Ecinya Consultants Pty Ltd

For the Committee's Inquiry into the *Trade Practices Act* 1974
Submission on s46

To the Secretary

Trade Practices Act Review

c/- Department of the Treasury
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Introduction:

Ecinya is an acronym for Exercise Caution IN Your Affairs and is an **independent** investment consultant that provides investment commentary for the E*Trade Australia web site.

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Ecinya welcomes the opportunity to put our views to the Senate Legal and Constitutional References Committee regarding the proposed changes to s46 of the *Trade Practices Act* 1974 reversing the onus of proof under actions brought by the Australian Competition and Consumer Commission (ACCC). The reform proposal is to amend s46 so that where the ACCC can show that a corporation possesses substantial market power, and has 'taken advantage' of that power; the corporation should then bear the onus of proof that its purpose was not a purpose proscribed under s46.

Ecinya believes that a discussion concerning the proposed change to s46 cannot be made without a discussion of competition policy in general. Our submission in Part 1 will thus make reference to some points we consider as important in the present

regulatory environment, and raises some questions for the Committee to consider. Part 2 will then discuss the proposed s46 amendment in particular.

Ecinya believes such a reform to s46 is not warranted because:

- Various provisions in the Act already assist in determining 'purpose'.
- An action brought by the ACCC is a civil action, which means that proof is on the lower standard of the 'balance of probabilities'.
- The proposal will have a severe disadvantage to innovative companies.
- Most importantly, the proposal is a radical change that will do very little to assist smaller businesses and enhance the economic prosperity of Australians.

PART 1

1. At schoolboy level we are told that the major inputs in a functioning economy are land, labour and capital. It follows in terms of our logic that an uneven access or sharing of these inputs creates a lack of competitiveness that is unproductive for corporate and household consumers. Thus we need a properly functioning Competition and Consumer Regulator. Market abuses do exist and need to be curtailed or prevented.

2. At schoolboy level we are also taught that the economic problem is the battle that wages between wants and needs which are unlimited in extent and variety, and resources which are limited. The economic problem becomes a question therefore of having a system that allocates scarce resources efficiently. The ACCC is in danger of becoming a mis-allocator of scarce resources. Some would say it is already there.

3. We believe we are seeing a rapid deterioration of competition in the Australian economy. In relation to small business we believe that there is effectively bi-partisan policy, with the Federal Parliament committed through its actions and neglect to the destruction of small business that are denied access to capital, land and labour on a viable cost basis. This lack of access means that the innovation and creative business skills of small business will be lost, enabling large business to completely dominate all of the goods and services sectors over coming decades. Small business capable of becoming larger, and then reaching large business status, will wither and die.

4. It is our belief that all of the watchdog organisations are conspicuous failures. These include the ACCC, APRA and ASIC. Why is this so ? We do not intend to answer the question but to simply place it on the public record. Perhaps the field they play on, the rules of engagement and the audience they play to all have their flaws.

5. The ACCC certainly has policy and execution problems. At the policy level its models are doctrinaire, biased and proceed on false notions of economics, commercial reality and common law. At the execution level we seriously question the ACCC's use of the media, with parties under investigation having to endure negative media reports before any findings are made against them by the ACCC and the courts.

6. The ACCC Chairman oft refers to "best international practice". There is no such thing. It is certainly not Europe with its rigid structures and consequent lack of flexibility in all matters economic. It is certainly not America with its excessive flexibility including shoddy and fraudulent accounting and commercial practices. We know enough of the rest of the world to have outcomes that are Australian focused. The "A" in ACCC is just as important as the "Cs". There should be an operational bias towards good Australian companies in the ACCC's rulings.

7. Scale is important, but big is not necessarily beautiful. Australia's GDP is around $US400 bil, America's around $10,000 bil. Australia's population is around 20 m, America's 280 m. The American model is of very suspect relevance to Australia.

8. Ecinya is concerned that many good and efficient companies are being hounded by the ACCC – Qantas, Telstra, Commonwealth Bank, Woolworths, Harvey Norman. A public reprimand might be sufficient under the Act after due process, rather than the tactics currently employed.

9. Competition and Consumer policy (CC) must be consonant with the commercial environment that exists and there is a need to change that environment before the CC policy will operate effectively. Bad policy and poor implementation imposed on a non-competitive environment will not work. We need a CC model that is compatible with the real Australian economy rather than a utopian, mystical or fictional model that exists somewhere in the minds of the collective ACCC personnel and its leader. Some context reform is required.

10. The first such context reform must be the extension of the Federal parliamentary term to 4 years with a mandatory period of 42 months or 5 years with a mandatory period of 48 months. Policy must always have sufficient time to work and/or its shortcomings recognised and changed.

11. The second reform is that as quid pro-quo for the GST personal tax rates for incomes under $75k need to be significantly lowered, perhaps in a series of steps. Small business has been harshly penalised by the GST and not sufficiently rewarded for giving up or mitigating the cash economy.

12. The third reform involves addressing duplication in State and Federal functions to minimise community costs through the taxation system. Some of these savings should be allocated to the watchdogs.

PART 2 - Section 46 Specific:

13. Section 46 aims to promote competition, not the private interests of particular persons or corporations[1]. However, competition is by its very nature deliberate and ruthless[2], and it is often difficult to discern conduct that is competitive and that which is predatory in purpose. Thus the crucial issue in considering reform of the section is how to best distinguish between the two.

