Submission on the

Review of the Competition Provisions of the Trade Practices Act 1974

Summary of Recommendations

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About the Australian Consumers' Association

Mission: Test – Inform – Protect - Empower

The Australian Consumers' Association (ACA) is an independent, not-for-profit company limited by guarantee. ACA was established in 1959 to:

- provide individual consumers with information and advice to help them with their decision-making in the market;
- lobby on behalf of the consumer interest and to provide a countervailing voice to balance the powerful interests of business and industry.

To fulfil its mission, the ACA tests and researches products and services, and publishes its findings in print (CHOICE magazine, Computer CHOICE, CHOICE Books) and through CHOICE Online (www.choice.com.au). These activities are the means by which ACA raises its funds as well as being the basis of much of its work for consumers. The ACA also lobbies and campaigns for improvements in consumer protection and for the empowerment of consumers.

The ACA accepts no government funding for its ongoing running expenses, no commercial sponsorship, and no advertising in any of its publications. It buys the products and services that it tests in the market. ACA's income is derived almost entirely from the sale of information to consumers - such as subscriptions to its magazines and online site, and sale of books; as well, a small income is derived from fee-for-service testing in its laboratories and related other expert services.

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Summary of Recommendations

The stated aim of the Trade Practices Act is to enhance the welfare of Australians through the promotion of competition and fair trading and consumer protection. Strong domestic competition law and its vigorous enforcement are crucial not only for the welfare of Australian consumers but also for Australia's economy. More generally, for the efficient functioning of the economy, it is crucial that consumers can be confident markets are operating honestly and fairly.

Competing Locally and Globally (Term of Reference 1a, 1c, 1f)

Some have suggested that one way to improve the welfare of Australians is to improve the chances of Australian companies being able to compete globally. This is apparently to be accomplished by permitting mergers that substantially lessen domestic competition so that these larger companies can have more chance of success abroad. Quite apart from the fact that there is no evidence that simply big is better – 50% of Australia's exports do not come from the big companies – empirical evidence suggests that it is a strong, rather than lax, domestic competition regime that assists in creating firms which are strong global competitors.

To use an analogy, proposals for softening competition law and particularly merger law are akin to suggesting that Australia should pursue the development of its world-class athletes by reducing the array of other possible top Australian athletes in the field. These "by definition" winners would then take the world by storm. Common sense suggests that such athletes, shielded from the rigours of competition, actually wouldn't stand a chance on the global stage; neither will companies which have not grown up in a culture of vigorous competition. Success globally, which is important for Australia's continued economic success, is a combination of ability to respond to customers, a strong price/value proposition, and most importantly, a finely honed competitive attitude. The suggestion that coddling companies at home can develop world-class competitors is a nonsense.

The economic concepts underlying competition law are reviewed in this section of the submission.

Accountability of the ACCC – Governance Structures, Use of Publicity (Term of Reference 1d, 1e)

The ACCC is currently accountable in a variety of ways: formally to the elected representatives in Parliament; more generally to the public; and in its enforcement activities to the courts by virtue of appeals or challenges to the Commission. Appeals against ACCC conduct or decisions can be made, depending upon the circumstances, through administrative appeals structures, the Commonwealth Ombudsman, and the Australian Competition Tribunal.

The ACA does not see the need for any additional levels of bureaucratic scrutiny to be added. Such proposals have little merit, are thinly disguised attempts at regulatory capture, and would considerably slow down the Commission in carrying out its duties. None of these outcomes would be of benefit to Australian consumers or to the Australian economy.

The ACCC's use of publicity is an extremely cost effective compliance and education strategy. Since our system of justice is a public one, inevitably those found guilty of breaches of the Act will suffer in terms of reputation – and so they should; in terms of possible reputational damage from the public being aware that a firm has been charged (not convicted), the ACA believes that the Australian society and media are sufficiently intelligent to be able to distinguish between an allegation and a conviction. It is more important from a societal point of view to maintain the justice system as a public one than to suffer the detriments of a secretive system.

