In 1993, the Hilmer Committee recommended that third line forcing should be made subject to the same competition test as other types of exclusive dealing. However, CSR understands that the reform was not made due to requests from consumer organisations. These organisations were concerned about consumers being disadvantaged through tied finance/insurance with white goods and housing purchases.

In CSR's view, such concerns should be addressed under Part V (consumer protection) of the Act and not Part IV (restrictive trade practices) of the Act. The issue is one of consumer protection, not competition. In that regard, there have been important changes since the Hilmer Report. Consumers have become more sophisticated and better informed, they have greater choice due to increased competition and the consumer protection provisions of the Act have been enhanced, in terms of both rights (such as unconscionable conduct) and penalties (which were considerably increased in July this year).

The notification procedure is impractical and expensive

The notification procedure for third line forcing is expensive and impractical. The opportunity for CSR to "bundle" products usually arises suddenly and temporarily. A tender for a construction project normally has a very limited tendering timetable and there is insufficient time in which to lodge a notification with the ACCC and be assured that the Commission will not revoke the proposed bundling. In addition, the process is expensive in terms of time and money for a one-off job and unnecessarily adds to the supply cost.

CSR is unsure of how much of the ACCC's resources are taken up with the notification procedure. However, it suspects that they are significant. If the offence were made subject to a competition test, those resources could be redeployed and the cost to business avoided.

It is CSR's submission that the current provisions do not take proper account of the cost to the consumer of opportunities lost because of per se illegality and the cost and impracticality of compliance with notification requirements.

CSR understands that there have been nearly 1,200 third line forcing notifications to the ACCC, 9 have been withdrawn and only 4 have been rejected (and none of these was within the last 2 years).

Related companies exemption

In CSR's view, there is no economic logic in prohibiting related companies from engaging in third line forcing while allowing a supplier, which is a single legal entity, to achieve the same result with second line forcing. The relevant sections of the Act favour companies, whose businesses are divisionalised within the one legal entity, over groups which conduct their businesses through subsidiaries.

In this regard, CSR has been disadvantaged as against its competitors where CSR wishes to bundle products manufactured by different companies in the CSR group. CSR has been prevented from doing so because it would be third line forcing. But its competitors have been able to bundle their products because, in their case, they are only second line forcing. It is illogical that the legality of the conduct is dependent on an "accident of birth".

Generally speaking, Part IV of the Act treats members of a group as a single economic entity in relation to competition. There is no economic reason why this should not be so with third line forcing as well.

Finally, the Federal Treasury's discussion paper, *Possible Amendments to the Trade Practices Act*, (July 2001), proposed that third line forcing be subject to a competition test, and that third line forcing by related companies be treated in the same manner as forcing by a single corporate entity. CSR strongly supports these proposals.

AUTHORISATIONS

There is a time limit of 30 days (extendable to 45 days) for the Commission to respond to an authorisation for a merger. However, for all other authorisations, there is no time limit (although the Minister can impose a 4 months time limit under section 90 of the Act).

The ACCC has cited[2] an authorisation granted to CSR in relation the Pioneer and Invicta Sugar Mills in the Burdekin region as an example of the ACCC assisting the Burdekin community and Australia's international competitiveness.

CSR agrees that the authorisation helped achieve the benefits described by the ACCC. The authorisation allowed for the extension of the cane crushing season and mill capacity which had significant benefit for cane growers as well as CSR.

However, the aspect of that particular authorisation which was counter-productive to the interests of the growers, the company and Australia's international interests was the time it took to obtain the authorisation.

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[2] See section 9.2.1 of the Commission's Submission to the Trade Practices Act review dated June 2002

Prior to lodging the application, CSR had consulted at length with the growers and had prepared a form of agreement that CSR considered achieved the benefits of an extended season and reflected the concerns and issues raised by the majority of growers.

CSR lodged its application for an authorisation in May 2000. CSR (and the growers) expected that the application would be processed quickly and could be implemented in time for the next crushing season which was due to commence in a few weeks.

The ACCC issued its final determination 14 months later, in July 2001. This meant that CSR and the growers lost the financial and other benefits of the agreement for the whole 2000 crushing season.

A major contributing factor to the delay was the stand taken by one particular grower who opposed the proposal and made a number of submissions to the ACCC. He also complained about ACCC's staff and the process for dealing with his complaints.

In CSR's view, this caused the ACCC to treat his concerns with disproportionate care. CSR's proposal enjoyed almost unanimous support from the growers.

The aggrieved grower was given many opportunities by the ACCC to put forward his views. CSR responded in detail to all of them but the ACCC allowed him to raise the same as well as different issues on subsequent occasions, including a public hearing in Townsville.

CSR had an even worse experience with an authorisation application some years earlier. CSR's Brisbane premixed concrete business obtained an authorisation (Authorisation No A50016) in relation to the negotiation of concrete cartage contracts with its fleet of lorry owner-drivers (**LOD's**). CSR's application was lodged in August 1995 but the final authorisation was not granted until more than 2 years later, in October 1997.

Whilst an interim authorisation was granted after 7 months, in March 1996, its terms were limited. The lengthy delay in and the lack of a final authorisation resulted in CSR being subjected to unnecessary industrial action involving the Transport Workers' Union (**TWU**) and the LOD's. The TWU asserted that the lack of a final authorisation supported its views that an authorisation was unnecessary and that the contract, for which the authorisation was being sought, was inherently unfair.

SECTION 155 INVESTIGATIONS

CSR is most concerned about the decision of the Full Federal Court in *Australian Competition and Consumer Commission v Daniels Corporation International Pty Ltd* [2001] FCA 936. CSR proposes that, if the High Court appeal in this case is unsuccessful, the Act be amended so that legal professional privilege applies to section 155 investigations.

Legal professional privilege encourages open and frank discussion between lawyers and their clients. CSR's trade practices compliance program encourages employees to raise their concerns with CSR's legal department. It is in the interests of both the employee seeking advice and CSR that advice be recorded in writing. CSR believes that, if the ACCC is able to inspect legally privileged documents in the course of a section 155 investigation, this will discourage open and frank discussions between lawyers and their clients and will discourage written legal advice.

COLLECTIVE BARGAINING BY DEDICATED SUPPLIERS

CSR believes that the Act should be amended to facilitate collective negotiation by those who supply goods or services solely to one customer.

By way of specific example, CSR contracts with cartage companies (known in the industry as lorry owner-drivers) which have trucks dedicated to transporting products solely for CSR. Likewise, sugar cane growers supply their cane to the CSR's mills located near their farms.

Since each of these groups of suppliers to CSR are in competition with each other, section 45 of the Act prohibits them from collectively negotiating with CSR their terms and conditions of supply. It has been necessary for CSR to seek authorisations from the ACCC to engage in collective negotiations with those suppliers. As stated above, CSR has had unsatisfactory experiences in obtaining those authorisations. In CSR's view, the process has been too expensive and time-consuming. Amendments need to be made to this process to substantially reduce the time and cost involved.

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