SUBMISSION TO

2002 REVIEW

TRADE PRACTICES ACT 1974

By

SPIER CONSULTING P/L

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TRADE PRACTICES ACT 1974

MAKING MARKETS WORK

- **EFFECTIVELY**
- **FAIRLY**
- **OPENLY**

TO BENEFIT THE WHOLE AUSTRALIAN COMMUNITY

EXECUTIVE SUMMARY

THE 2002 TRADE PRACTICES ACT ENVIRONMENT

- **The law has proven very successful and is no longer novel or specialist. It has developed a populist following.**
- **The Institutions are mature and responsible.**
- **The administration of the Law is now more in the economic mould, within a legal framework.**
- **Markets are more global, yet there are still real and enduring domestic concerns.**
- **Small business needs protection.**
- **Consumers need protection.**
- **Speed is all the more important.**
- **Transparency is important.**
- **The Australian market is more concentrated than ever.**
- **The Administrative goal must be compliance and market based remedies.**
- **The Community needs to have confidence in the market and its policing.**
- **The Community views corporate 'crime' as very serious and expects offenders to be punished and those hurt compensated.**

SUGGESTIONS

Overall the Trade Practices Act 1974 serves the Australian community well, but as with anything that has its genesis sometime ago it can be improved.

The following is a list of suggested improvements to the Trade Practices Act 1974 and its administration.

- A fast track immunity mechanism to be introduced to allow collective negotiation by small business with large suppliers and customers.
- Section 46 to be amended to either add an 'effects test' to 'purpose' or make purpose easier to prove.
- Predatory conduct to be made one of the possible indicators of misuse of market power.
- Authorisation for section 46 conduct should be considered.
- A mechanism to be introduced into the Act to enable the ACCC to move quickly to stop conduct in breach of the Act, with strict safeguards. This is particularly relevant to misuse of market power issues.
- Additional remedies to be provided to the Courts, namely criminal sanctions for serious competition offences. Civil penalties for consumer protection offences. Divestiture in relation to misuse of market power. Penalties for breach of the unconscionability provisions.

- Business to be able to take private damages action proceedings for misuse of market power in the Federal Magistrates Court.
- Section 51AC to be strengthened, in particular for unilateral action by the bigger party to a contract.
- Public Interest criteria for authorisation to be specifically listed in the Act and to include (1) a fairness criteria (2) effect on industries or communities undergoing structural change criteria.
- Better protection for witnesses in ACCC/Australian Competition Tribunal investigation/proceedings.
- Improved authorisation processes for both merger and non-merger applications.
- Application of the Act to government's commercial dealings to be reinforced.
- Corporate governance issues to be included in the TPA remedies regime.
- No change to merger law, but changes to process, including a mechanism to assist appropriate industry rationalisation.
- ACCC international role and co-operation/information exchange with international counterparts to be specifically enabled in the Act.
- Trans Tasman competition law to become a reality and the current mechanism that applies only to section 46 to apply to all competition provisions.
- Simplify the Act to make it understandable to the wider Community.
- ACCC not to be inhibited in relation to the use of the Media as a compliance tool.
- The Parliament should be the only body that oversights the TPA institutions.
- The Committee should look at the interface between competition law and anti-dumping law.
- The Objects Clause in the Act to include a reference to small business interests. The Clause to be expanded to include the Aims of the Act and its administration, including what is expected from business and from the Regulator.

NUTSHELL HISTORY OF AUSTRALIAN COMPETITION & CONSUMER REGULATION.

- 1906-AUSTRALIAN INDUSTRIES PRESERVATION ACT
- 1965-TRADE PRACTICES ACT
- 1960's-STATES AND TERRITORIES INTRODUCE CONSUMER PROTECTION LAWS
- 1974-TRADE PRACTICES ACT, INDLUDING PROVISIONS ON COMPETITION, NATIONAL CONSUMER PROTECTION, PRODUCT STANDARDS, MERGER AND CONSUMER WARRANTIES
- 1974-TRADE PRACTICES COMMISSION (TPC) ESTABLISHED
- 1974-PRICES JUSTIFICATION ACT INTRODUCED
- 1974-PRICES JUSTIFICATION TRIBUNAL ESTABLISHED. PREDECESSOR TO PRICES SURVEILLANCE AUTHORITY (PSA)
- 1977-TRADE PRACTICES ACT 1974 EXTENSIVELY REVIEWED AND AMENDED. MERGER LAW CHANGED AND SECONDARY BOYCOTTS PROHIBITED
- 1976-COMMONWEALTH, STATES AND TERRITORIES ENTER INTO AN AGREEMENT ON NATIONAL CONSUMER PROTECTION ADMINISTRATION
- 1982-83-STATES AND TERRITORIES ENACT MIRROR CONSUMER PROTECTION LEGISLATION BASED ON TRADE PRACTICES ACT
- 1983-PRICES SURVEILLANCE ACT ENACTED. PRICES SURVEILLANCE AUTHORITY ESTABLISHED
- 1986-89-TRADE PRACTICES ACT AMENDED TO LOWER THRESHOLD OF MARKET POWER AND TO INTRODUCE MANUFACTURERS WARRANTIES
- 1990-TRANS-TASMAN, MISUSE OF MARKET POWER LEGISLATION INTRODUCED
- 1991-HILMER COMMITTEE REPORT ON NATIONAL COMPETITION POLICY