The ACA believes that consumers have become far more aware of their rights because of the high public profile of the Commission and its Chairman, and far more comfortable in the market as a result. This is an excellent, if unmeasured, benefit of a market regulator acting with very high transparency. The media, which provides prominent coverage of the ACCC and its activities – which again is an important public outcome – also provides major public scrutiny of the Commission.

Throughout the world, public confidence in regulators has suffered badly. High-profile corporate collapses and apparent widespread dishonesty has undermined consumer and investor confidence in not only corporate governance but also regulatory effectiveness. The ACCC, and Allan Fels as its current Chairman, remind consumers, through public presence and transparency, that appropriate vigilance of a regulator is possible. This is welcome in a society where transparency, openness, and public accountability are increasingly valued.

Mergers, Authorisations - Section 50, Section 87B (Term of Reference 1a, 1b, 1c, 1e)

The current mergers regime in Australia has a number of important features. One aspect, which is critical, is the high transparency of the process and the opportunity for consumer organisations, businesses and other stakeholders who might be affected, and the public more generally to put a view and be heard in a merger proposal which would involve a substantial lessening of competition.

The first step in the process of considering a merger requires the ACCC to determine if the proposal would significantly lessen competition. This determination is conducted privately and some 95% of proposals are approved. Where a merger might significantly lessen competition, firms have an opportunity to give undertakings, either structural or behavioural, to enable the merger to go ahead. In the small number of instances, about 2%, where the problem of substantially lessening competition cannot be overcome

through undertakings, companies in Australia still have an opportunity to successfully merge by arguing the public benefits of the merger, on the basis that these outweigh the competitive disadvantage.

For the proposition to be accepted, that the public benefits outweigh competitive detriment (i.e. detriment to consumer welfare), companies appropriately must make this case in public. The public, media, consumers and business stakeholders, have a right to examine the claimed public benefits of a merger and to offer their view as to whether these claimed benefits are realisable and sufficient. Proposals to amend s 50 and s 87B, such that the public benefits test is inserted into the initial consideration of a merger, mean that these supposed benefits would be considered behind closed doors and not be subject to public scrutiny before a merger is agreed. There is no reason, in our view, to accord businesses this level of confidential privilege, in addition to having accorded to them the privilege of considering a merger even in situations where competition detriment occurs.

In the same vein, the formality of a quasi-judicial forum, the Australian Competition Tribunal, would effectively lock out consumers, small businesses and others without deep pockets, from making input into the decision-making process in the event that major mergers were allowed to be taken directly to that forum. The cost of QC representation and other legal advice would be prohibitive for most, if not all, smaller parties. As well, tribunal processes are not the most appropriate ones to handle complex issues of benefits and costs. Even inquisitorial tribunals operate within a legal tradition of constraint by the rules of presented evidence. It is very difficult for such bodies to undertake the necessary research in relation to determining whether a merger should proceed.

For reasons of public accountability, the ACA does not support amendments to s 50 or 87B which inserts the public benefits test early into a consideration of a merger and does not support the proposal that businesses have the option of going directly to the Tribunal for a merger decision. Nor do we accept that the authorisation process is truly problematic. Our view is that business is reluctant to make its arguments in public since it does not wish to subject itself to the public scrutiny that this process involves. The ACA would maintain that business needs to get itself into the 21st century, where societal requirements for transparency and public scrutiny will be increasing, not decreasing.

Specific Improvements to the Trade Practices Act

The Australian Consumers' Association believes that the time is opportune to strengthen the Trade Practices Act in certain important ways and to ensure that the regulator can be vigilant and forceful in the pursuit of firms which breach the law. Eight suggested changes to the Act are outlined.

1. Effects test – Section 46 (Term of Reference 1b, 1c, 1e, 2)

The current test in s. 46, a purpose test, creates enforcement difficulties in obtaining sufficient evidence to prove the proscribed purpose. This type of evidence is very rare, increasingly so.

