Review of the competition provisions of the Trade Practices Act 1974

Submission by the Victorian Government

'A competitive and fair marketplace'

July 2002

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SECTION 1: EXECUTIVE SUMMARY

The Victorian Government supports a competitive and fair regulatory environment that delivers genuine on-going benefits to consumers, both in terms of pricing and a diverse product range.

Policy context

Victoria has in place a long term vision for the State entitled *Growing Victoria Together* that sets out major issues and priorities for the future growth of Victoria. It creates a framework for building an innovative, internationally focused economy that promotes investment and jobs growth across the whole State for all Victorians.

The internationalisation of the Victorian economy is changing the way that business is being done. More than ever, businesses need to be responsive to customer needs, innovative and connected. The Government is responding to this changing environment by promoting business innovation through a number of programs and facilitating a supportive regulatory framework that recognises the important role that SMEs play in driving the Victorian economy.

At the Commonwealth level, the *Trade Practices Act 1974* (TPA) should ensure a competitive, but fair, business environment. This is essential to promoting a vibrant small business sector. The Victorian Government is also creating a supportive business environment conducive to investment and jobs growth by ensuring an appropriate regulatory framework.

The Australian Competition and Consumer Commission (ACCC) deals with anti-competitive behaviour, but it is questionable whether certain provisions in the TPA are achieving their intended outcome. Imbalances in the bargaining power are often to the detriment of smaller businesses and are seen in liquor and grocery retailing, retail tenancies and petroleum marketing in particular.

The current Review of the TPA is welcomed as an important opportunity to examine competition provisions of the Act and their effectiveness and identify opportunities for reform that would generate benefits to consumers, and ensure that the TPA adequately addresses the legitimate concerns of small businesses.

Misuse of market power

Victoria is concerned with issues raised by small business in relation to the effectiveness of the misuse of market power provisions of the TPA (section 46) to adequately protect small business from dominant firms engaging in anti-competitive practices such as predatory pricing and price discrimination. Victoria is concerned that s.46 as it currently stands is not effectively achieving its objective, and is therefore failing to adequately protect small business from illegitimate conduct by those firms who have a substantial degree of power in a market. **Victoria believes that the current provisions need to be strengthened to ensure that the objectives of s.46 are met and small business is adequately protected.**

Victoria considers that the Review should closely investigate the merit of introducing a 'cease and desist' power as an option to facilitate speedy action against the (*prima facie)* illegal misuse of market power. Breaches of the order would incur penalties.

With appropriate checks and balances the inclusion of such a provision may enable faster enforcement action and the promotion of less costly dispute resolutions. Ultimately this could reduce the amount of damage that a firm with substantial market power can inflict via illegal market practices.

Victoria notes that the Productivity Commission in its Inquiry Report into the Telecommunications Competition Regulation (2001), supported the retention of a modified version of such provisions in the TPA (Part XIB) specific to the telecommunications industry, conditional on the introduction of a better appeals mechanism. **Investigation of the inclusion of a cease and desist provision may alleviate some of the current concerns in relation to the effectiveness of s.46.**

Another issue that should be considered by the Review is the possibility of strengthening s.46 via the introduction of an effects test, as called for by the ACCC and small business associations. **The drafting of an effects test would need to be considered carefully, particularly given the potential for adverse consequences that may jeopardise the competitive process.** In particular, it is important that any new provisions do not serve to create uncertainty in the business community in relation to genuine price discounting by firms for reasons of competition rather than predatory behaviour. There may also need to be specific provisions within s.46 on price discrimination and predatory pricing.

Merger Provisions

Victoria considers that the current mergers and acquisitions provisions should be retained. The existing merger laws are in keeping with international practice and the current s.50 accords with most comparable jurisdictions. The 1993 change in the law from a test of dominance to a test of substantial lessening of competition is considered to have operated satisfactorily. In practice, it is generally recognised that the Australian merger regime is one of the least cumbersome of those jurisdictions having merger control.

Victoria considers that small business concerns about 'creeping acquisitions' need to be addressed, particularly in the retail sector. A view of the small business sector is that the current merger law does not cover the gradual acquisition of small participants in an industry by a larger participant and that s.50 should be strengthened to allow for a cumulative effects rather than just 'one-off' acquisitions. This could be sectorally based. At present major merger proposals are likely to trigger ACCC investigation while a series of relatively minor or one-off acquisitions are not likely to draw attention, but over time may substantially lessen competition.

Authorisation of collective bargaining

Victoria supports the application of a rigorous public benefit test in instances where businesses wish to engage in collective restriction on competition. The public benefit test should recognise the benefit associated with the promotion of efficient small business.

Victoria considers it appropriate that the authorisation process continue to apply to conduct such as collective bargaining, so long as a rigorous public benefit test is applied. Victoria considers that in relation to applications for authorisations that promote efficient small business, the TPA needs to provide the Commission specific guidance on the public benefit test. This should include longer-term impacts, social and environmental impacts and regional implications.

