



**Co-operative  
Federation of  
NSW Ltd**

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Australia*

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

July 24, 2002

Dear Sir/Madam

Attached is the submission to the Review of the Trade Practices Act 1974 on behalf of the Co-operative sector of NSW. As mentioned by telephone this morning, an extension of time to lodge this submission was sought by the Australian Centre for Co-operative Research and Development (ACCoRD) last month. Due to various problems affecting the research team, we are unable, at this time, to provide the background information we would like to give you. We expect to send an addendum of supplementary information in the near future.

If you have any queries regarding the attached, please do not hesitate to contact the undersigned.

Yours sincerely  
Helen McCall  
Executive Officer

## **REVIEW OF THE *TRADE PRACTICES ACT 1974 (Cth)***

### **1. INTRODUCTION**

The Co-operative Federation of NSW Ltd (“Co-operative Federation”) is a co-operative with its members being other New South Wales co-operatives.

The Co-operative Federation was incorporated in 1993 at the instigation of the then NSW Minister for Co-operatives. Its creation came about after the failure of the Australia Association of Co-operatives, which was an entity with a similar aim.

The aims of the Co-operative Federation are to:

- Represent and assist New South Wales co-operatives in their relations with government.
- Facilitate or provide advice and services for New South Wales co-operatives.
- Improve the awareness and understanding of the extent and significance of co-operatives.
- Promote the exchange of information among co-operatives.
- Maintain links with co-operative organisations, both interstate and internationally.

Co-operatives in New South Wales have expressed their concerns to the Co-operative Federation that the *Trade Practices Act 1974 (Cth)* does not recognise the inherent benefits of co-operatives and may often present a barrier to the successful realisation of the objections of trading co-operatives. The Co-operative Federation therefore welcomes the opportunity to provide this submission.

## 2. EXECUTIVE SUMMARY

The principles and objectives of co-operatives mean that co-operatives have a very different culture to corporations and other forms of business.

The *Trade Practices Act 1974 (Cth)* has as its objective the enhancement of the welfare of Australians through the promotion of competition and fair trading. It seeks to do this by preventing anti-competitive conduct, thereby promoting competition and efficiency in business and greater choice for consumers.<sup>1</sup>

Trading co-operatives are by nature a collection of small businesses, gathering together to compete against other organisations in their market and to achieve economies of scale and business efficiencies they would be unable to achieve on their own. Co-operatives are operated for the benefit of their members and are controlled by their members.

Co-operatives are regulated by uniform State legislation, that governs the relationship between a co-operative and its members and between members of the co-operative. Legislation governing co-operatives has existed since the early 1900's.

State based regulators administer co-operative legislation and the operation of co-operatives. For example, in New South Wales the co-operatives are subject to the *Co-operatives Act 1992 (NSW)* and accompanying Regulations. The Registry of Co-operatives (which comes under the Department of Fair Trading) regulates co-operatives in New South Wales.

The Co-operative Federation seeks:

1. The removal of the *per se* prohibition on third line forcing so far as it relates to co-operatives. Third line forcing arrangements by co-operatives should be subject to the “substantially lessening competition” test under Section 47(10).
2. A simpler notification process for collective bargaining between co-operatives and their members.
3. Where co-operatives lodge notifications for collective bargaining between co-operatives and their members, the statutory protection should remain unless revoked by the Australian Competition & Consumer Commission (“ACCC”). The statutory protection should not be limited in time.
4. The cost of authorisation applications for co-operatives to be reduced.
5. Where authorisations are granted to co-operatives, the statutory protection should remain unless revoked by the ACCC. The statutory protection should not be limited in time.

<sup>1</sup> Australian Competition & Consumer Commission publication “Authorisations and Notifications” May 1999.

### 3. CO-OPERATIVE STRUCTURE

The principles and objectives of co-operatives mean that co-operatives have a very different culture to corporations and other forms of business. Co-operatives are voluntary, member-controlled organisations with democratic decision making structures on a one member one vote basis. Co-operatives are administered by persons who are elected by and accountable to the members. The members of a co-operative agree that principles of ownership, control and sharing of profits will apply to the organisation so that benefits are shared among members in proportion to the amount of use a member makes of the co-operative. Most co-operatives are small community based associations.