At the moment, there is probably at least some conduct taking place in the Australian market that would be deemed to be a misuse of market power (such as predatory pricing, refusal to supply, and so on) if it was not placed outside the reach of the law by the inability of either the Commission or a competitor to show evidence of actual anti-competitive purpose. Allowing this situation to continue is neither helpful for competition in Australia nor fair to competitors. It would be far better if companies with a substantial degree of market power faced a law that proscribed misuse of market power where the regulator can show that a company's behaviour clearly took advantage of its market power to the detriment of a competitor whether or not documents about purpose were obtainable.

> **Submission: That s 46 be amended to include an additional phrase such that corporations with substantial market power cannot take advantage of their power for the purpose *or effect* of damaging competitors or potential competitors.**

Penalties, Deterrence, Compensation, Disgorgement

For breach of the Trade Practices Act, the penalties available to the courts should allow for the ability to punish individuals by gaol sentences or through fines, the setting of possible fines at a level that acts as a deterrent, and also for opportunity to compensate wronged parties and ensure that firms do not retain ill-gotten gains, even where the class of consumers harmed by the breach of the law is dispersed.

2. Criminal Sanctions (Term of Reference 1b, 1c, 2)

In the interests of equality of justice, there is no reason that corporate criminals engaged in cartel behaviour, which is a form of theft, should be immune from a jail sentence which is faced by other thieves. There is clearly insufficient personal deterrence at the moment and overseas experience suggests that a jail term is far more feared than a

pecuniary penalty. Immunity from prosecution for crimes is granted to children or those who are deemed to be mentally deficient. The ACA does not perceive any rationale for Australian society to accord such tender treatment to business executives breaking the law.

Submission: That a new section be inserted into the Trade Practices Act to provide for criminal sanction for serious or "hard-core" cartel behaviour.

3. Civil Penalties for Part V (Term of Reference 2, 3)

It is possible for the Commission to get criminal penalties in the form of fines (but not jail sentences) for Part V offences, but not civil penalties. This is a very curious feature of the Act. It is not fair for businesses always to face criminal penalties for breaches of Part V and there are innumerable (but not pursued) cases where a company should face a pecuniary penalty but where the conduct does not justify criminal action. The addition of civil penalties for contraventions of Part V would help to provide a deterrent to offences against the Act, would allow more fairness in the enforcement of that part of the Act, and would also enable justice to be carried out promptly and at lower cost.

Submission: That a new section for contraventions of Part V be introduced into the Trade Practices Act providing for civil penalties.

4. Fines (Term of Reference 1b, 1c, 2)

While it appears that the level of Australia's pecuniary penalties has had some deterrent effect, it is clear that the ACCC does not lack for business - the level of fines does not appear to be sufficient to deter breaches of law by companies which assess the benefit/risk favourably. Fines need to be set at a level that can ensure that a company suffers a financial disadvantage in relation to its competitors from its inappropriate and illegal behaviour. By preference, it should not be possible for a company to base its decision-making on a calculation that the benefits of illegal action outweigh the likely impact of fines.

Submission: That the Trade Practices Act be amended to allow for the appropriate pecuniary sanction of companies such that the company can be fined as a percentage of its gross turnover or as a multiple of the ill-gotten gain from which it has benefited.

5. Cy-pres Solutions (Term of Reference 2, 3)

A fair number of breaches of trade practices law have dispersed effects on consumers such that a price-fixing arrangement, for example, could have a small effect on each individual consumer but a large effect in aggregate. While the perpetrators of collusion

who are caught and found guilty are fined, it has not been usual for the Australian courts to also ensure that the ill-gotten gains of a company are disgorged and returned to consumers in some form. The doctrine of cy-pres provides not only for the compensation of consumers who have been wronged where they can be identified, but also for the disgorgement of gains through a distribution of funds to be used for consumer benefit broadly.