- 1993-TRADE PRACTICES ACT 1974 AMENDED TO CHANGE MERGER LAW BACK TO 1974 LAW, ENFORCABLE UNDERTAKINGS AND HIGHER PENALTIES INTRODUCED

- 1993-NATIONAL COMPETITION POLICY ADOPTED BY COMMONWEALTH, STATES AND TERRITORIES

- 1995-AUSTRALIAN COMPETITION AND CONSUMER COMMISSION CREATED. TPC AND PSA MERGED TO CREATE ACCC. ACCC GIVEN ADDITIONAL ROLES IN RELATION TO UTILITIES AND UNIVERSAL APPLICATION OF THE TRADE PRACTICES ACT

- 1995-NATIONAL COMPETITION COUNCIL CREATED TO ADVISE GOVERNMENTS ON COMPETITION ISSUES

- 1996-STATES AND TERRITORIES PASS COMPLIMENTARY COMPETITION LEGISLATION TO THE TRADE PRACTICES ACT TO BE ENFORCED BY ACCC

- 1997-ECONOMIC REGULATION IN TELECOMMUNICATIONS ADDED TO THE TRADE PRACTICES ACT

- 1998-UNCONSCIONABLE CONDUCT BETWEEN BUSINESSES ENACTED IN TRADE PRACTICES ACT. MANDATORY CODES OF CONDUCT INTRODUCED

- 2000-ACCC GIVEN CRITICAL ROLE IN RELATION TO THE NEW TAX SYSTEM (GST). ROLE ENDED JUNE 2002

- 2002-INDEPENDENT REVIEW OF COMPETITION PROVISIONS OF TPA

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1. HOW FAR HAVE WE COME?

In '**SECURING AUSTRALIA'S PROSPERITY'** (15October 2001) the Prime Minister announced an Independent Review of the Competition Provisions of the Trade Practices Act 1974.

The Review is to establish whether the Competition Provisions and their administration:

- Continue to encourage an environment where Australian business can grow and compete internationally;
- Protect the growth of businesses in regional Australia; and
- Deal fairly with the affairs of individual businesses.

Since 1974 there have been many reviews of the Trade Practices Act 1974 [TPA] that have specifically addressed the Competition Provisions.

Of theses Inquiries the 1976 Swanson Report is most relevant. It was independent. It arose out of business concerns, both big and small business. The outcome of the Swanson Committee was extensive changes to the TPA, including merger law.

Over the subsequent years the Act and its institutions have been extensively expanded. However, the underlying framework is still that of the 1974 law.

There are two broad principles, which underpin the anti-competitive conduct provisions of the TPA. These are:

- That any behaviour which has the purpose, or effect, of substantially lessening competition in a market should be prohibited; and
- Such behaviour should be able to be authorised on the basis that the public benefits of particular conduct outweigh the detriment caused to the public by any likely lessening of competition.

However, the broad principles outlined are just that, 'broad'. The more detailed and correct outline is:

- There are a number of prohibitions that relate to anti-competitive conduct (or as sometimes called, restrictive trade practices,) namely:

    . collective price agreements –deemed per se prohibition.
    . collective non-price agreements-subject to a competition test.
    . collective primary boycotts-per se prohibition.
    . collective secondary boycotts-both per se and competition test depending on the effect of the conduct.
    . resale price maintenance-per se prohibition.

- exclusive dealing-subject to a competition test.
- third line forcing-per se prohibition.
- misuse of market conduct-subject to an effect on competition test.
- anti competitive mergers-subject to a competition test.

All the prohibitions, except misuse of market power, can be exempted from the law based on a public benefit test (authorisation).

Private action

Private individuals and companies may also take action under the TPA to obtain remedies against anti-competitive conduct. However, only the ACCC can obtain penalties for breach of the Law. Private litigants can only seek injunctions and damages. However, in relation to mergers, private litigants cannot seek an injunction, but can seek divestiture and damages once a merger has proceeded.

Private litigation is quite frequent, and this self-enforcing element of the legislation has worked well. It has meant that the regulator can concentrate on issues of broad public impact and not be drawn into inter business conflicts.

Actions under the Trade Practices Act can largely only be taken in the Federal Court of Australia which has developed specific competition law expertise and being a Federal body is more attuned to national issues than would be the State or Territory Courts.

Consideration of the TPA normally focuses on the ACCC, but private access is important in the overall regime.

2. ISSUES

The Review will no doubt examine merger law in some detail. Globalisation is a catch cry of some. As part of the concerns about the merger law in a globalised market the Committee is urged to look at the inter-relationship between merger law and anti-dumping law. An article that I co-authored for the Trade Practices Law Journal on the issue of the interface of anti-dumping and merger law is at **Attachment B.** Globalisation issues cut both ways.

The Review should look at what has been achieved in Australia with our model of corporate conduct regulation and see how it is working. It should then look at ways of improving the model, keeping in mind that most of our trading partners have similar laws.

Any review of the Trade Practices Act must factor in the interests of big businesses, small business, primary producers, governments and critically, the community at large. The Terms of Reference reflect what the PM stated in Securing Australia's Prosperity namely, "Strong and effective trade practices legislation remains crucial to the Government's commitment to encourage the success and the fairness of Australia's business activity".

The success of the TPA should be acknowledged in order to dispel any view that the Review is about weakening the desire for strong and effective Trade Practices legislation.

One lesson that should have been learnt from the introduction of National Competition Policy is that, as a nation we must look at all the ramifications of changes to economic regulation and not be blinded by theory. The Productivity Commission Report on NCP and Rural and Regional Australia and a Senate Inquiry into the socio-economic effects of NCP attest to this.

