SUBMISSION TO THE REVIEW

OF THE TRADE PRACTICES ACT 1974

16 July 2002

CONTENTS

Submission to the Review of the Trade Practices Act 1974

Australian Business Limited provides an extensive business support network to over 14,000 members in regional and metropolitan NSW and the ACT, representing a range of sectors, both small and larger enterprises. Businesses use Australian Business Limited (ABL) to connect them with the information, people and advice they need to make sound business decisions and stay competitive.

The general approach of this submission is to attempt to provide practical views on the broad parameters of a number of issues before the Review. As the Review proceeds ABL may form more specific views on particular issues.

ABL makes the following comments to the Trade Practices Act (TPA) Review:

Misuse of Market Power

The Australian Competition and Consumer Commission's 2000-2001 Annual Report recommended that section 46 of the TPA should be revised to add an "effects" test and to allow the ACCC to issue temporary "cease and desist" orders.

ABL surveyed a group of manufacturers to seek their views on these proposed changes. The attachment shows the questions asked and the results by business size based on number of employees.

The two notable aspects of the results are the strong support for the changes amongst smaller and medium sizes businesses (SMEs), and the large number of businesses in all size groups that were "undecided" about these particular changes.

The results provide a clear message about sentiment. SMEs have significant concerns about "unfair" competition from larger businesses.

ABL believes that the operation of section 46 (and perhaps, other aspects of the TPA) does need to be strengthened in order to protect SMEs, and indeed larger businesses, from "unfair" competition. This is particularly the case if there is to be any change to the merger provisions that result in increased merger activity.

An evaluation group consisting of a cross-section of ABL members has extensively considered the arguments put by both supporters and opponents of the "effects" test and "cease and desist" powers. While very supportive of the view that more needs to be done to prevent misuse of market power, the ABL evaluation group concluded that it did not support either of the particular changes to section 46 being sought by the ACCC. This view has been endorsed by ABL Council, and it is the view put by this submission.

A full-blown “effects” test would appear to carry risks of being interpreted and used in such a way that the competitive process would be impeded. Competition by its very nature results in the activities of some businesses having an adverse effect on the activities of other businesses. It is not in the interests of the Australian economy that business, whether big or small, should fear the possible effect of their legitimate competition.

The Chairman of the ACCC has himself acknowledged this danger with the “effects” test – although, on balance, he does not believe that this would be the case.

A variety of alternative means of strengthening the TPA in respect of abuse of market power have been suggested by a number of individuals and groups. These range from modified versions of an “effects” test to listing of specific examples of misuse of market power. ABL is keen to participate in further consideration and discussion of these.

This process would be assisted if the ACCC were to give specific examples of cases where it believes an “effects” test would have made a particular difference to acting on allegations of misuse of market power.

ABL does not believe, based on the evidence presented to date, that a “cease and desist” power should be vested in the ACCC in the form that has been proposed. Any decision to expand the capacity for discretionary administrative action by a government agency where the legality or otherwise of the conduct in question has not been established should not be taken lightly.

If the Review is convinced that the existing injunction-making provisions are inadequate for the purposes of maintaining a competitive environment, other options that have been suggested and could be investigated include vesting a “cease and desist” order making power in the Australian Competition Tribunal or giving the ACCC such a power without attaching sanctions to it. In the latter case, if the offence were proved, the court in fixing penalties would take into account the response of the business to the ACCC request.

Both these options have disadvantages, the former being a public process while the latter still allows administrative discretion in relation to unproven offences. The case for change in this area will need to be very strong.

In coming to this view ABL has sought to balance the legitimate concerns of businesses of all sizes, while seeking the continuation of strong competition that is in the overall interests of the Australian economy.

Collective bargaining

ABL believes that in some instances smaller businesses should be able to more easily come together to bargain with larger firms. Such instances would generally occur when smaller businesses effectively have little choice but to deal with particular larger businesses – for example, because of location.

Criminal Sanctions

The possible introduction of criminal sanctions for so-called “hard-core” collusion is another issue that has been subject to extensive ABL member evaluation and discussion. The result is that ABL supports the introduction of criminal sanctions where it is clear that secret collusive activity has had the same effective result as direct theft.

However, we stress that the criminal processes should only be used for very significant cartel activity and that "beyond reasonable doubt" and jury trial standards should apply.

The ACCC, in its submission to the Review, argues that criminal sanctions should only apply to companies which satisfy two of the following criteria:

(a) gross revenue in excess of $100 million
(b) gross asset value in excess of $30 million
(c) more than 1000 employees

ABL is concerned that this is an arbitrary set of criteria which may lead to punishment based on who did it rather than what was done – a principle that ABL could not support. For example, half a dozen companies just below the above threshold could involve themselves in more damaging behaviour (in monetary terms) than two or three companies just above these thresholds.

Criminal sanctions should therefore apply to any person directly involved in collusion in which very large financial returns are achieved or expected to be achieved. ABL does not support criminal sanctions under the TPA for relatively small (in monetary terms) acts of collusion.

The Review should thus look at criminal sanctions in terms of harm done -- with graduated penalties, and only the most severe instances attracting possible criminal prosecution.

The ACCC would be expected to refer only so-called “hard-core” collusion cases to the Director of Public Prosecutions. The DPP would then make a decision on whether the matter was serious enough for criminal prosecution.

In order to ensure that relatively minor acts of collusion do not get inadvertently caught in the criminal sanctions net, the Review may need to recommend changes to the ability of smaller firms to legally engage in collective bargaining (as recommended in the previous section of this submission).

Where non-criminal penalties are applied, regard should be taken of the capacity to pay so that businesses of all sizes have relevant incentive to not engage in collusive behaviour.

