



17 July 2002

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

Fax: (02) 6263 3939

Dear Sir/Madam

Please find attached a copy of Commerce Queensland's Submission to the Review of the Trade Practices Act 1974.

Commerce Queensland is Queensland's peak industry association representing over 4,000 members directly and over 15,000 members through affiliated organisations. Commerce Queensland's membership base represents a cross section of small, medium and large businesses and, as such, is very interested in the outcomes of this Review.

Please contact Mr Jon Norris, Director - Policy, on (07)3842 2237 should you wish to discuss the attached submission.

Yours faithfully

  
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**SUBMISSION TO THE SENATE INQUIRY REVIEWING THE ANTI-  
COMPETITIVE PROVISIONS OF THE TRADE PRACTICES ACT 1974**

**SUMMARY**

Commerce Queensland is Queensland's peak industry body representing over 4,000 businesses directly and over 15,000 indirectly through affiliated smaller industry groups and Chambers of Commerce. The Commerce Queensland membership comprises businesses of all sizes and across all industries.

In developing this submission Commerce Queensland undertook a survey of a large sample of its membership from across Queensland. This survey, as well as discussions with a range of industry and government representatives, provide the foundation material for the recommendations contained in this submission.

In relation to this Review of the Trade Practices Act 1974 (TPA; "the Act"), Commerce Queensland has outlined a number of issues and recommendations that the Senate Committee should take into consideration when formulating its final report.

Competition is not an end in itself but a means to an end. In this context, businesses operating within the Australian domestic economy, at least in many of its markets, require economies of scale to ensure competitiveness both domestically and on the international stage. This in turn necessitates the formation of oligopolies in some markets. Due to these domestic idiosyncrasies, businesses have found it necessary to engage in the formation of joint ventures (oligopolies) in order to achieve the desired operational structures assist their market presence.

The existence of these market structures is not a problem in itself. The problem lies in the behaviour of certain businesses and/or individuals and the enforcement of a suitable regulatory regime that takes into account the reality of competition on a global scale. In short, market power should be considered a necessity in certain markets within Australia, given the relatively small size of the markets and the need to compete against large international firms. It is the misuse of this market power that should be addressed.

A summary of the key issues and recommendations are outlined below. A copy of the Submission in full is attached to this summary.

1. The ambiguity in relation to the Section 46 (what is interpreted as a misuse of Market Power) and Section 50 (what is a lessening of competition) should be removed. The objectives of the Act must be clear and this must be reflected in the wording of the Act. This would assist the ACCC in determining its (appropriate) role in enforcing the Act as well as providing greater clarity within the business community.



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2. The Government should consider the introduction of an "effects" test within Section 46 as long as:

- The legislation explicitly states what the "effects" test entails;
- The onus of proof is not reversed; and
- It necessitates a clear causal link between the alleged behaviour of a business and/or group of businesses and the negative effects on a business or group of businesses.

3. Greater penalties for illegal behaviour under the Act are supported. These penalties should be reflective of the severity of the crime and act as a suitable deterrent to potential transgressors. This includes the adoption of much larger financial penalties and criminal penalties for price fixing and collusion. The penalties incurred should be consistent and reflective of the damage inflicted on the affected business/es. These penalties should apply to all businesses and organisations, not just big business.

However, it is recommended that collective bargaining by small business be excluded from the legislation. This would allow them greater capability in developing substantial cost savings and developing economies of scale.

4. The inclusion of "cease and desist" powers for the ACCC is not supported. Improving the current system and/or adopting a complementary dispute system for resolving these issues would be a more effective means of addressing the problems associated with the delays in the court system (in progressing cases).

5. The public announcements ("trial by media") used by the ACCC should cease given its detrimental impacts on businesses regardless of their innocence or otherwise. The ACCC and/or another Federal Government agency should use other more effective means to educate the public and business community about the Trade Practices Act and anti-competitive behaviour.

6. The ACCC should be more accountable and transparent in undertaking its role in enforcing the TPA. This would be achieved through the establishment of a Board to oversee the actions and assist in setting the strategic direction of the ACCC. The Board could also assist the ACCC in clarifying its role in implementing the TPA.

7. Section 50 should be clarified (as to what is in the public's best interests) and less restrictive. The interpretation and implementation of this Section of the Act should allow mergers where it can be demonstrated that, even with a reduction in competition in a particular market or markets, there are demonstrable benefits to overall economic efficiencies i.e. lower prices and a greater range of services for consumers in the longer term.