Having regard to the increase in concentration in Australian industry the Review could specifically look at the relevance of such trends to the current TPA. Industries such as airlines, telecommunications and retailers call for such attention.

Much is said about globalisation and the international focus and setting of competition law is important. The fact that we trade in the global economy also requires us to look at harmonising our laws with that of our trading partners, effective international co-operation in law enforcement and assisting our less developed neighbours to develop similar institutions. Our relationship with NZ is of special importance.

The Review is said not to look at the consumer protection provisions and nor it seems the regulatory provisions covering areas such as telecommunications, energy, airlines and rail. However, there is often interaction between the various Parts of the Act and the Committee should feel free to comment on related issues in so far as they are relevant to the Competition Provisions.

The TPA must be seen as a whole, with its various parts complementing each other.

3. TODAYS' SETTING

The philosophy and goals of the Trade Practices Act 1974 are a 1970's adaptation of anti-trust/competition laws of Europe and North America. They are also fashioned to protect individual liberties and utilize the traditional Australian legal culture.

The 1974 Act and its institutions were innovative and have proven flexible and dynamic. Over the years it has been constantly reviewed and built upon.

The institutions that have developed with the law are:

- Australian Competition and Consumer Commission - successor to the Trade Practices. Commission and the Prices Surveillance Authority.
- Australian Competition Tribunal - successor to the Trade Practices Tribunal.
- Federal Court of Australia.
- National Competition Council.
- State and Territory Utilities Regulators.

Related Institutions are:

- Foreign Investment Review Board.
- Australian Securities and Investments Commission.
- Australian Prudential Regulatory Agency.
- Australian Communications Authority.
- Australian Broadcasting Authority.
- International Air Services Commission.
- Reserve Bank of Australia.
- State and Territory Fair Trading Authorities.
- New Zealand Commerce Commission.

A stroll through the history of the Australian system is at **Attachment A.**

Over the past 28 years an 'Australian model of corporate conduct regulation' has evolved, namely,

- Competition law with a public benefit override.
- Per se competition law offences predominate. Informal merger review.
- Consumer protection law.
- General access for third parties in relation to essential facilities.
- Specific third party access regimes, eg telecommunications and airports.
- Regulation in relation to telecommunications.
- Small business protection.
- Prices surveillance.
- Product safety and recall laws.
- Corporate compliance role.
- A single conglomerate regulator.
- High transparency.
- Significant international focus and interface.
- Cross membership with other regulators.
- Court based system.
- Private rights of action and representative actions.

This conglomerate Regulator has on the face of it some conflicting roles, but that is not so in practice. The ACCC brings a competition culture to these varied roles. Industry specific agencies do not have such a culture.

In 2002 and onwards, we are faced with a different environment and a review of some of the workings of the Act may be appropriate. Not the underlying philosophy.

The factors of relevance in Australia today are:

- The Law has proven very successful and is no longer novel or specialist. It has developed a populist following;
- The Institutions are mature and responsible;
- The Administration of the Law is now more in the economic mould yet within a legal framework;
- Markets are more global, yet there are still real and enduring domestic concerns;
- Small business needs protection;
- Consumers need protection;
- Speed is all the more important;
- Transparency is important.
- The Australian market is more concentrated than ever; and
- The community needs to have confidence in the market and the policing thereof.

4. WHAT IS IMPORTANT?

It is critical to focus on what is important and not ideologies or old scores.

I would suggest some basic questions:

- What are the objects and goals of competition law today and in the future?

- How are these objects and goals to be met by the current Act?

- How do we ensure compliance with the Law in the Australian legal and commercial environment?

The TPA transcends personalities and must be viewed in the longer term and in changing community attitudes. What was unfair or unconscionable in 1974 or 1997 may have changed dramatically today and will continue to change.

We should not get hung up on the rhetoric or ideology about the TPA being solely about economic efficiency. That is but one of its policy goals. Much is said about US anti-trust and its economic underpinnings.

Anti-trust law, as the name suggests was about breaking down the power of the big trusts (conglomerates), not about economic efficiency. The Canadian Combines Act 1890 and the Australian Industries Preservation Act 1906 had the same goal.

5. THE TERMS OF REFERENCE

Do the Competition Provisions of the Trade Practices Act?

(a) Inappropriately impede the ability of Australian Industry to compete locally and internationally?

The Act does not inappropriately impede the ability of Australian Industry to compete locally and internationally. In fact, it has remained remarkably flexible in the face of dramatic changes to the Australian market and the global environment.

Those who say otherwise often do so out of self-interest and take a view that the only interests in relation to issues such as mergers are those of shareholders and not the wider community.

The Act has a very good mechanism to balance the wish for competition and wider community concerns. i.e., authorisation, but it is seldom used for various reasons, including the time taken and the public nature. We need to address those issues, rather than throw out a very good scheme. The two tier scheme was a deliberate mechanism by Parliament for anti competitive to be assessed against public benefit criteria and in a transparent way. In the early days of the TPA there were a significant number of applications in relation to mergers, now we are told the scheme is unworkable for mergers. What has changed?

We have heard industry saying that we need to look at the global marketplace. Competition law analysis does that. However, views will differ. A CEO of a large company will have a very different view of the world from Level 40 of a city skyscraper, than customers at ground level.

There will be those that say merger law needs to factor in efficiency and other public benefit issues. That is an option. Nevertheless, one needs to look at other jurisdictions and see what happens there.