Victorian Government Initiatives

While the TPA is the primary legislative vehicle to address anti-competitive or unfair market practices, the Victorian Government has developed a range of initiatives that are aimed at promoting a transparent and fair environment for consumers and small businesses. Initiatives include:

- the drawing down of unconscionable conduct provisions (based on s.51AC of the TPA) into the *Fair Trading Act 1999*;
- reform of retail tenancies legislation to achieve a fairer balance between the interests of retail tenants and landlords (to be introduced in the Spring sittings of Parliament); and
- new arrangements in the packaged liquor industry including the introduction of a mandatory code of conduct, to ensure a competitive but fair packaged liquor industry.

The Victorian Government also recognises that there is a need to bring together a number of resources within government to provide a central point where small retailer concerns regarding unfair market practices can be addressed in a timely and low cost manner. This is most pressing in the retail industry, where imbalances of power are most prevalent.

SECTION 2: VICTORIAN GOVERNMENT POSITION ON ISSUES COVERED BY THE TERMS OF REFERENCE

2.1 Policy Approach

The Victorian Government has in place a long term vision for the State entitled *Growing Victoria Together*, that sets out major issues and priorities for the future growth of Victoria. It creates a framework for building an innovative, internationally focused economy that promotes investment and jobs growth across the whole State for all Victorians.

The Victorian Government's action plan for promoting business growth in the State – *Building Tomorrow's Businesses Today*, recognises innovation as a key to economic prosperity. The action plan recognises that prices are generally not the only selling point in today's marketplace – rather quality, originality and timely delivery are also key considerations.

In regard to regulatory policy, Victoria seeks to promote an environment that supports business growth and delivers investment and job growth. Regulation should be closely scrutinised to ensure that it delivers real and practical benefits for the community, while providing business with certainty and minimal compliance costs in order to promote investment and innovation.

The TPA needs to ensure a supportive regulatory framework that creates a competitive, but fair, business environment. It should also provide for a level playing field and the appropriate balance of large and small business. Small business plays an important role in the Victorian economy, with 273,900 small businesses (96% of all businesses) employing over 811,000 people, or about 43% of total jobs in the State.

A consumer survey conducted as part of a study[1] by the Government into the Victorian packaged liquor industry found that non-price factors were valued just as significantly as price in determining the purchasing preferences of consumers. Other considerations that consumers value include product range, quality of service and convenience of location.

Diversity is critical to promoting choice and variety for Victorian consumers and an edge for winning export markets. Therefore an effective TPA must ensure that the interests of small and large businesses and consumers in a competitive and diverse market are not undermined by unfair market practices.

[1] Office of Regulation Reform, *Review of the 8% limit on packaged liquor licence holdings*, Victorian Government, September 2000.

2.2 Misuse of market power

Victoria is concerned with issues raised by small business in relation to the effectiveness of the misuse of market power provisions of the TPA to adequately protect small business from dominant firms engaging in anti-competitive practices such as predatory pricing and price discrimination. **Victoria believes that the current provisions need to be strengthened to ensure that the objectives of s.46 are met and small businesses are adequately protected.**

The Review should closely investigate the merit of a 'cease and desist' provision that may alleviate some of the current concerns in relation to the effectiveness of s.46. Such a provision to enable a temporary halt to *prima facie* illegal misuse of market power would appear to have merit by enabling faster enforcement action and the promotion of less costly dispute resolutions, provided that it adequately balances accountability and due process.

Another issue that the Review should consider is whether s.46 could or should be strengthened by the introduction of an 'effects test', as called for by the ACCC and small business associations. There may also need to be specific provisions within s.46 on price discrimination and predatory pricing.

A key issue for consideration by the Review is the question of misuse of market power. Victoria believes the TPA should ensure a regulatory framework that provides a fair environment for conducting business. It is considered vitally important for the growth of the Victorian economy that businesses are not stifled by the actions of companies that misuse their market power. An effective TPA must ensure that the interests of businesses and consumers in a diverse market are not undermined by unfair practices such as predatory pricing that lead to market dominance by a handful of major corporations.

Current provisions

Section 46 of the TPA relates to misuse of market power. Under s.46 a corporation that has a substantial degree of power in a market shall not take advantage of that power for the purpose of:

(a) eliminating or substantially damaging a competitor of the corporation or of a body corporate that is related to the corporation in that or any other market;

(b) preventing entry of a person into that or any other market; or

(c) deterring or preventing a person from engaging in competitive conduct in that or any other market.

The objective of s.46 is to prevent firms with substantial market power from engaging in illegitimate conduct that undermines the competitive process, such as predatory pricing and price discrimination.

Current issues

A wide range of views have been expressed about the operation of s.46 by small business associations, large business, and regulatory and professional bodies, both in terms of the current Review and in other similar reviews and inquiries conducted in the past. In general the debate centres on the effectiveness of s.46 in preventing firms with substantial market power from engaging in anti-competitive conduct to the detriment of smaller market participants and the competitive process more generally.