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- ◆ The limited competition should be addressed through an appropriate regulatory framework (ie. the other areas of the TPA). This may necessitate significant changes to the administration of company mergers, ensuring that the ACCC plays only an advisory role in these matters. In short, if an effective regulatory framework is in place and enforced appropriately then this should assist in a relaxation of the merger laws.
8. There is a significant need for the Federal Government to support the education of the business community, particularly small business, on the TPA, the role of the ACCC and exactly what is anti-competitive behaviour. It is clear that many businesses regard "normal" competitive practices by large businesses as "anti-competitive" and in fact, they often seek some form of protection from legitimate competition ie. larger businesses capability to offer discounts, volume pricing, and achieve lower marginal costs through economies of scale in production, distribution and delivery.



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## **SUBMISSION**

In preparing this submission, Commerce Queensland has focussed its attention of Part IV of the Trade Practices Act (TPA), particularly sections 46 and 50. These specific Sections of the Act examined are attached.

The Submission and its recommendation have been prepared using feedback from a broad range of Queensland businesses (small, medium and large) and discussions with industry, business and government representatives. The Submission seeks to present a balanced view, reflective of what are dichotomous views in the business community on these matters.

### **Issues**

- ◆ The TPA, specifically Section 46 and Section 50 in Part IV, are ambiguous and open to a great degree of interpretation by the ACCC and the courts. There is significant uncertainty as to what the legislation means and this issue is exacerbated by the lack of understanding of the legislation in the business community, particularly amongst small business.
- ◆ The ACCC undertakes very public investigations on some high profile large businesses. The justification for these actions from the ACCC is the "positive" role this plays in raising anti-competitive issues within the public sphere and educating the business community in relation to the TPA.

These public activities are detrimental to the reputations of the businesses concerned, can cause significant commercial damage to the affected businesses and transgress what is considered to be natural justice. Any perceived shortfall in the legislation and its enforcement does not justify these actions.

- ◆ An effective market system is the optimal mechanism to ensure the most efficient production, distribution and sale of goods and services within the economy. It is recognised there exists an imbalance of (economic) power in many markets and this requires a sensible regulatory framework. However, the existence of market imbalances is not in itself anti-competitive and, with the appropriate protection in place, can foster greater efficiencies and improved outcomes to consumers and society as a whole. It is clearly the misuse of market power that is the problem not the existence of dominant market players.

An effective regulatory regime and enforcement mechanism should be sufficient to ensure market (power) imbalances function effectively, delivering greater efficiencies that in turn deliver a greater range of goods and services at lower prices to consumers i.e. some markets or industries may necessitate or require monopolies and/or oligopolies in order to derive economies of scale and provide



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Incentives for long-term investment, particularly in such a small market as Australia.

- ◆ The ACCC has advocated the inclusion of an "effects" test within the TPA (to replace the "purpose" or "intent" test) to determine the misuse of market power as defined within the Act.

On the face of it, the change from the "purpose" to an "effects" test may seem warranted given the ACCC's perceived difficulties in proving intent (as currently defined within the legislation). Small businesses and their representative organisations are very supportive of the effects test within the TPA.

However, there are a number of significant concerns that Commerce Queensland has in relation to the adoption of such a test:

- What will the "effects" test entail and what will it mean for businesses in a practical sense? i.e. when implemented and enforced by the ACCC.
- Will the "effects" test entail a reversal of the "onus of proof"? If so, this could not be supported.
- Would the "effects" test necessitate that a demonstrable and clear causal link be established between the alleged behaviour of a business and group of businesses and the impacts/effects on a business and/or group of businesses? (There are any number of factors and reasons that cause negative impacts on businesses that are not caused by "anti-competitive" behaviour.)

The "effects" test requires much further explanation as to what it means and how it would operate in practice.

- ◆ The ACCC has also recommended the inclusion of "cease and desist" orders in enforcing the TPA. This would necessitate the ACCC being the final arbiter in determining what is "anti-competitive" behaviour and negate the role of the courts and due process. One of the rationales for supporting this amendment is the delay in processing cases through the court system and problems with proving "anti-competitive" behaviour.

Small businesses by and large seem to be very supportive of this measure. However, initially it would seem prudent to address these problems (such as the delays in the court system) through alternate means.

It is not appropriate that the ACCC should have powers to act as a policeman and judge and jury.

- ◆ The ACCC has called for the introduction of criminal sanctions to be introduced into the TPA for the "most serious breaches" of part IV of the Act. The ACCC has



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stated that these penalties would apply to the activities of collusion such as price-fixing, bid-rigging and market sharing. This is understood to focus on breaking the power/s of what are termed domestic and international 'hard core cartels'.

The penalties that relate to Part IV of the Act must be consistent with the crime and the damage/potential damage such behaviour inflicts i.e. the financial and non-financial penalties must be reflective of the crime and act a deterrent. In this regard, tougher penalties would seem necessary for what must be clearly defined in the legislation as "hard core" collusion.