Canada has had an efficiency exception since 1986, which is seldom used except recently in the Superior Propane case. That case has been see-sawing through the Canadian Competition Tribunal and Courts for three years. The issue in that case relates to efficiencies, how they are measured and what is the basis of any efficiencies etc. The fact is that the inclusion of issues such as efficiencies has not worked in Canada and has so far not allowed mergers found to be a breach of competition law to proceed.

There seems to be an assumption by some in business that if you change the mergers law to add public interest criteria or change the processes the few mergers that are stopped will be allowed to proceed. That cannot be presumed.

(b) Does the Act provide an appropriate balance of power between competing businesses and in particular businesses competing or dealing with businesses that have larger market concentration or power?

It does not. Small business has been short changed post Hilmer and the imbalance needs to be addressed. Post Hilmer we have seen increasing market concentration and loss of former protections to small business, all done in the name of the consumer, but the consumer has not gained as much as big business has.

When section 51AC was introduced into the Act in 1998 there was an assumption that it would protect small business generally. Of course it only does so in vertical relationships and does not do so in terms of horizontal relationships i.e. competitors.

Section 46 needs to be improved, but not only that, remedies need to be seriously examined, both those available to the Commission and those available to private litigants. Most private section 46 cases have been unsuccessful and it cannot be said they were all misconceived.

Some are arguing that with various section 46 cases before the Courts we need to wait on the outcome of these cases. However, it is for the Parliament to dictate the policy and hence the law. This is another opportunity to do that.

Another point of imbalance is that small business needs to be able to aggregate its market power. Big business can, chains can, and consequently there needs to be a simple mechanism to allow small business to negotiate collectively in relation to contracts and other dealings with either large customers and /or suppliers. This should not be open-ended and should be subject to a public benefit test.

(c) Does the Act promote competitive trading which benefits consumers in terms of service and price?

The Act cannot force competition, the Act cannot force lower prices, but what it can do is foster a competitive climate. That is what it should do and does it very well.

Unfortunately, little has been done in Australia to empirically assess these issues. A program of evaluation is essential. Some work was done many years ago by the Commission on changes flowing from the operation of the Act in various industries. This was very helpful, albeit now outdated. The TPC /Bureau of Industry Economics did some work on mergers some years ago. Whilst a good attempt to start evaluations of the market place, effect of merger law in some industries was inconclusive and was not repeated.

(d) Provide adequate protection for the commercial affairs and reputation of individuals and corporations (in this regard, the Committee may examine the processes followed by the ACCC and the laws under which the ACCC operates, but is not to reconsider the merits of past individual cases).

If this Term of Reference is aimed at the use of the Media by the Commission then we should really wait until the Report of the ALRC on penalty issues. The ALRC Report will cover the issue of the use of the Media and its use by regulators generally.

The ultimate aim of the Law is compliance and compliance needs openness and publicity and that is critical. Any curb on the use of the Media must be seen with great trepidation and suspicion.

The ACCC cannot force the Media to run stories. The simple fact is that the ACCC's role is good copy and the ACCC has good stories. A less accessible ACCC will still generate Media as the media will pursue stories that are worth pursuing.

(e) **Allow businesses to readily exercise their rights and obligations under the Act, consistent with certainty, transparency and accountability, and use compliance or authorisation processes applicable to their circumstances**.

Comments have already been made about access and the exercise of rights and obligations. As to certainty, that is always a great aim, but commercial environments are not certain and those who argue for certainty on the other hand will also argue that everyone is different.

The certainty that is appropriate is that the Commission issue as many guidelines as appropriate and show consistency of principle, but there cannot be consistency based on every individual matter.

In relation to authorisation, the processes need to be speeded up and simplified.

With the maturing of the Law more should be done in relation to industry wide compliance, jointly with the ACCC and industry. Industry can do more to self regulate but a close working relationship with the ACCC would no doubt assist the process. A Culture of Compliance must be a goal for both business and the ACCC.

(f) Is the Act flexible and responsible to the traditional needs of industries undergoing change, particularly in rural and regional Australia?

The Authorisation process is flexible enough to accommodate such needs. However, the Government might consider having a bigger role and refer matters to the Commission for authorization, particularly where there is a need for structural adjustment.

Moratoriums or exemptions from the TPA in relation to certain industries going through structural change should not be considered. Exemptions should not be a feature of the TPA, as they have been in the past.

In relation to public benefit and to authorisation it may now be appropriate to list public benefits in the Act; we have had some 28 years of experience. Lists are dangerous at times and there is often the issue of what has been excluded, but experience will help in that regard. In such a list the following additions should be considered:

- The impact of deregulation and any other structural adjustment on the Australian community or communities, in particular rural and regional areas; and
- Fairness in relation to the balance between big and small business and business and consumers.

It will be said that the Public Interest additions like the above are straying from pure economics and going more and more into social and other policies. That is right.

The Act already, through its public benefit tests both in relation to the role of the ACCC and NCC goes well beyond economics. This law is more than just economics. To confine the Public Benefit test to economic efficiency will likely result in far fewer applications and even fewer granted.

The authorisation process is not solely about economic efficiency even though that is one of the most important aspects; it is about public benefit in its broadest. The Law is ultimately about consumer welfare.

7. SUGGESTED IMPROVEMENTS.

The following suggested improvements are largely on a section-by-section basis plus some administrative issues. Some of the suggested changes are already picked up in the Treasury Discussion Paper of late last year.