Section 46 contains what is commonly referred to as a 'purpose test' and it is this test that has received a great deal of attention. A common area of complaint is that the purpose test is a source of difficulty in proving cases of misuse of market power. For instance, the National Association of Retail Grocers of Australia (NARGA) has stated that its concerns with the TPA:

> "… stem from the Act's limitations in constraining the ACCC from pursuing alleged abuses of market power within the retail grocery industry. In particular, the present s.46 prohibition against the misuse of market power has had limited impact in view of the need to demonstrate the requisite anti-competitive purpose for the conduct"[2].

The Queensland Retail Traders and Shopkeepers Association also express this concern in its submission[3].

The ACCC has also commented publicly in relation to difficulties proving cases under s.46.

> "The Commission's experience has been that in the absence of smoking gun documents, proving a relevant purpose under s.46 to the satisfaction of a court is an onerous forensic process"[4].

Furthermore

> "…the ACCC believes that small business has been disadvantaged by the difficulties encountered by the ACCC in taking s.46 cases. Small business are unlikely to have the necessary resources to initiate and run a s.46 case and rely on the ACCC to run such cases upon bringing possible breaches to the attention of the ACCC".

However, in relation to the ACCC finding it difficult to find the necessary evidence of purpose in a number of cases, the Australian Chamber of Commerce and Industry (ACCI) suggests that it is more likely the allegations of wrongdoing were without foundation, and hence there was no evidence to be found[5].

In response to the apparent difficulties with the current s.46 provision, several solutions have been proposed. In its submission to the Senate Legal and Constitutional References Committee earlier this year, NARGA, although supportive of a reversal of the onus of proof, suggested a number of other alternatives that could also be considered such as:

[2] NARGA submission to Senate Legal and Constitutional References Committee, Feb 2002, pp 8.
[3] Queensland Retail Traders and Shopkeepers Association, Submission to the Trade Practices Act Review, July 2002.
[4] ACCC Submission to the Trade Practices Act review, June 2002, pp 80.
[5] ACCI submission to the Senate Legal and Constitutional References Committee, March 2002, pp 2.

- including a list of factors that the court could be taken into account in determining purpose under the present s.46; and
- the introduction of specific new prohibitions within the TPA to deal with anti- competitive below cost pricing and anti-competitive price discrimination.

The Coalition of Small Business for Trade Practices Act Reform (the Fair Trading Coalition) has also recommended to this Review that s.46 be specifically amended to address anti-competitive below cost pricing.

An option canvassed by the ACCC in response to the difficulty it faces proving a relevant purpose under s.46 is the introduction of what it terms an 'effects test'. Under this option the current s.46 and the existing purpose test would remain with the inclusion of an effects test. This formulation would see s.46 (1) drafted as

> "A corporation that has a substantial degree of power in a market shall not take advantage of that power for the purpose, or with the effect or likely effect, of…."[6]

The ACCC points to several arguments to support introducing an effects test, including:

- other prohibitions under Part IV of the TPA being framed in terms of purpose or effect;
- the current forensic difficulties in proving 'purpose' under s.46;
- current flaws in applying the s.46 purpose test to high technology and network markets; and
- overseas competition regimes generally adopting an effects based test.

Concerns with introducing an effects test have been expressed by a number of parties and relate to the potential for such a test to dull or reduce the competitive process. Some business associations have expressed concerns along the following lines:

- it would not be able to satisfactorily distinguish between desirable and undesirable competitive activity by firms;
- it is likely to bring within its ambit much legitimate business conduct and so operate to stifle pro-competitive behaviour;
- there is a risk that it would broaden the application of s.46 and so render its application uncertain for business; and
- it may deter vigorous competition and, by doing so, cushion inefficient businesses and permit a sub-optimal allocation of resources, which is ultimately not in the interests of the economy, business or consumers.

The Standing Committee on Economics, Finance and Public Administration in a report entitled *Competing Interests: is there balance? Review of the Australian Competition and Consumer Commission Annual Report 1999-2000*, noted that the proposal to move to an effects test has been considered on five occasions since 1989 during various reviews of the TPA. All five inquiries expressed concern that the effects test would not be able to satisfactorily distinguish between desirable and undesirable competitive activity by firms.

[6] ACCC Submission to the Trade Practices Act review, June 2002, pp 94.

In response to concerns raised in relation to the potential consequences of an effects test, the ACCC in its submission to this Review maintain that s.46 is already written with ample safeguards to protect legitimate competitive conduct. For instance, under s.46 it still has to be proven to a court that:

- a firm has a substantial degree of market power;
- that the firm has 'taken advantage' of its power; and
- the proscribed behaviour under s.46(1)(a-c) has occurred.

From a small business perspective the introduction of an effects test has gained support of NARGA and the Fair Trading Coalition. The Fair Trading Coalition[7] has suggested that it would be appropriate for authorisation of conduct that might otherwise be in breach of the amended s.46 in order to protect businesses from any unintended consequences of the proposed change.