Any increase in penalties for behaviour/activities as defined in Part IV of the Act should apply to all organisations, not just big business.

The problems in adopting criminal sanctions are primarily concerned with the granting of additional investigative powers to the ACCC in undertaking this extended role. This problem would be overcome through the establishment of a Board to ensure greater accountability of the Commission and its actions.

- ◆ The ACCC is accountable to the Treasurer and ultimately the Federal Parliament for its actions. However, there are a number of areas particularly in relation to its very public and high profile investigations, where the ACCC oversteps what is considered reasonable behaviour.

Changes to the TPA that may grant additional and stronger powers of investigation would necessitate introducing more effective 'checks and balances' on the ACCC to ensure it is more accountable. The establishment of a Board to oversee its activities is one way of addressing this issue.

There have been significant concerns raised in some quarters in relation any (new) Board's "independence" in overseeing the ACCC i.e. having business people overseeing an organisation that investigates business behaviour and activities. However, these issues can be addressed through an appropriate Board Charter, structure and composition.

The Business Council of Australia has advocated the establishment of a non-statutory advisory Board to oversee the ACCC (similar to the Board of Taxation). This proposal has significant merit and should be favourably considered.

- ◆ There is a lack of knowledge and understanding of the TPA, the role of the ACCC and of what constitutes "anti-competitive behaviour". Indications are that many small businesses regard what are usually standard business practices used by large businesses in gaining market share and achieving cost savings as illegal (or should be illegal) anti-competitive actions.

This is an educative issue that has not been adequately addressed.



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- ◆ The merger laws within the Act (Section 50) should allow for mergers and acquisitions that will support effective competition at the domestic and international level i.e. allow greater efficiencies and economies of scale to facilitate effective competition in some domestic and international markets.

Section 50 of the Act must take into account these issues and clearly define what is in the interests of the community as a whole in the long-term, and not focus solely on pursuing "competition for competition's sake". The outcomes sought are employment and export growth, innovation, investment growth and greater consumer choice. Competition is not an end in itself and restricting potential mergers may, in some instances, create greater fragmentation and be detrimental to longer-term sustainable competition. These issues should be reflected in the legislation. As an aside, an effective regulatory and enforcement framework should serve to allow a less restrictive merger regime.





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## **RECOMMENDATIONS**

1. The ambiguity in relation to the Section 46 (what is interpreted as a misuse of Market Power) and Section 50 (what is a lessening of competition) should be removed. The objectives of the Act must be clear and this must be reflected in the wording of the Act. This would assist the ACCC in determining its (appropriate) role in enforcing the Act as well as providing greater clarity within the business community.
2. The Government should consider the introduction of an "effects" test within Section 46 as long as:
  - ◆ The Legislation specifically states what the "effects" test entails;
  - ◆ The onus of proof is not reversed; and
  - ◆ It necessitates a clear causal link between the alleged behaviour of a business and/or group of businesses and the negative effects on a business or group of businesses.
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However, it is recommended that collective bargaining by small business be excluded from the legislation. This would allow them greater capability in developing substantial cost savings and developing economies of scale.

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5. The public announcements ("trial by media") used by the ACCC should cease given its detrimental impacts on businesses regardless of their innocence or otherwise. The ACCC and/or another Federal Government agency should use other more effective means to educate the public and business community about the Trade Practices Act and anti-competitive behaviour.
6. The ACCC should be more accountable and transparent in undertaking its role in enforcing the TPA. This would be achieved through the establishment of an advisory Board to oversee the actions and assist in setting the strategic direction



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of the ACCC. The Board could also assist the ACCC in clarifying its role in implementing the TPA.

7. Section 50 should be clarified (as to what is in the public's best interests) and less restrictive. The interpretation and implementation of this Section of the Act should allow mergers where it can be demonstrated that, even with a reduction in competition in a particular market or markets, there are demonstrable benefits to overall economic efficiencies i.e. lower prices and a greater range of services for consumers in the longer term.
  - ◆ The limited competition should be addressed through an appropriate regulatory framework (i.e. the other areas of the TPA). This may necessitate significant changes to the administration of company mergers, ensuring that the ACCC plays only an advisory role in these matters. In short, if an effective regulatory framework is in place and enforced appropriately then this should assist in a relaxation of the merger laws.
8. There is a significant need for the Federal Government to support the education of the business community, particularly small business, on the TPA, the role of the ACCC and exactly what is anti-competitive behaviour. It is clear that many businesses regard "normal" competitive practices by large businesses as "anti-competitive" and in fact, they often seek some form of protection from legitimate competition i.e. larger businesses capability to offer discounts, volume pricing, and achieve lower marginal costs through economies of scale in production, distribution and delivery.