

Dawson Review – Inquiry into Trade Practices Act

The National Institute of Accountants (NIA) is one of the three professional accounting bodies in Australia, representing over 12,000 accountants throughout Australia and working in all fields of the accounting and auditing profession. NIA members are particularly associated with small business, either working as public accountants specialising in advising to small business or working in other areas aiding small business. The NIA welcomes the Dawson Committee's review of the *Trade Practices Act* (“*the Act*”) and hopes that the review will strengthen the already strong competitive environment in Australia.

The NIA would like to say from the outset that it does not believe that there is a systemic failure of *the Act* nor that there are major areas of concern. However as with all legislation there are areas the NIA believe could be improved on to help *the Act* work more effectively. The NIA would like to see measures that help to ensure that small business can compete more fairly with the larger operators in their market, without reducing the overall competitiveness in the market place. Small business is often referred to as the “engine room of the Australian economy”, it is one of the major employers (by sector) in the country. However the interests of small business are not always properly protected and they can suffer at the hands of the larger players in their industry. Often the actions of the large firms are not aimed at competing with each other, but to driving out small operators.

The NIA believes that it is important for the regulator and Government to remember that it is generally the small business operators who are responsible for avoiding situations where there is oligopoly power in an industry. However small business needs the help of *the Act* and the Australian Competition and Consumer Commission (ACCC) to ensure their survival, there are times when strict application of *the Act* will negatively impact on them.

The NIA makes the following recommendations to the Committee:

Recommendation 1: National Competition Policy should be applied subject to the “Public Interest Test”, and where possible that test should reflect the particular communities being affected, rather than the nation as a whole.

Recommendation 2: The NIA recommends that an “effect test” be added to section 46 of *the Act*, with appropriate safeguards that it be used only where there has been serious abuse of market power.

Recommendation 3: The NIA recommends that the ACCC be provided with the power to issue “cease and desist” orders, within strict guidelines.

Recommendation 4: The NIA recommends retention of the current merger rules, that the process be kept streamlined, however boosting the requirements in relation to pre-merger notification.

Recommendation 5: The NIA recommends amending *the Act* to apply to circumstances where Government agencies undertake commercial activities in competition with others in the market.

Recommendation 6: The NIA recommends that the ACCC be given the power to review legislation and regulation, in order to ensure fair competition amongst professionals based on skills and experience, not membership of a professional body.

Public Interest Test

Competition is vital in all industries and in all areas of Australia, however what amounts to competition differs widely between industries and between regions. A rigid, dogmatic approach to Competition Policy overlooks the rationale behind the policy in the first place. That is to improve the welfare of Australians by ensuring they have access to products and services at a fair price and to prevent the use of market power by a small elite. However at times Competition Policy has been followed in such a strict and dogmatic fashion that it has failed to understand that fair competition in different market places may mean different things and the need to temper competition policy with the overall notion of the “Public Interest Test”. While competition may nearly always be in the “Public Interest” how that is carried out should take into account the “Public Interest” of those being affected by the changes.

Furthermore public support for competition reform is often diminished by such rigid application of Competition Policy. The public loses focus of the benefits of competition and becomes more swayed by those who oppose such measures. Therefore the NIA believes to ensure a better application of *the Act* and to help ensure public support for competition reform that an overarching “Public Interest Test” be applied in competition policy.

This is of particular importance to people in rural and regional areas, many of whom feel that policies are made without understanding the particular impact on their communities. The loss of services or employment caused by strict adherence to such policies can be particularly harmful to these communities. The “savings” that might otherwise arise from competition can be overwhelmed by these losses in employment or services and should be of particular concern to policy and decision makers.

Recommendation 1: National Competition Policy should be applied subject to the “Public Interest Test”, and where possible that test should reflect the particular communities being affected, rather than the nation as a whole.

“Effect test” added to Section 46 of the Act

One of the main concerns for small business in relation to abuse of market power, is that the position almost becomes *a fait accompli*, that the damage is done before any action is taken. One of the reasons for this arises from the difficulty that the ACCC has in gaining access to sufficient proof that there was a purpose to lessen competition. The difficulty arises from finding a “smoking gun” proving a link between the actions of those with market power with an intent to lessen competition. Such activities can easily be justified as normal cut and thrust of competitive behaviour.

While the NIA would not support changes that stifled normal competitive behaviour, it is also imperative that the ACCC can act quickly to prevent abuse of market power, rather than to wait for the position to be entrenched. Adding an “effects test” would also bring Australia in line with overseas jurisdictions.

Adding an “effect test” would allow ASIC to investigate instances where the actions of those with market power has in fact led to an abuse of that market power in order to reduce competition. It would still be an important factor to prove that there was in fact substantial degree of market power and that that market power was used to either prevent the entry of new competition or to damage or eliminate an existing competitor.

The ACCC itself has admitted that it has taken few actions under the current section 46 due to the difficulty of gaining access to documentation to prove intent. One option canvassed by the ACCC is reverse the burden of proof, that is to place the burden on the accused company to show that it did not intentionally abuse its market power. However the ACCC has admitted that this would be a second best option, that adding an “effect test” to section 46 is to be preferred.

Recommendation 2: The NIA recommends that an “effect test” be added to section 46 of the Act, with appropriate safeguards that it be used only where there has been serious abuse of market power.

Cease and Desist Orders

As noted above, part of the problem with the current regime is that it is often too late for action to be taken to stop abuses of market power. One solution would be to provide the ACCC with “cease and desist” powers, as similar regulatory bodies overseas have. Such powers would allow the ACCC to take action early before a position of market power is entrenched.