R.L Smith and D. K Round have canvassed other means of dealing with problems such as predatory pricing[8]. According to Smith and Round:

> "The best way to evaluate whether a price is predatory is via a 'price-plus test' that evaluates the actual price in the context of structural and, more importantly, behavioural conditions which both theory and empirical evidence indicate are necessary for predatory pricing to be commercially worthwhile. These conditions include market share, entry barriers, the extent of multi-market operations, signalling, reputation effects, recoupment types and possibilities, asymmetric possession of information and a variety of threats"[9].

Another area of concern raised by small business is that the provisions in s.46 describe the misuse of market power in generic terms, rather than specifically mentioning predatory pricing and price discrimination, the two key types of anti-competitive behaviour. Price discrimination was previously prohibited under s.49 of the TPA, but this section was abolished in the early 1990s on the premise that breaches would be picked up under s.46. However, many small businesses consider that the generic provisions of s.46 do not adequately cover the issue and that a specific provision is needed.

Cease and desist orders

The notion of a 'cease and desist' provision in the TPA has been suggested as an alternative means of addressing misuse of market power issues, as is practiced in New Zealand. Recent amendments to the NZ *Commerce Act 1986* allow the Commerce Commission to make a cease and desist order. The Commission needs to be satisfied that a person has breached section 47 and it needs to act urgently to prevent a particular person or consumers from suffering serious loss or damage, or to protect the public interest. A cease and desist (or similar) provision may afford small business some temporary protection from firms who are clearly engaging in illegitimate conduct to the detriment of the competitive process.

[7] Fair Trading Coalition, Submission to the Review of the Trade Practices Act July 2002, pp22.
[8] Smith R. L. and Round D. K., Section 46: A Strategic Analysis of Boral, *Australian Business Law Review*, Vol. 30, June 2002, pp 202-215.
[9] Smith R. L. and Round D. K., Section 46: A Strategic Analysis of Boral, *Australian Business Law Review*, Vol. 30, June 2002, pp 214-215.

International perspective

As noted above, the ACCC has indicated that a rationale for introducing an effects test into s.46 of the TPA is that Australia is out of step with overseas competition regimes which generally adopt an effects based test. In its submission to this Review, the ACCC conducted a comparative analysis of monopolisation/abuse of market power provisions in overseas jurisdictions. The analysis concentrated on the European Union, United States, Canada, Japan and New Zealand. In all cases, except NZ, it was shown that, in general, an effects-based test (rather than purpose-based test) is used in competition analysis. However, international comparisons of statutes need to be read in conjunction with the interpretation by courts in each jurisdiction, to gain a clearer picture of the application of the respective laws.

Victorian Government position

The Victorian Government is concerned about the effectiveness of s.46 to adequately protect small business from anti-competitive practices by major firms, such as price discrimination and predatory pricing. Victoria considers that the current provisions need to be strengthened to ensure that the underlying purpose of s.46 is met and small businesses are adequately protected. The Review Committee should give consideration to making specific provision in s.46 to cover predatory pricing and price discrimination.

Victoria considers that the merits of cease and desist provision should be investigated by the Review, particularly in cases where there is likely to be a substantial period of time from when the illegal misuse of market power occurred to when an outcome is reached in legal proceedings. With appropriate checks and balances to address the potential costs, administrative difficulties and potential for abuse, inclusion of such a provision may enable faster enforcement action and the promotion of less costly dispute resolutions. Ultimately this could reduce the harm or amount of damage that a firm with substantial market power can inflict via illegal market practice.

Victoria notes that the Productivity Commission, in its Inquiry Report into the Telecommunications Competition Regulation (2001), supported the retention of a modified version of such provisions in the TPA (Part XIB) specific to the telecommunications industry, conditional on the introduction of a better appeals mechanism. As an option, the inclusion of a cease and desist provision may alleviate some of the current concerns in relation to the effectiveness of s.46.

Another means by which s.46 could be strengthened is the introduction of an effects test, as called for by the ACCC and small business associations. However, the drafting of effects test would need to be considered carefully, particularly given that there is the potential for adverse consequences that may jeopardise the competitive process. In particular, it is vitally important that any new provisions do not serve to create uncertainty in the business community in relation to genuine price discounting by firms for reasons of competition rather than predatory behaviour.

It is clear that the risk of adverse impact on genuine competitive activity from application of an effects test reduces the greater the market power of the company. One option the Review Committee may wish to consider is retention of the purpose-based test for companies with a degree of power in a market which is substantial but falls below a defined higher threshold, above which an effects test would apply.

2.3 Merger provisions

Victoria considers that the current mergers and acquisitions provisions should be retained. Small business concerns about 'creeping acquisitions' should be addressed, particularly in the retail sector. The current merger law does not cover the gradual acquisition of small participants in an industry by a larger participant and that s.50 should be strengthened to allow for cumulative effects rather than simply 'one-off' acquisitions that over time may substantially lessen competition.