The TPA and its administration have served the Australian community well, but improvements could be made.

The suggestions are aimed at making the TPA more effective, more in tune with global needs, more transparent and more accountable.

Section 2-Objects of the Act

Small business interests should be included in the Objects Clause, plus a list of what the Parliament expects of the ACCC and of business in terms of outcomes and aims.

Section 2A & 2B-Application of Act to Commonwealth and States

The Act should to apply to any business dealings by governments. That was the post Hilmer policy. Some court cases since have chipped away at this. The words 'carries on a business' in sections 2A & 2B are too uncertain and may not catch what are clearly commercial dealings by Government. See J.S. McMillan v Commonwealth [1997 ATPR 46-175]

The impact of the 'The Bradken' case [Bradken Consolidated P/L v BHP (1979) CLR 107] needs to be limited so as to catch conduct in breach. The Bradken principle is one of form and not substance. It is suggested that where the Bradken principle is invoked that the TPA still applies, but that no penalty can be sought against any party, such as in Sections 2A /2B. However, action can be taken for injunction and damages.

Section 45- Joint Venture provisions

The joint venture exceptions do not work as intended and need to be redrafted and even strengthened. This is an important exception and needs to be altered to cover all genuine joint ventures.

It may be that a notification mechanism should be considered for genuine infra–structure joint ventures.

Section 45 & Section 4D- exclusionary provisions-collective negotiating by small business.

The Trade Practices Act should be amended to allow primary producers and small business to negotiate collectively when dealing with large customers or suppliers, including the ability to boycott such large enterprises.

Presently, any type of collective negotiating arrangement may contravene section 45 of the TPA. These arrangements are sometimes given authorisation by the ACCC for a period of years under the TPA. However, that process is slow, expensive and uncertain, the onus is on the Applicants and the ACCC is unlikely to authorize boycotts.

Proposal

- The Trade Practices Act to be amended to allow primary producers and small business to collectively negotiate when dealing with large customers or suppliers, including the limited ability to boycott such large enterprises. This would use the notification process already in the Trade Practices Act;

- This would,

    - Be available to small businesses when negotiating with large customers or suppliers.

- Be limited to collective negotiation and would not cover dealings with those not subject of the notification.

- Would provide protection from section 45 (Contracts, arrangements or undertakings that restrict dealings or affect competition).

- Would cover collective arrangements including refusing to do something, i.e., boycotts. (Guidelines as to permissible boycotts to be issued by the ACCC before the amendments become law.)

Proposed Notification Process

Presently, notification exists for protection for exclusive dealing (and third line forcing- which has a 21 day objection period by the ACCC), the protection is automatically granted and remains valid until revoked by the ACCC on basis that conduct substantially lessens competition and that there is insufficient public benefit.

A similar process is suggested for collective negotiation by small business. Notifications will be public.

Small businesses involved would receive protection under the Act until the ACCC makes a finding on the ground that the conduct is anti-competitive and not a benefit to the public. Onus will be on ACCC to establish that the conduct is not in the public benefit, rather than on small business to prove public benefit.

Normal appeal process to the Australian Competition Tribunal would apply.

Protection only applies to arrangements between small businesses and/or their Associations. Those not in the category do not have the protection even if they are involved in, or affected by the conduct. (There will need to be a definition of small business for the purpose of these amendments).

Further factors (non-exclusive) could be introduced in the TPA for assessing public benefit under these provisions.

- The needs of small business and the communities dependent on them;
- The relative strengths of the buyers in the relevant market;
- Any effect on competition; and
- The interests of consumers.

Co –operatives

A similar mechanism could be introduced for co-operatives that are registered under State or Territory law. Such a mechanism would cover all activities of a co operative.

Section 46- misuse of market power.

Since the introduction of the current Trade Practices Act 1974 there have been many Inquiries that have looked at section 46, either directly of indirectly.

As a result of the various Inquiries section 46 has changed over the years as follows:

- 1977-Section 46 amended to take out 'effect' and substitute the need to show 'purpose'. However, threshold to remain being 'in a position to control a market'; and
- 1986-Section amended to change threshold from 'in a position to control a market' to 'substantial degree of market power' and to allow the inference of 'purpose' from the surrounding circumstances.

Section 46 is about market power and attempts to curb its use. Unfortunately, various kinds of economic concepts have been implied into the Section by both courts and regulators. Concepts such as recoupment, which are not in the law.

Fortunately, the Full Federal Court decision in ACCC v Boral Ltd [2001 FCA 30] brought the section down to earth, in particular the judgement of Finklestein J. The Court dispels some of the myths and implied assumptions. This decision is currently subject to an appeal to the High Court.

The underlying policy of section 46 is to enhance competition and benefit consumers. However, the specific prohibition talks of damage to competitors as a means of implementing such policy.

Proof is difficult, as you need to get into the mind of a business. Even though 'purpose' can be inferred, it is nevertheless difficult, especially for a private litigant. There have not been many cases over the years, let alone successful cases.

Section 46 has always been said to tread a fine line between competitive conduct and misuse of market power. But clearly the Parliament is saying, and has said since 1974, that businesses with market power must constrain the use of that power. Competition is ruthless, but if you are large you must constrain the urge to add an element to being ruthless that your size facilitates. Those with market power may cry, unfair. Yet is it fair for others to bear the scars of market power.