Mergers

The Business Council of Australia (BCA) submission to the Review proposes changes to the TPA that will, in its words, allow "Australian companies to achieve the scale and efficiencies necessary to compete at an international level and against international competitors in the domestic market". At other times, this has been phrased in terms of a need to create "national champions".

ABL surveyed a group of manufacturers to seek their views on the "national champions" argument. The attachment shows the question asked and the results by business size based on the number of employees. The results are clear with strong opposition to "big business mergers to create 'national champions'".

Some of those who answered "no" to this question did, however, indicate that they may have a different view if additional measures could be put in place to ensure that the merged entities did not then use their enhanced market power in Australia to engage in "unfair" competition.

After extensively considering the various points of view, ABL has decided the argument in favour of "national champions" could have legitimacy in specific instances.

However, ABL believes it is imperative that any changes to the mergers consideration process that increase the scope for mergers be accompanied by changes in the TPA to strengthen its provisions against the misuse of market power.

The BCA, with some justification, also submits that the process of merger approval needs to be streamlined. However, ABL does not believe it would be appropriate that the TPA be amended to allow "merger proponents to elect to take an application to approve a merger directly to the Australian Competition Tribunal".

The Tribunal is an appeals body in this area, and should generally remain so.

The BCA proposal that mergers proposals go direct to the Tribunal and that "the Tribunal's decision would not be subject to further re-hearing or review" is inconsistent with criticisms made by the BCA that "most ACCC decisions in this area … are not subject to review" and that there is great "potential for and implications of regulatory error under the TPA".

For smaller and medium sized businesses, the issue of larger business mergers is much too important for it to be conducted with no opportunity for review.

ACCC "Corporate Governance"

ABL does not intend to enter the debate about the “media activities” of the ACCC, except to suggest that the ACCC needs to recognise that media activities can unfairly damage reputations even as they might be informing the public under its right to know. A formal Charter covering governance may be appropriate.

ABL supports the establishment of an advisory body for the ACCC – perhaps, based along the lines of the advisory Board of Taxation. The ACCC, however, should continue to be responsible to Parliament.

Representative actions on behalf of small business

Access by small business to the enforcement powers of the TPA has been an issue for some time due to the cost of using the legal system.

The ACCC has the power under section 87 to undertake representative actions on behalf of third parties in respect of contraventions of Part IV. The Review could usefully revisit this issue to determine whether the ACCC's powers to initiate representative actions is working to the advantage of small businesses.

The key issue is whether adequate resources are being applied to launching prosecutions where aggrieved small businesses have insufficient resources to do so.

Further Views and Elaboration

ABL would be happy to meet with the Review committee to discuss further the above issues, or other issues that the Review might wish to raise.

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Appendix to ABL submission to TPA Review

SURVEY ON "BOOSTING ACCC POWER"

The Government will soon announce a review of The Trade Practices Act (TPA). The Australian Competition and Consumer Commission (ACCC), chaired by Prof. Allan Fels, has indicated that it wants increased powers to promote business competition.

The ACCC wants changes to section 46 of the TPA which relates to "misuse of market power". We are seeking your views on two of these proposed changes.

Question (1)

Under the Trade Practices Act, the ACCC presently has power to take action against a company that engages in anti-competitive behaviour with the "purpose" of eliminating or damaging a competitor, preventing a new competitor from entering the market, or preventing a competitive market from functioning.

The ACCC wants to add an "effects" test to this "purpose" test. Thus, the ACCC would have power to take action against a company that engages in anti-competitive behaviour with the "purpose or effect" of eliminating or damaging a competitor, preventing a new competitor from entering the market, or preventing a competitive market from functioning.

Would you support an "effects" test being added to the "purpose" test?

This question was answered, as shown in the table, by 341 manufactures:

	Would you support the "effects" test being added to the "purpose" test?		
Number of Employees	**Yes**	**No**	**Undecided**
0-20	53%	23%	24%
21-100	53%	16%	31%
100-500	34%	30%	36%
+ 500	31%	31%	38%
TOTAL SAMPLE	**47%**	**23%**	**30%**

Question (2)

The ACCC says that it often takes too long for it to take effective action against "misuse of market power". It wants additional powers to issue temporary "cease and desist" orders to companies which are alleged to be engaged in anti-competitive behaviour. This would stop any anti-competitive conduct while the ACCC investigates it.

Would you favour changes to the Trade Practices Act that would give the ACCC power to issue "cease and desist" orders?

This question was answered, as shown in the table, by 340 manufactures:

	Would you favour changes to the Trade Practices Act that would give the ACCC power to issue "cease and desist" orders?		
Number of Employees	**Yes**	**No**	**Undecided**
0-20	56%	24%	20%
21-100	56%	22%	22%
100-500	42%	27%	31%
+ 500	40%	20%	40%
TOTAL SAMPLE	**52%**	**24%**	**24%**

Question (3)

The Business Council of Australia (representing Australia's 100 biggest companies) is arguing that more mergers between big companies should be allowed so that "national champions" can be created to compete in world markets.

The Business Council claims that the Australian Competition and Consumer Commission (ACCC), headed by Professor Allan Fels, has been using the Trade Practices Act to prevent mergers that would create such "national champions".

Do you think that more big business mergers should be allowed in order to create "national champions"?

This question was answered, as follows, by 437 manufactures:

	Do you think that more big business mergers should be allowed in order to create "national champions"?	
Number of Employees	**Yes**	**No**
0-20	32%	68%
21-100	35%	65%
100-500	50%	50%
1000 plus	56%	44%
TOTAL SAMPLE*	**39%**	**61%**