The adequacy of the merger provisions of the TPA is another key issue for consideration in the Review. In particular, the small business sector has questioned the adequacy of the TPA to deal with the gradual acquisition of small participants in a market by a larger participant, leading to a concentration in market share, which can over time substantially lessen competition. This issue relates particularly to the grocery sector. The other issue of concern is the question of whether or not the merger provisions of the TPA prevent mergers necessary for Australian firms to be of the size necessary to take part in global markets.

Current provisions

Section 50 generally prohibits mergers or acquisitions that would have the effect or likely effect of substantially lessening competition in a substantial market for goods and services. The ACCC uses a series of benchmarks to determine which merger applications are likely to give rise to concerns about the level of competition in the relevant market.

- the market involved must be substantial;
- the combined market share of the four (or fewer) largest firms is at least 75% and the merged firm will supply at least 15% of the relevant market; or
- the merged firm will supply at least 40% of the relevant market.

If these benchmarks are exceeded, the ACCC then examines a number of factors relating to the structure and conduct of the market to determine if the proposed change would substantially lessen competition. Section 50 of the TPA prohibits acquisitions that would result in a substantial lessening of competition.

In determining whether the acquisition would have the effect, or likely the effect, of substantially lessening competition in a market, s.50(3) provides an exhaustive list of matters that must be taken into account. These include: availability of substitute products, whether the merger would remove a vigorous competitor, whether the market conditions are conducive to coordinated conduct, the nature and extent of vertical integration, the dynamic characteristics of the market such as growth, innovation and product differentiation, and the actual and potential level of import competition in the market.

If a merger has the effect of substantially lessening competition, the TPA provides that authorisation of the merger can take place provided there are net public benefits associated with the merger (public benefit test). Section 87B of the TPA provides for the enforcement of undertakings, which can be used in cases to overcome the anti-competitive effect of mergers where appropriate.

There have been several changes to the competition test since the TPA came into force in 1974. The Act initially prohibited mergers likely to result in a substantial lessening of competition in a market for goods and services in Australia, but was changed to a dominance test, following a review in 1977. An example of the problems associated with the dominance test is highlighted by the acquisition by Amcor and Visy Board of 50 per cent each of the only remaining Australian corrugated fibreboard manufacturer, Smorgon, in 1989. The acquisition did not lead to dominance by either company as they each increased their market share proportionately; but it did substantially lessen competition.

A number of reviews considered returning to the substantial lessening of competition test over the 1980s until in 1993 the test reverted back to substantial lessening of competition. The key difference between the 1974 substantial lessening of competition test and the current test is the reference to 'substantial market' as opposed to 'goods and services within Australia'.

Current issues

In terms of s.50 of the TPA that specifically relates to mergers and acquisitions that would result in a substantial lessening of competition, there have been a number of views that have been put forward by businesses and their associations.

From a small business perspective, 'creeping acquisitions' is an issue that needs to be addressed by the Review. A view of the small business sector is that the current merger law does not cover the gradual acquisition of small participants in an industry by a larger participant and that s.50 should be strengthened to allow for a cumulative effects rather than just "one-off "acquisitions. At present major merger proposals are likely to trigger an ACCC investigation while a series of relatively minor or one-off acquisitions are not likely to draw attention but over time may substantially lessen competition.

Under the current mergers law, small acquisitions, such as say the acquisition of a small independent supermarket by one of the major companies, would be unlikely to result in any substantial lessening of competition. However, over time and over product and geographic markets as a whole, such acquisitions may in fact result in a concentration of market share (and hence market power) with a small number of large companies.

Small business concerns relate mainly to the grocery sector and the apparent long-term strategy of a major chain to increase its market share through numerous individual acquisitions of other existing supermarkets, rather than by building new stores or expanding existing stores. According to NARGA, the rise to market dominance by the major chains has been built on an aggressive program of acquisitions of successful independent stores and chain operations, with little or no intervention by the ACCC. Currently, there is no obligation to notify acquisitions to the ACCC before they take place, but rather a system of voluntary notification.

The view of NARGA is that

> "… where the cumulative effect of acquisitions is to substantially lessen competition, NARGA would submit that s.50 should allow consideration of such a cumulative effect. Not to do so has the potential to undermine the operation of s.50 in those instances where an entity can acquire a substantial degree of market power through relatively minor piece-meal or ad hoc acquisitions"[10].

[10] NARGA submission to Senate Legal and Constitutional References Committee, Feb 2002, pp7.

The Fair Trading Coalition recommends that the TPA be amended to provide that where a company reaches a certain market share, any further acquisition must be notified to the ACCC and assessed under the proposed (by the Coalition) amended merger authorisation test. Alternatively, the Federal Government could 'declare' certain highly concentrated industries and where declared any acquisitions would need to be notified to the ACCC, and assessed by the ACCC on public benefit criteria.

The ACCC has commented that the difficulties in establishing a breach of the law relate to the very small market shares generally being acquired, and the question therefore of whether the competitive effect is substantial.

From a large business perspective, the Business Council of Australia (BCA) has argued that the current merger provisions deny companies the scale they need. The BCA has claimed that the ACCC has obstructed mergers and takeovers unnecessarily. Representatives of large corporations have argued that s.50 needs to be weakened in order to more easily allow for the creation of so-called 'national champions' capable of competing on the world stage.