Nevertheless, a dilemma for Australian business is that it is unclear what conduct may fall foul of the misuse of market power law. In Canada, the Competition Act 1986 actually lists, by way of illustration, conduct that may amount to misuse of market power. (Canada is the closest jurisdiction, other than NZ, to Australia, both in law and environment).

Another provision in the Canadian Act (section 50) expressly prohibits price discrimination and predatory pricing. That provision is not limited to those with market power, but in reality only those with market power can engage in such conduct.

It may be that section 46 needs to be amended to list what conduct might be prohibited and hence an approach such as Canada's should be considered. This would be relevant no matter what test in section 46.

Australia adopted the Canadian prescriptive approach in 1993 in relation to mergers, when largely adopting the Canadian merger factors now found in section 50(3) of the TPA.

An 'effects or purpose' test is a possible option for strengthening. A further option is to have a rebuttable presumption that, once the plaintiff can show all the elements of the offence except purpose, then it is assumed that the defendant must have had the purpose unless the defendant can show otherwise. This is somewhat similar to a pure reversal of onus, but less draconian and puts a greater burden on the plaintiff. It is an evidentiary reversal not a legal reversal.

A 'purpose or effects' test would be rational as it would target harmful effects and not only where 'purpose' can be shown. 'Purpose or effect' is in other sections of the Act, such as Section 45.

If an 'effects test' is adopted, there may need to be some consequential amendments to the Law. Effect is a blunt tool. It may be that in relation to conduct that only has the 'effect' and not 'purpose' that there should be the possibility of authorisation, and perhaps only the ACCC can take action for 'effect only' cases and that there not be penalties, only remedies such as damages and injunctions.

In terms of authorisation it is suggested that there be a fast track form as some of the Section 46 conduct may need very quick regulatory assessment, as we are often dealing with dynamic markets and dynamic conduct.

It may even be that no matter what test applies to section 46, authorization should be a possibility. Section 46 as it stands will cover conduct that is planned, such as changes in distribution networks or supply arrangements. Consequently there may be cases where authorization is appropriate. They will be rare.

Predatory Conduct

The Trade Practices Act covers predatory conduct through Section 46

The problem that has arisen is that it is not clear what is meant by predatory conduct and whether or not the Courts are prepared to infer what is predatory.

It may be that an 'effects test' in section 46 may overcome some of the uncertainty, but there may be a need to spell out predatory conduct in the legislation as it does seem to be one of the matters of greatest concern to small business and something on which the Courts need specific guidance.

Post script to section 46.

A great deal has been said about section 46 and' purpose'. However, little has been said about 'taking advantage'. After Melways, Safeways and now Rural Press (Full Court of the Federal Court, [2002] FCAFC 213, 16 JULY 2002, it would be a brave litigant to take section 46 action. The minefield of 'purpose' and /or 'taking advantage' give little prospect of success.

Section 47 – exclusive dealing-third line forcing

Section 47(6) (7) covers conduct that warrants legislative control.

However, much of it relates to consumers and small business issues. It is said that the current provision should be subject to a competition test. If that is done, third line forcing conduct should be added to the list of unconscionability indicators in sections 51AB and AC. Such conduct should not be left unfettered.

Section 48-resale price maintenance

The basic scheme of the RPM provision is to prohibit conduct that seeks to stop discounting. However, the provisions in the Act require the use of a 'specified price' by those engaging in rpm. That is both restrictive and unnecessary. The need for a 'specified price' should be deleted.

Further, the RPM law should be amended to cover the situation where the person imposing the RPM is not the supplier, as the Law currently requires. There are situations where others, such as landlords, seek to control retail prices.

Section 50-mergers

The current test in section 50 should not be changed.

The current mergers test in Section 50 accords with most comparable jurisdictions and maintains consistency of thresholds within the TPA.

The change in the Law from a test of dominance to a test of substantial lessening of competition seems to have occurred satisfactorily. Moreover, as more and more mergers in deregulated sectors are scrutinized by the ACCC, it is increasingly evident that the change in the test was necessary if deregulation is to work properly.

The Commission has published guidelines, which do not differ very greatly from those in North America and Europe and in some cases has led them. There have been some updates in the guidelines covering the role of efficiency considerations in relation to S50.

The ACCC's statistics show that only about five per cent of mergers were opposed and of them, some were later not opposed once satisfactory undertakings were given.

Some people raise the question of whether or not the merger provisions of the Trade Practices Act prevent the mergers necessary for Australian firms to be of the size necessary to take part in global markets.

The answer to this is rarely, if ever, and, if so, then in circumstances where it is on balance undesirable because of the anti-competitive effect in the Australian market. The fact is, that the Commission has not in the last seven years opposed mergers where imports make up more than 10 per cent of the relevant market (this is not a rigid rule, but it is a fact of history). In other words, the ACCC has not opposed mergers in sectors already exposed to international trade competition. It is in this sector, that the argument for firms needing to be large to take part in world markets is most relevant.

If a merger is anti-competitive, authorisation is possible on public benefit grounds. Since 1993, the Act explicitly states that export generation, import replacement or contributions to the international competitiveness of the Australian economy are public benefits.

Clearly the framework of the Act is not an obstacle to allowing Australian firms to merge, to achieve the scale necessary for international competitiveness providing there is sufficient public benefit. There are in fact many cases where authorisations have been permitted.

Merger policy is not some necessary evil. Rather, it has a positive contribution to make to Australia's international competitiveness. If mergers are allowed to occur without the application of competition law, then our exporters and import competitors will be supplied uncompetitively and inefficiently and their capacity to compete in world markets will be hindered.