Section 6 of the *Co-operatives Act 1992 (NSW)* details the principles upon which co-operatives are based, namely:

1. **Voluntary and open membership** – Co-operatives are voluntary organisations, open to all persons able to use their services and willing to accept the responsibilities of membership, without gender, social, racial, political or religious discrimination.
2. **Democratic member control** – Co-operatives are democratic organisations controlled by their members, who actively participate in setting their policies and making decisions. Men and women serving as elected representatives are accountable to the membership. Members have equal voting rights, that is, one member, one vote.
3. **Member economic participation** - Members contribute equitably to and democratically control, the capital of their co-operative. At least part of that capital is usually the common property of the co-operative. They usually receive limited compensation, if any, on capital subscribed as a condition of membership. Members allocate surpluses for any or all of the following purposes: developing the co-operative, possibly by setting up reserves, part of which at least would be indivisible; benefiting members in proportion to their transactions with the co-operative; and supporting other activities approved by the membership.
4. **Autonomy and independence** – Co-operatives are autonomous, self help organisations controlled by their members. If they enter into agreements with other organisations, including governments, or raise capital from external sources, they do so on terms that ensure democratic control by their members and maintain their co-operative autonomy.
5. **Education, training and information** - Co-operatives provide education and training for their members, elected representatives, managers and employees so they can contribute effectively to the development of their co-operatives. They inform the general public, particularly young people and opinion leaders, about the nature and benefits of co-operation.

6. **Co-operation among co-operatives** – Co-operatives serve their members most effectively and strengthen the co-operative movement by working together through local, national, regional and international structures.
7. **Concern for the community** - While focusing on member needs, co-operatives work for the sustainable development of their communities through policies accepted by their members.

A key feature of co-operatives is that they allow small operators to obtain the benefit of economies of scale and other benefits including marketing and packaging and education, training and information. Co-operatives can help maintain diversification of ownership in an industry and provide a balance to the monopoly forces prevalent in the global economic climate.

Co-operative members are small businesses who often have little or no bargaining power or market strength in comparison to other corporate entities competing in the same market. By joining together in a co-operative, these small businesses are able to collectively negotiate with other (usually larger) corporate entities.

Farmers are unable to collectively negotiate with supermarkets and processors without authorisation, whereas a chain of supermarkets is able to collectively negotiate with farmers because of their common ownership structure (ie, they are part of the one company).<sup>2</sup>

The Co-operative Federation submits that the *Trade Practices Act 1974 (Cth)* does not currently recognise the fundamental differences between co-operatives and other corporate entities. The *Trade Practices Act 1974 (Cth)* is targeted at preventing the anti-competitive practices of corporations and has an inherent bias against businesses joining together. The Co-operative Federation submits that the *Trade Practices Act 1974 (Cth)* does not recognise the pro-competitive nature of the co-operative structure, being small businesses co-operating through co-operatives to compete against other larger businesses.

<sup>2</sup> As stated by the National Farmers Federation, Submission to the Government review, National Farmers Federation, dated 21 June 2002, p8.

#### 4. THIRD LINE FORCING

Section 47 of the *Trade Practices Act 1974 (Cth)* is intended to limit conduct that is believed to have an adverse impact on competition. The conduct referred to in Sections 47(6) and (7), namely third line forcing, is prohibited regardless of whether or not the conduct has the purpose, or has, or is likely to have the effect of substantially lessening competition. The legislation reflects an assumption that any conduct that amounts to third line forcing will have anti-competitive effects.

The above assumption has been the subject of much academic debate and was challenged in the Hilmer Report.<sup>3</sup> In the Hilmer Report it was stated that:

“The basis for a distinction between third line forcing and other forms of tying is not clear. *Per Se* prohibitions are appropriate where conduct has such strongly anti-competitive effects that it is almost always likely to lessen competition. Third line forcing does not fall into this category...third line forcing should only be prohibited if it substantially lessens competition.”<sup>4</sup>

The Hilmer Report recommended that the *per se* prohibition be removed on third line forcing. This recommendation was not adopted.

The main economic objection to third line forcing is that it can be used to extend monopoly power. Other objections arise where there is a secret commission or kickback passing between two suppliers, where there is a misrepresentation as to what is being offered and where there is a disparity in information between the suppliers and the acquirer or prospective acquirer. The objections that have led to the prohibition of third line forcing *per se* are not generally applicable to co-operatives when dealing with their members.

It is highly unlikely that there are any issues of monopoly power in relation to co-operatives that enter into arrangements involving third line forcing, as most co-operatives are small community based associations.

A co-operative may in some circumstances be able to best fulfil the needs of its members by entering into agreements involving third line forcing. A co-operative may be able to obtain better prices for its members on goods and services by guaranteeing a supplier the business of its members. The decision to enter into the arrangements will be subject to the normal democratic decision making process of the co-operative and the representatives of the members will be accountable to them.