The Commission's track record on this matter does not seem to support this claim. According to the Joint Select Committee on the Retailing Sector 1999, it had received evidence that the Commission had not in the last seven years opposed mergers where imports make up more than 10 per cent of the relevant market. In other words, the ACCC has not opposed mergers in sectors already exposed to international trade competition - the sector that the argument for firms needing to be large to take part in world markets is most relevant.

The 'national champion' argument used in support of anti-competitive mergers should be carefully considered. Such a scenario could result in Australian consumers paying higher prices to help support businesses charging lower prices to overseas consumers. Small business is generally opposed to the 'national champion' argument. A recent survey by Australian Business Limited found that 65% of small manufacturers (21-100 staff) oppose big business mergers to create national champions. For those with 20 or less staff, the proportion was 68%. For businesses overall, the share was 61%.

The Victorian view is that both large and small businesses benefit from more competitive markets. It is strong domestic competition that ultimately creates the 'national champions'. Big businesses benefit from strong domestic competition, which lowers costs and enables them to compete internationally.

The Commission has faced claims that the TPA's merger policy is harming the economy. The argument is that the policy is driving company headquarters offshore and preventing the development of large Australian companies that can 'punch above their weight in the Australian market and beyond.

It is also claimed that preventing mergers will force companies to re-locate overseas. However, there seems to be little evidence that companies have been forced overseas because their merger proposals have not succeeded. Victoria's view is that business size is not a prerequisite to export success: many small and medium sized businesses have succeeded in overseas markets and this trend will be accelerated with the growth in electronic commerce and information and communications technology.

Despite this, there are clearly some industries, such as advanced manufacturing and defence, where Australian firms require significant resources and capacity to be internationally competitive and meet the demands of global supply chains. It is recognised that there is provision in the TPA to authorise a merger that would breach the substantial lessening of competition test if it generates public benefits (eg. increases exports or improves the international competitiveness of an Australian industry). Given the success of some Australian firms competing in a global marketplace may depend on them achieving significant scale on a local level through mergers, it is critical that the authorisation provisions operate efficiently and properly recognise the global dimension of certain industries.

The ACCC has stated that it considers s.50 of the TPA and the Commission's own informal clearance process for merger assessments are working well and is not persuaded that any significant change is required to either. In its submission to the Review, the Commission concludes that there is no compelling evidence to support claims that the current merger law is stifling Australia's international competitiveness or that it is unsuitable in an era of global competitiveness. The Commission points to merger statistics to demonstrate that while the number of mergers examined is steadily rising, the actual number of mergers opposed by the Commission is small, averaging between 4 and 5 per cent.

It is relevant to note the recent trend for the large corporations is for more de-mergers rather than mergers to enhance international competition by rationalising down to core activities. A major example is Amcor, which has now become one of the world's largest packaging companies after splitting off its Australian paper manufacturing operation in a de-merger. BHP is undergoing a similar change by splitting its resource and steel operations to enhance world competitiveness.

International perspective

The approach taken by Australia in terms of merger laws under s.50 of the TPA is not out of step with current overseas merger provisions, such as in the United States, Canada and New Zealand. Although the European Union currently has a dominance test in place, there is serious consideration being given to a move towards a substantial lessening of competition test, as adopted by other advanced economies. Indeed the concept of 'shared dominance' applied in the EU means that effectively a 'substantial lessening of competition test' already applies there.

It is also noted that the Commission has published merger guidelines that do not differ very greatly from those in North America and Europe. There have been some updates in the guidelines covering such issues as the role of efficiency considerations in relation to s.50 and in relation to 'globalisation' arguments to the extent that anti-competitive mergers may now be justified even if the merger is anti-competitive in the Australian market.

If a merger is anti-competitive, authorisation is possible on public benefit grounds. The TPA 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 TPA is not an obstacle to allowing Australian firms to merge to achieve the scale necessary for international competitiveness providing there is a sufficient public benefit.

In terms of trade practices legislation generally, Victoria notes the IMD World Competitiveness Yearbook 2002, ranked Australia second (only to Finland, out of 49 countries) in an Executive Opinion Survey, which considered the extent to which Australian competition legislation prevents unfair competition. The surveys are targeted at senior executives who represent a cross-section of the business community in each country. The survey respondents are nationals or expatriates, located in local and foreign enterprises in the country and which, in general, have an international dimension. The ranking clearly indicates that in the mind of Australia's senior executives current competition laws are relatively successful in preventing unfair competition.

Victorian Government position

Victoria recognises the broad benefits that may accrue from mergers through allowing efficiencies, additional markets, access to capital and other synergies. However, they can also lead to a lessening of dynamic elements of economic growth that are driven by competition. In particular, competition drives innovation, more effective management and a more responsive attitude to demands of consumers.