In a deregulatory environment the current test ensures scrutiny of mergers in industries that have deregulated and may seek to reaggregate or seek to overcome the positive effects of deregulation.

In any case the previous dominance test did not suit service industries that were unlikely to be subject to international competition.

Many mergers have major national implications and should not be seen as being the play things of shareholders. In particular small business interests should be considered in the case of any lessening of competition.

Global issues are important, but so are domestic. The proponents of the pre eminence of global issues are saying that the domestic market does not matter. There is also considerable doubt that the so-called benefits of large scale entities actually eventuates. It may often be the case that a domestic monopoly is created, but that in no way assists in the international market. All we may achieve is move from three rusty factories to one rusty factory.

Possible Changes to mergers process

Merger procedures can be improved, especially the authorization process. Having said that the Australian merger regime is one of the fastest and least cumbersome, amongst those jurisdictions that have merger law.

Retain the current two-tier process, but alter the authorisation process:

- Change public benefit test to 'no significant public detriment' test;
- Only the Applicant or the Minister to have standing to appeal to the Australian Competition Tribunal (ACT);
- ACCC's role in the ACT to be spelt out to include an amicus role;
- Other parties can seek leave to intervene in ACT, but will put in their views via the ACCC;
- ACT review is no longer de novo;
- Strict time limits on ACT, say 30 days or ACCC decision stands; and
- ACT to be given the power to award costs.

In relation to changes in ACT processes, Canada has recently amended its law to put process controls on the Canadian Competition Tribunal and there is more in the pipeline. We can learn from the Canadians in this regard.

Related merger issues

Creeping acquisitions

The Act to provide that where a company reaches a certain market share e.g., CR4, any further acquisition must be notified to ACCC and assessed under the authorisation test.

Merger pre notification

No mandatory pre notification, but the Act to specifically recognise the current system of voluntary notification. Failure to notify, where an eventual breach is found by a court, will attract a mandatory extra penalty.

Return to a pre 1977 clearance process is not favoured. That was cumbersome and expensive. The current informal process should stay informal. It has resulted in Australia having one of the most efficient merger regimes.

It is suggested that fees be imposed for voluntary notification. This will deter any unnecessary notifications.

International co-operation

The Act to provide that the ACCC is empowered to swap information with other co-operating jurisdictions. These jurisdictions to be listed in the Regulations.

Enforceable undertakings-Section 87B

Where such undertakings are utilsed to facilitate a merger being allowed to proceed that the ACCC must consult interested parties on the proposed undertaking and the detail thereof. It is suggested that the ACCC put all draft undertakings on its website for 14 days and advertise in the Press, seeking comments.

There will be rare cases where the merger will be confidential and in those cases the ACCC can defer seeking third party views, but must do so as soon as possible. As interested parties have not been able to influence the undertaking before it was accepted it may be appropriate to provide that, parties with standing can apply to the Federal Court within 14 days of the undertaking becoming public for it to be varied, on the basis that it does not overcome the anti competitive effect or that it causes other anti competitive effects.

ACCC Mergers Public Register.

The current ACCC Mergers Public Register is voluntary and should be enshrined into legislation to add to transparency and the associated obligations to keep it current.

Ministerial Reference of mergers.

There will be instances where an industry is subject to restructure. This will often include some possible mergers and rationalisations. In some cases this will be with government support.

It is suggested that the Minister has the power to refer to the ACCC for authorisation assessment proposed or possible industry changes. It would be expected that the Minister provide a view on what the Government's view of the long term future for the relevant industry.

Section 51AC-business to business unconscionability

This provision was introduced in 1998 and is still in its early days. However, it is clear from experience that it needs some strengthening and in particular where the larger party to a contract acts unilaterally to the severe detriment of the smaller party.

Part VII - Authorisation process and review process

The changes suggested in relation to merger authorizations earlier in this submission are relevant.

In addition, in relation to non merger applications;

- A 'no significant public benefit test' to apply only in relation to those instances where the substantial lessening of competition is deemed by the Act.
- Allow applications for existing conduct;
- Set time limits for the issue of the draft determination, suggested time is three months. The Act currently provides for four months until final decision, this has not been promulgated, as there is a problem in that the provision does not accommodate interim authorisations. Any time limit will need to accommodate interim decisions. Four months to final is a little short, as a possible Pre-Decision Conference and Submission Process needs to be built into any time frame;
- The Act to specifically indicate that Equity issues can be a public benefit to be taken into account by the ACCC and the ACT. This is in line with the Act which includes concepts such as unconscionable conduct;
- We have had years of the public benefit test. It may be time to enshrine into the Act a list of public benefits on a non-exclusive basis; and
- Bloc authorisations and notifications. ACCC to be able to grant bloc authorisations or notifications where it considers that the conduct generally has public benefit or no significant public detriment.

Section 87B-enforceable undertakings

The Act should make it clear that section 87B covers all the roles of the ACCC. Currently, the section only applies to the ACCC's powers under certain Parts of the TPA.

Enshrine the current ACCC Section 87 B Public Register in law, currently it is voluntary.

Part VI-Remedies

The ACCC and the Courts need to have all the appropriate powers to do what the TPA is expected to do, namely police market conduct in breach of the Act and where possible to stop such conduct before it causes damage.

In that regard speed is important, as is transparency, fairness and accountability.