In addition, the persons on whom the third line products or services are forced are the members of the co-operative and it is the members who will benefit from the gains made as a result of the arrangement. When a co-operative enters into third line forcing arrangements either the members will benefit directly, or the co-operative will benefit directly and its members will benefit indirectly.

<sup>3</sup> Report by the Independent Committee of Inquiry into National Competition Policy, August 1993.

<sup>4</sup> *Ibid.* pp 52-53.

Section 51(1) of the *Trade Practices Act 1974 (Cth)* provides that in determining whether or not a breach of Part IV has been committed, anything specified in and specifically authorised by Federal legislation (other than patents, trade marks, designs or copyright legislation), or by State or Territory legislation, or by Federal, State or Territory regulations, is to be ignored.

Section 43 of the *Co-operatives Act 1992 (NSW) (No. 18)* previously provided an exemption for the purposes of Section 51 for co-operatives in respect of Sections 47(6) and (7). The courts have historically interpreted State laws that purported to provide exemptions from the *Trade Practices Act 1974 (Cth)* narrowly. Section 43 was held by the courts to be ineffective because of technical deficiencies, regardless of the benefits provided to members of reduced premiums and cheaper fuel.<sup>5</sup>

Section 43 of the *Co-operatives Act 1992 (NSW)* was subsequently repealed by the *Co-operatives Legislation Amendment Act 2001 (NSW)*.

The *per se* prohibition on third line forcing as it relates to co-operatives should be removed. Third line forcing arrangements of co-operatives with their members should be subject to the “substantially lessening competition” test under Section 47(10).

<sup>5</sup> *Re Ku-ring-gai Co-operative Building Society (No. 12) Ltd* (1978) 36 FLR 134; *Trade Practices Commission v Legion Cabs (Trading) Co-operative Society Ltd* (1978) 35 FLR 372.

## 5. NOTIFICATIONS

The trading relationship between a co-operative and its members is fundamental to the co-operative structure. Such a trading relationship is likely to raise trade practices issues under the *Trade Practices Act 1974 (Cth)*.

The Co-operative Federation seeks the amendment of the *Trade Practices Act 1974 (Cth)* to allow collective bargaining between members of a co-operative and between a co-operative and its members to be the subject of a notification and not an authorisation.

Notification guidelines should be determined after consultation with co-operatives.

Where co-operatives lodge notifications, the statutory protection should remain unless revoked only upon a later investigation and determination by the ACCC that the conduct has the effect of substantially lessening competition and that the public benefits no longer outweigh any public detriment of the conduct.

The Co-operative Federation rejects the ACCC's suggestion that immunity only operate for 3 years.<sup>6</sup> The statutory immunity granted by notifications for collective bargaining between co-operatives and their members should not operate differently to the current notification procedures. To ensure certainty to co-operatives there should be no time limit imposed on the statutory protection.

<sup>6</sup> ACCC Submission to the Trade Practices Act Review, June 2002, Part 4, p123.

## 6. AUTHORISATIONS

The current authorisation procedures under the *Trade Practices Act 1974 (Cth)* in relation to collective bargaining are expensive and onerous on co-operatives, which are primarily small businesses.

Where co-operatives are required to seek authorisations the costs and delays involved are an unfair burden on co-operatives. The time and effort involved in preparing an application identifying public benefits arising from the proposal and responding to possible public detriment arguments represents a large financial and time cost to co-operatives.

The Co-operative Federation seeks a reduction in the application fee for authorisations in respect of co-operatives.<sup>7</sup>

Authorisations have generally been granted by the ACCC for 3-5 years. The applicants are required to submit further applications at the end of the authorised period. This involves further costs to co-operatives.

Where co-operatives are granted authorisations, the statutory protection should remain unless revoked only upon a later investigation and determination by the ACCC that there has been a material change of circumstances. To ensure certainty to co-operatives there should be no time limit imposed on the statutory protection.

The Co-operative Federation seeks an amendment to the authorisation provisions for authorisations granted to co-operatives that pass the public benefit test to be issued for an indefinite period of time.<sup>8</sup>

Helen McCall  
Executive Officer  
Co-operative Federation of NSW Ltd

July 24, 2002

<sup>7</sup> Note the ACCC's suggestion of a discounted application fee of \$500-\$1000 and the discretion to waive authorisation application fees when the fees impose an unreasonable burden on the applicant. ACCC Submission to the Trade Practices Act Review, June 2002, Part 4, p120.

<sup>8</sup> Submission to the Government review, National Farmers Federation, dated 21 June 2002, p11.