Creeping Acquisitions

Victoria's view is that the ACCC needs to be able to consider the effect on the market of past mergers and acquisitions and to be able to take those into account in considering any current merger or acquisition. In addition, there are rural impacts that need to be considered. For example, the effects of the swallowing up of independent retailers in country towns by large chains can have social costs and adverse economic impacts if, in the longer term, a monopoly occurs. While it is noted that the TPA recognises regional markets, thus allowing for these types of consideration, there needs to be recognition that metropolitan markets can differ substantially from those in small regional towns.

Victoria also recognises that some small businesses are concerned that an amendment to prevent creeping acquisitions could affect small business operators from selling their businesses to larger companies. However, in any particular case it would always be possible to seek authorisation for a takeover based on public benefit considerations.

On balance, the Victorian view is that the Review should look at the feasibility and net benefits of amending the s.50 'statutory factors' to allow the ACCC to take into consideration previous mergers and acquisitions by an acquirer. This would allow the Commission to consider the aggregate effect of previous mergers and assess the resultant state of competition in any relevant market.

Reforms to improve the effectiveness of s.46 may also consider the creeping acquisitions issue. It may be desirable for the Committee to consider the proposal of the Fair Trading Coalition to the Review, providing for certain highly concentrated industries to be 'declared' under s.46. In this case, creeping acquisitions in (say) grocery retailing could be addressed without changing the current merger laws that are in line with international practice.

Merger Provisions

The Victorian Government view is that the current mergers and acquisitions provisions should be retained. The existing merger laws are in generally in keeping with international practice. The current s.50 accords with most comparable jurisdictions and the 1993 change in the law from a test of dominance to a test of substantial lessening of competition seems to have operated satisfactorily. In practice, it is generally recognised that the Australian merger regime is one of the fastest and least cumbersome of those jurisdictions having merger control.

Victoria is home to many internationally recognised and globally competitive Information and Communications Technology (ICT) companies that are integrated into global industry supply chains. It also has internationally competitive expertise and products. Victoria is not convinced that any loosening in the merger provisions as has been proposed by large businesses would enhance growth in this industry. In practice, the growth of this sector is facilitated more in establishing networks and alliances.

Victorian Government industry policy favours the achievement of critical mass and innovation through networks, strategic alliances and the formation of pro-competitive industry clusters rather than through anti-competitive mergers and acquisitions. The Victorian Government's 2010 Information and Communications Technologies Industry Plan – "Growing Tomorrow's Industries Today" is focussed on "identifying and promoting the clusters of firms within the industry that provide Victoria with global strength and sustainable competitive advantage". A major component of the framework for growth is the identification and support of strategically important ICT clusters.

There is a view that short-term competitive pressure may induce companies to reduce research and development and innovation expenditure and that there is a need for enterprises to merge to achieve economies of scale and critical mass to compete internationally. However, the latter can also be achieved through joint ventures, alliances, or 'clustering' of industries. The Strategic Audit of Victorian Industry has found that "developing and maintaining networks and linkages among firms and firms and institutions is essential to promote sharing of ideas and know-how and achieving critical mass. Inter-firm networks, including efficient and innovative supply chains and industry clusters (based either on technologies, infrastructure or research and education capabilities) promote domestic linkages".

Victoria considers that the merger provisions should not be relaxed – they are in line with international practice, but attention needs to be given to cumulative effects of acquisitions over time, particularly in industries where there is significant market concentration and in rural and regional locations.

Victoria recognises that there may be issues associated with the application of authorisation processes for mergers under the TPA. Because of the need to avoid critical delays and the likelihood of appeals of uncertain duration before determination, few companies have been prepared to test whether their merger proposals, which may fail on competition grounds, may succeed in gaining authorisation based on public benefit grounds.

One consequence of this has been a tendency for companies and to a degree the ACCC, to import public benefit considerations into the assessment of competition. For example, impacts on employment seem to have been important influences on a number of recent 'failing firm' decisions. This mixing of competition and public benefit considerations could be given statutory recognition. The suggestion of allowing parties to go straight to the Australian Competition Tribunal where authorisation is sought also appears to be worthy of consideration by the Committee.

2.4 Authorisation of collective bargaining

Victoria considers that, in granting authorisations that promote efficient small business, the TPA needs to provide the Commission with specific guidance on the public benefit test. This should include longer-term impacts, social and environmental impacts and regional implications.

It is important that non-legislative restrictions on competition assessed under the authorisation test are subject to rigorous assessment on public benefit grounds after a transparent process of considering the views of all interested parties.

Authorisation has been sought by numerous businesses previously operating in regulated environments, to ease the transition from deregulation. Victoria supports collective arrangements of this kind where they serve to protect efficient small business.

Victoria would support consideration of a change to the TPA that recognised that the protection of efficient business was a public benefit for the purposes of the application of the authorisation test. Victoria also considers that both economic and non-economic considerations need to be taken into account in applying the public benefit test. Social impacts, including regional development and employment, and environmental impacts, need to be taken into account.