The following improvements are suggested;

- The ACCC should be able to issue a Compliance Notice. Failure to abide by such a Notice would be a breach of the Law. An ACCC Notice is to be accepted in Court as prima facie evidence of a breach when the ACCC brings a matter to Court for an Interim Order to stop the conduct. The Notice will not be evidence of breach in any substantive proceedings, but if the Company is found to be in breach by the Court, a refusal to abide by a Notice will be relevant to penalty.

  If the ACCC fails in any eventual Court proceedings, action may be taken for damages by the Business which received the Notice.

  Such Notices not to be made public by the ACCC until a matter is in Court.

The NZ Commerce Commission has a cease and desist power. The US FTC has had the power for years. A similar power existed in GST provisions of the TPA.

- Provide for criminal penalties and jail for hard core competition matters, e.g., cartels. It may not be fair to have the possibility of criminal penalties apply to small businesses. If there is a need to differentiate, a point of differentiation could be public companies to be subject to possible criminal actions, all other business will not.
- Divestiture to be one of the remedies for all competition offences, but limited to ACCC or Minister.
- Law to prohibit corporations paying fines imposed on its employees.
- Section 76, the section to set out criteria or factors re quantum of penalties.
- Extend time limits for Part IV civil breaches to 6 years from when ACCC first becomes aware and a global limit of 10 years.
- Provide for civil penalties for Part V conduct.
- Provide for penalties for breach of the unconscionability provisions.
- Individuals found to have been in breach of the Act to be banned, by the Court, from being an officeholder in a company.

Section 155-collection of information

ACCC to be able to seek court injunctions to have parties answer section 155 notices where they fail to do so, or do so falsely. This would be more effective than penalties or jail as what the ACCC is after is information.

OTHER ISSUES

- **ACCC complaint handling**

The Act to specifically provide that the ACCC has the role and power to handle complaints. The Act is silent on this.

- **ACCC standing in Courts and Tribunal**

ACCC to be given specific standing to appear before any Commonwealth, State or Territory Court or Tribunal as an amicus on competition, consumer and related issues. This is in line with Canadian competition law.

- **Oversight of the Act and its administration**

The Federal Parliament should be the only body to oversight the TPA and its administration. Any other form of oversight is offensive to the Parliament.

The ACCC is already subject to the normal review mechanisms, such as administrative law remedies.

- **Membership of ACCC**

Currently the Act requires that the States and Territories be involved in the appointment of ACCC members including Associate members. This process, whilst consultative, slows down appointments.

There is sometimes the need to make quick, but short term appointments to assist the ACCC on major issues coming before it. The Productivity Commission often has short term appointments to assist on particular References.

It is suggested that the Act be amended to enable quick, short term appointments.

- **ACCC International role**

ACCC to be given a specific role to operate internationally and to enter into international agreements and contracts relating to co-operation and capacity building.

Furthermore, the ACCC to be specifically empowered to exchange information with domestic and overseas counter parts, where such counterparts agree to do likewise.

- **Trans Tasman competition law**

Currently Australia and NZ have a unique legislative regime where the misuse of market power provisions of the Australian Trade Practices Act and the NZ Commerce Act have Trans Tasman operation.

It is suggested that it is time for all the provisions of Part IV to have Trans Tasman effect and vice versa in the NZ Commerce Act. See attached paper – **Attachment C** for further details.

- **Rural and Regional**

The Act to require ACCC to have an on going rural and regional presence. .

- **Sections 28 & 29 –education and research**

Amend Act to empower the ACCC to educate and research in relation to all aspects of its powers, currently, the Section is limited to consumers.

- **Section 162-witness protection**

The current section 162 is weak in relation to the protection of witnesses or potential witnesses. The law needs to be strengthened and to cover investigations as well as court or ACT proceedings.

This will be all the more important if the ACCC uses leniency programmes more. For an example of such a problem see ACCC v McPhee 1997 ATPR 41-570, where Court action was taken by the respondent against the ACCC's witnesses.

- **Corporate Governance**

The Act should build in 'best practice' governance processes to be recognised by the Court and by the ACCC. Good governance should be rewarded; bad governance should be punished as part of the sentencing process when a business is found to be in breach.

- **Evaluation of the impact of the Act in the marketplace**

One major shortcoming in Australia is that there is little or no evaluation of the impact of the TPA. Overseas this is the norm. There are some Australian institutions that can do this. The ACCC has indicated publicly that it would try to do this. It has not been able to do so. It really is an issue of money and perhaps business can assist in this regard.

- **Simplified Trade Practices Act**

The Act is complicated and becoming more so. Much of this is due to constitutional and jurisdictional complexities. The Act needs a drafting overhaul. The NZ Commerce Act is a good model. With the national and State and Territory regime, we should be able to have a comprehensive, yet simplified Act.

- **Access to courts**

A major problem for small business is access to courts or tribunals. It is suggested that the Federal Magistrates Court be given jurisdiction for Part IV private actions for damages, in particular for section 46 actions.

Furthermore, consideration should be given to giving jurisdiction to the Federal Magistrates Court in competition cases where a private litigant is taking coat tails damages action following a successful ACCC case.

- **Small business Advocate**

The ACCC nor any other public body can effectively handle all small business complaints. There needs to be a body to handle such complaints as State and Territory Fair Trading bodies do for consumers.

It is suggested that a Small Business Advocate be established to handle such complaints. Funding could be by government, business and the users.

The Advocate could handle complaints on the same basis as Fair Trading bodies do and where appropriate refer matters to the ACCC or other appropriate bodies. However, its main goal will be to resolve complaints and to do so quickly and informally.

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