Such a power would allow the ACCC, in circumstances where it is clear that a firm with substantial degree of market power is undertaking anti-competitive behaviour, to seek a court order requiring the alleged perpetrator from continuing such actions until such time as the matter can be determined in a court of law. The problem now is that the time it takes the ACCC to gather sufficient evidence, take the matter through the courts, and then to reach a verdict in favour of the ACCC, the damage is done.

Such powers though would need to have very strict guidelines on when and how they could be used. It would be just as much an abuse of power for legitimate competitive behaviour of a firm to be stifled by unfair use of such “cease and desist” orders. The ACCC should have to show that there is *a prima facie* case that abuse may be taking place and that it would be detrimental to others in that market.

However when used properly such powers would help the ACCC prevent the abuse of market power, even by merely hinting at the potential use of the power.

Recommendation 3: The NIA recommends that the ACCC be provided with the power to issue cease and desist orders, within strict guidelines.

Mergers Test

The NIA believes that the current Mergers test should not be dramatically altered. Mergers and acquisitions are an important part of any thriving economy. They can in fact be very positive for competition, ensuring that there are a number of reasonably large players in a market, rather than domination by one or two. However it is important to maintain Merger guidelines to ensure that any merger does not unnecessarily reduce competition in a market.

The NIA does not support the argument that anti-competitive (in the local market sense) mergers may be necessary to ensure the existence of “National Champions”. While size may be a factor in some industries, the ability of small to medium firms to innovate and find a market niche is also important. To date size has not been a detriment to many small Australian business finding significant overseas markets. Such an argument is often an excuse to gloss over abuse of market power in the home market. If anything ensuring a vibrant, competitive home market will ensure that even the larger companies are better able to compete overseas, as they will be lean and used to the cut and thrust of competition.

Any Mergers and acquisition policy must have regard to all constituents in the affected market. This requires informing all relevant parties of the impact of the proposed merger/acquisition, and allow them the opportunity to comment on the impact of such actions. The Government may not always be aware of all those impacted by mergers/acquisition, and therefore may not be aware of all the costs of allowing such actions. It is important to ensure a cost effective structure, that does not stifle merger activity but does allow those aggrieved to have to opportunity to comment.

Recommendation 4: The NIA recommends retention of the current merger rules, that the process be kept streamlined, however boosting the requirements in relation to pre-merger notification.

Trade Practices Act and Government Agencies and Legislation/Regulation

The NIA appreciates that there are times and circumstances where it will be inappropriate or impossible to apply *the Act* to all Government Regulations. However the NIA believes that the ACCC should have the power to look at the impact of Legislation and regulation and its effect on competition.

There are many circumstances where Government agencies are involved in commercial dealings and compete with others in that market place. The fact that *the Act* does not cover those Government agencies can cause an anomaly. Such agencies are often quite large and are major players, if not the dominant player in their market. The NIA supports efforts to ensure such agencies when they are involved in commercial dealings and where they compete with others, are subject to *the Act*.

The NIA also supports the ability of the ACCC to review Government Legislation and regulations that impact on the ability of individuals and companies to operate freely in their market. The NIA appreciates the need to ensure that persons operating in certain markets need to have particular skills and be required to make certain undertakings before they can operate. This is to protect consumers and should be encouraged. Unfortunately at times legislation and regulation can act in an anti-competitive manner, entrenching the position of certain players in the market place, while denying access to others equally qualified.

The NIA in particular has come across on numerous occasions legislation or regulations affecting accountants and auditors that stipulates the membership of one or other private bodies to the exclusion of others. The NIA would like to see reform to *the Act* to allow the ACCC to take actions to ensure that there is fair competition in professions that is based on skill, experience and equal opportunity and that work is not unfairly restricted based on membership of a professional body over that of other professional bodies.

Recommendation 5: The NIA recommends amending *the Act* to apply to circumstances where Government agencies undertake commercial activities in competition with others in the market.

Recommendation 6: The NIA recommends that the ACCC be given the power to review legislation and regulation, in order to ensure fair competition amongst professionals based on skills and experience, not membership of a professional body.

Penalty Provisions

The NIA supports efforts to raise the level and range of penalties available under *the Act* in order to act as an effective deterrent. While compliance with *the Act* and Competition Policy should be the main focus, it is important that there are sufficient penalty deterrents.

Conclusion

The NIA believes that in general the *Trade Practices Act* and the actions of the ACCC have been beneficial to the Australian economy. They have ensured a robust domestic economy and generally prevent abuses of market power. However there is still room for improvement. The NIA believes that its recommendations for improving *the Act* will help to ensure that there is effective competition in the Australian economy.

The NIA is concerned that the comments by some of the larger companies in Australian will be used as an excuse to water down *the Act* and the activities of the ACCC. Small business is vital to the Australian economy, and in turn it is dependent on an effective competition watchdog. While the NIA agrees that at times some of the public statements made on behalf of the ACCC have been inflammatory and not helpful, it should also be said the public outcry of some firms against the ACCC is indicative that in fact *the Act* and the ACCC are working effectively.

It is important to ensure that the Australian economy is free and competitive; the best way for Australian companies to compete internationally, is to ensure that they compete locally. *The Act*, the ACCC and Competition Policy should always be aimed at ensure the best return for the Australian people. This means that actions should be tempered by an overriding concern for the public benefit and for understanding that each market is different and that there are many different sub-markets that may require some adjustment in how policies are implemented.

The NIA believes that overall the competitiveness of the Australian market is strong, however evolutionary changes are needed to ensure *the Act* is relevant to changing circumstances.