In its report on the impacts of competition policy on rural and regional Australia, the Productivity Commission found that the direct costs of some competition policy reforms have tended to show up more in country areas than in the cities. As well, it found that there has been more variance in the incidence of benefits and costs of competition policy reforms compared with metropolitan areas.

The Review's terms of reference include regional impacts and these can be significant for small business and can have flow on effects. In rural and regional communities, small businesses are often the backbone of the local social infrastructure. They are more likely to support local suppliers of goods and services as well as local institutions and sporting associations. An effective low-cost authorisation process is also essential in enabling business to develop their own self-regulation schemes.

SECTION 3: VICTORIAN GOVERNMENT INITIATIVES

The TPA is the primary legislative vehicle to address anti-competitive or unfair market practices. This should continue to be the case. However, the Victorian Government has a stake in competition law, given the constitutional division of powers between the Commonwealth and the States and its commitment to the National Competition Policy reform agenda.

Victoria also has a strong interest in ensuring that Australia's competition laws improve the welfare of Victorian consumers and provide opportunities for efficient and innovative small businesses to compete in an industry without being the subject of unfair market practices.

The Government has developed and implemented a range of effective and practical initiatives that are aimed at promoting a transparent and fair environment for consumers and small businesses.

Unconscionable conduct

In 2001, Victoria introduced unconscionable conduct provisions into the *Fair Trading Act 1999*. The provisions, based on s.51AC of the TPA, extend existing protection to ensure that unincorporated businesses are subject to those unconscionable conduct provisions. Victoria's drawing down of s.51AC enables small businesses that have been the subject of unconscionable conduct to appeal to the Victorian Civil and Administrative Tribunal, a low-cost and informal tribunal.

Unconscionable conduct provisions are particularly relevant in the case of retail tenancies, where they can provide tenants with broad protections against unfair practices by landlords. While the number of cases concluded under the statute in the Victorian and federal jurisdictions is limited, the unconscionable conduct provisions have the potential to promote better management practices by landlords so as to avoid litigation.

Victoria notes the call by the Franchising Council of Australia in its submission to the Review for greater certainty regarding the type of actions that may constitute unconscionable conduct, given there is no precise definition. However, s.51AC has only been operating for a relatively short period and the case law is yet to be fully developed. Victoria considers that the existing provisions should remain until the outcomes that they produce become clearer.

Retail tenancies

Victoria has undertaken a comprehensive review of its retail tenancies legislation. Following from the review, the Government is currently developing new legislation to achieve a fairer balance between the interests of retail tenants and landlords. One means by which the new legislation will address unfair market practices is the inclusion of unconscionable conduct provisions that are based on s.51AC of the TPA, but tailored to the needs of retail tenancies.

An exposure draft of the *Retail Leases Bill 2002* is being released in late July 2002 for public comment, prior to its introduction into the Parliament during the Spring 2002 sittings.

Packaged liquor retailing

The packaged liquor industry is characterised by a large number of small liquor retailers competing against the two major supermarket chains in an intensely competitive market that is experiencing modest growth.

Since the early 1980s, the number of packaged liquor outlets that a person or company may hold has been restricted to 8% of the total number of packaged liquor licences in force. The 8% rule was introduced due to concern about the increasing number of licences that a major retailer was acquiring at the time. It was considered that the 8% rule would prevent excessive market concentration and an industry comprised of a diverse and vibrant small business sector.

A comprehensive review of the 8% rule during 2000 found that it was becoming ineffective over time in protecting small liquor retailers for several reasons. The abolition of the 'needs criteria' in 1998 had led to strong growth in the pool of licences, enabling the major chains to obtain new licences while remaining under the 8% limit. The major chains were also identifying means under the legislation of effectively increasing their holdings above the limit.

It became clear to the Government and the associations representing small liquor retailers that that new approaches were required to continue to promote a competitive and diverse packaged liquor market. Concerns were also expressed to the review by small liquor retailers that the major chains were allegedly engaging in unfair market practices that were having an adverse impact on their businesses and that the TPA was not effectively addressing their concerns.

Over the course of the past 12 months, the Victorian Government has worked closely with the packaged liquor industry to develop new arrangements that more effectively promote the underlying intent of the 8% rule, and relevant legislation was recently passed.

A major initiative under the new legislation is the provision for a mandatory code of conduct to ensure a competitive but fair packaged liquor industry. The code will deal with matters such as the responsible development of the industry, including unfair market practices. It is not intended that the code duplicate or conflict with the TPA or the responsibilities of the ACCC, but rather that it promote business conduct that is consistent with the TPA and the Victorian Government's policy framework of a competitive, but fair, business environment.

Conclusion

While the above initiatives deal with particular industry sectors separately the Victorian Government recognises that there is a need to bring together a number of resources within government to provide a central point where small retailer concerns regarding unfair market practices can be addressed in a timely and low cost manner. This may be particularly beneficial in circumstances where difficulties experienced by small businesses in respect of unfair market practices do not attract the attention of the ACCC but are nonetheless injuring small business. The Victorian Government will continue to work with the business community to promote a competitive and fair marketplace.

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