14. The ACCC has favoured the adoption of an effects-based approach. It is Ecinya's view that such an approach has many problems, the most important of which would be to unduly widen the section to catch conduct undertaken for legitimate or competitive purposes. A test imposing liability on competitors that exclude others would not distinguish between predatory and legitimate competitive conduct. This brings with it the huge risk of imposing liability on companies that have engaged in effective competition. A system that too often may punish merit is hardly good competition policy.

15. It must not be taken as granted that the view expressed by the ACCC is a view that is in the public's best interest. Ecinya is supportive of the view taken by Warren Pengilley in his submission to the inquiry that "the ACCC's prime concern is to advocate changes in the law which make those cases it brings easier to win". The adoption of an 'effects-based' test will not be in the public's interest given its risk of imposing liability on companies engaged in effective competition.

16. The introduction of an effects-based test can be seen to go against the very aim of the Act. Although conduct having the effect of lessening competition has a detrimental effect on the competitive process, to extend the section to prohibit legitimate business conduct would take it beyond the restrictive trade practices it was designed to prohibit. An effects-based test should absolutely not be implemented.

17. Various provisions in the Act already assist in determining 'purpose'. Section 46(7) provides that a corporation may be taken to have acted with a proscribed purpose even if the existence of that purpose is ascertainable only by inference. Section 4F(1)(b) provides that there is no need to show that the purpose was the sole purpose motivating the conduct, it need only be a substantial purpose. Section 84(1) and (5) makes it sufficient to show that a director, servant or agent had the state of mind acting in his/her authority, not that the corporation had the proscribed state of mind.

18. It must also be remembered that the presumption of innocence is an important principle in our legal system. Reversing the onus of proof in section 46 would presume *guilt*. Also a s46 action is a civil action and the rules of a civil proceeding thus apply. This means that proof is on the lower standard of the 'balance of probabilities'. The ACCC may also take advantage of procedures

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[1] *MelwayPublishing Pty Ltd v Robert Hicks Pty* Ltd [2001] HCA 13 at 17 quoting *Queensland Wire v BHP* (1989) 167 CLR 177; 33 ALR 577

[2] *Queensland Wire v BHP* (1989), above n1

such as access to the entire defendant's internal files and workings, while there is also an elimination of any right to silence for the defendant. The ACCC is an experienced, well-funded and well-advised litigant, not an underdog that needs help. It is Ecinya's view that presuming guilt given the ACCC's large powers would seem unfair for many defendants.

19. The ACCC has made it known that they are "aware from experience of instances where corporations have issued specific instructions in relation to the creation or destruction of internal documents" and this is making the task of proving purpose even more difficult. It is suggested that a reversal of the onus of proof in which the burden of proving purpose would rest on the respondent company would be of great benefit and assistance in such circumstances. However, the ACCC already has experience of corporations seeking to create apparently legitimate substantial purposes for conduct that potentially breaches s46. This would then mean that the ACCC would remain in a position of having to show that the apparent legitimate purpose put forward by the respondent was not the true purpose of the conduct, the change thus achieving very little.

20. A reversal in the onus of proof could also have a dampening effect on research and development conducted by businesses, and discourage companies from exploiting technological advances. A company having market power should be able to commercialise the product of its research and development and enjoy the return that this provides. The company has taken substantial risk and why should the law require the company to share its return with others who have not shared the risk? Under all the major political parties in Australia the aim is to make Australia a 'knowledge nation'. To foster such an aim would require the exploitation of new designs and concepts, which quite validly could give a company a market advantage. Reversing the onus of proof would enable the ACCC to take action against an innovative company because of the presumption of guilt, and to then force it to defend itself even though all it had done was exploit its innovation. Thus a reversal of the onus, whilst achieving very little in the way of helping to prove purpose, will have a severe disadvantage to innovative companies and will go against the very aim of efficiency that the TPA is supposed to be promoting.

CONCLUSIONS:

The law must achieve a fine balance between the promotion of competition and the control of predatory conduct. This is the central difficulty for competition policy in Australia and elsewhere. As the High Court said in the Queensland Wire case:

> "The object of s46 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"[3]

Although there are problems evident in the current purpose test used, reversing the onus of proof will not solve many of these and will introduce further problems.

There should be no amendment of s46.

We believe there should be absolutely no extension of the ACCC's powers.

A selection of their past decisions should be reviewed to determine how productive/ beneficial the decisions have been.

There should be a properly constituted Board of Directors that the ACCC personnel report to and are accountable to. The Board should have the right to reject a recommendation of ACCC personnel. Flexibility and desirable economic outcomes should be a major part of such a Board's mandate. Flexibility means that every case would be treated on its practical merits at the time of consideration rather than precedent emanating from different time and circumstance.

Upon rejection the ACCC personnel would then have a right of appeal to the Treasurer who can ask the Board to review the submission. The Treasurer or a member of the Department of the Treasury may attend any convened meeting of review. The Treasurer has no right of veto or over-rule. The treasurer is simply asking everyone to "think again".

Ecinya also recommends the creation of a Small Business Board of Liaison and Review, which would meet with the ACCC three times a year to discuss issues relating specifically to small business. The board will comprise representatives nominated by various small business bodies such as the Retail Traders Association, etc.

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[3] *Queensland Wire* op cit n5 at 192-193