The Consumer Law Centre Victoria is one of the few instances of a cy-pres solution in Australia. A finance company, which was engaging in dishonest and unfair selling practices, was required to compensate consumers at large by paying $2.25 million to a fund establishing the Centre. The outcome is a consumer advocacy group which can represent the interests of consumers in a manner which ultimately assists in reducing consumer detriment and improves the protection of consumer interests broadly.
At the moment, the Act is silent in providing direction to the Court on how penalties might be distributed. The ACA submits that consumer welfare in Australia could be enhanced through more use of the cy-pres doctrine.

Submission: That provisions be introduced into the Trade Practices Act 1974 (with mirror provisions in the ASIC Act) formulating cy-pres solutions in Australian consumer protection law.

6. Regulatory Intervention in Unjust Contracts (Term of Reference 1c, 2, 3)

There is increasing recourse by companies in Australia to contracts which shift business risks to consumers (including small business in its dealings with large businesses) or unjustly burden consumers with inappropriate contractual terms. Some examples of contracts which are allegedly unfair in ACA's opinion are provided at Appendix II.

Terms in these contracts include: unilateral change clauses, tendentious default provisions, clauses that confer a particular evidentiary value upon certificates or other documents issued or held by a business or third parties, onerous obligations on the customer, apparent attempts to contract out of "fit for purpose" warranties under the Act, and onerous terms in "clickwrap" contacts for e-commerce services.

Unlike many other countries, Australia has no systematic process or effective law for dealing with such unjust terms in contracts and the federal Government has been completely lenient about this. This may account for their proliferation here. Other country governments either have addressed or are in the process of addressing this problem and are not simply leaving consumers to the "mercies" of an unequal power relationship between consumers and business.

Submissions:

- **That a new *Part IVB – Unfair Terms* be inserted into the *TPA*;**

- **That this new Part be modelled on the key features of the UK *Unfair Terms in Consumer Contracts Regulations 1999*, appropriately adjusted to fit within the TPA framework;**
- **That, consistent with the UK *Regulations*, the new Division:**
- **declare that unfair contract terms, as defined, are not binding on consumer parties;**
- **impose a positive duty on the ACCC, as regulator, to consider complaints about unfair terms; and**
- **give the ACCC (and, perhaps, other specified bodies) the power to seek both enforceable undertakings and injunctions to restrain the continuing use of unfair terms.**
- **That mirror provisions dealing with contracts in relation to financial services be inserted as a new Subdivision within Part 2, Division 2 of the *ASIC Act*, and**
- **That additional resources be provided to both the ACCC and ASIC to ensure that the new legislative responsibilities proposed are effectively and actively administered.**

Further, the ACA considers that extensive work needs to be carried out on the magnitude and nature of unfair contract terms in the marketplace and recommends that as a priority the three key regulators – Australian Competition and Consumer Commission, Australian Securities and Investments Commission and Australian Communications Authority - jointly undertake a wide-ranging study into the matter, consider what terms should be "black listed", and report on their findings.

Small Business Issues

7. Cease and Desist Orders (Term of Reference 1b, 1c, 1f)

In situations of misuse of market power against a small business, before a decision can be obtained in the courts (which can take a number of years) the small business may well be bankrupt. Thus the ACA supports the introduction into the Act of "cease and desist" orders to provide a breathing space while evidence is collected to injunct such a behaviour.

8. Collective Bargaining by Small Business (Term of Reference 1b, 1c, 1f)

With the caveat that certain protections would need to be in place, the ACA can support an amendment that would permit small businesses to bargain collectively in some cases. The protections include: no blanket exemption from the law; the ability of the Commission to intervene to redirect a proposed collective bargaining arrangement to the authorisation process in situations where such bargaining could significantly harm competition; and that the collective bargaining be permitted only in relation to dealing with businesses which have a significant degree of market power.