

SUBMISSION

TRADE PRACTICES ACT REVIEW

JULY 2002



Australian Council of Trade Unions

Unions
Work

Preface

Part IV of the *Trade Practices Act 1974* (TPA) includes secondary boycott provisions in s45D and s45E. Although not part of the Terms of Reference of this Review, the ACTU and our affiliated unions restate our long standing position that industrial relations matters should not be within the jurisdiction of the Australian Competition and Consumer Commission (ACCC). These provisions unnecessarily draw the ACCC into matters which are not part of its regulatory role nor its area of regulatory expertise. ACTU Policy states that (as adopted in 1985):

*"The Trades Practices Act is a totally unacceptable vehicle to cover the legitimate activities of trade unions. The Act should be used for promoting free competition and fair trading by business enterprises."*¹

¹ Industrial Legislation Policy, 1985 ACTU Congress.

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Submission

Introduction

The Australian Council of Trade Unions (ACTU) welcomes the opportunity to contribute to this Review of the *Trade Practices Act*.

The primary concern of the ACTU is the wages and conditions of working people. Our objective is to improve the living standards of working Australians. Income is one side of the living standards equation, the other side is prices. The ACTU has a long standing position in advocating price regulation to protect the living standards of Australian workers and consumers.

ACTU has established a track record of advocacy in this area. The ACTU led the campaign against price fixing which led to the introduction of the original legislation against price fixing.

- In 1973 the ACTU Executive called for a referendum to give the Federal Government the power to control prices.
- ACTU Budget Submissions (1966-1970) to the Holt and Gorton Federal Governments addressed the issue of price fixing by monopolies and cartels.
- In 1970 a joint venture between Bourke's, a discount store, and the ACTU was established to break retail price maintenance in Melbourne.
- At the time the, then, ACTU President, Bob Hawke spoke publicly "of the iniquities of retail price maintenance, the need for legislation against it, the determination of the trade union movement to smash it".²

The 1982 "Statement of Accord by the Australian Labor Party and the Australian Council of Trade Unions regarding Economic Policy" advocated a prices and incomes policy for Australia. The prices and incomes policy was

² Robert. J. Hawke A Biography, Blanche d'Alpuget, page 184.

Scope of ACTU Submission

The ACTU notes that the Review Terms of Reference require the Committee to review the operation of the competition and authorisation provisions of the Act. The ACTU Submission concerns itself with the review of the competition provisions in Part IV of the Act, and the associated penalty provisions.

The ACTU supports the ACCC's continuing role as the independent regulator of the *Trade Practices Act*, for the benefit of the economy and the welfare of society. In performing its functions, it is critical that the ACCC ensures market power of big business is not abused and fair trading is observed, thereby protecting workers, consumers, business and the community in general.

The ACTU Executive at its recently concluded July 2002 meeting passed the following Resolution:

"Australian Competition & Consumer Commission

The ACTU Executive notes the attack in recent months by a range of business leaders on the ACCC. This attack is clearly a coordinated effort by big business to reign in the regulatory power of the ACCC, and follows a series of successful prosecutions of large companies engaged in collusive and anti-competitive conduct.

The Trade Practices Act is designed to protect consumers and businesses by ensuring a fair trading regime. Under the Act the ACCC is responsible for preventing price collusion, rigged bidding processes, manipulation of supply and other illegal conduct designed to maximise profits. Collusive conduct of this kind can deliver massive windfall gains to big business.

This submission is based on the premise that increasing concentration of market power among big business requires greater regulatory powers.

In referring to 'cartel activity' we adopt the "hard-core" definition employed by the Organisation for Economic Cooperation and Development (and relied upon by the ACCC):

*"... an anti-competitive agreement, anti-competitive concerted practice or anti-competitive arrangement by competitors to fix prices, make rigged bids (collusive tenders), establish output restrictions or quotas, or share or divide markets by allocating customers, suppliers, territories, or lines of commerce."*⁴

The ACCC plays an important role in preventing such practices. The ACTU supports the thrust of the ACCC Submission to the Review, particularly the points that follow.

Existing penalties – insufficient deterrent

Existing penalties do not provide a sufficient deterrent to deter all collusive arrangements. The existing penalties, introduced in 1993 are:

- A corporation found to have engaged in cartel conduct in contravention of these sections (s45) of the Act is liable for a maximum pecuniary penalty of \$10 million per contravention.
- Individuals are liable for penalties of \$500 000 per contravention.

We note that the ACCC has concluded:

⁴ OECD, Hard Core Cartels, Meeting of the OECD Council at Ministerial Level, 2000

International practice

Other countries, including the United States, have criminal penalties for collusive conduct. The UK is currently considering introducing them. This debate should be had in Australia.

Australia needs to adopt a sanctions framework consistent with those of our major trading partners. Not to do so creates risks of:

- Australian consumers paying higher prices for goods than in other countries;
- Australian business suffering a competitive disadvantage because of higher input costs;
- Australia being seen as a "safe haven" for international cartels;
- Australia's international business standing being undermined.

Criminal sanctions

The ACTU agrees with the ACCC submission that:

"While introducing criminal penalties (or increasing maximum pecuniary penalties) will never prevent all anti-competitive breaches of the Act, the Commission believes the current penalties, on their own, are inadequate as effective deterrents".⁶

In its Submission to the Review the ACCC proposes the introduction of criminal sanctions.

The ACTU supports the level of penalty being proposed by the ACCC:

- A corporation convicted of a criminal offence would be liable for a fine at the same maximum level that would apply if the contravention were civil;

⁶ ACCC Submission to the Trade Practices Act Review, June 2002, page 28

the proposed draft leniency policy would complement the introduction of criminal sanctions by encouraging participants in cartel conduct to expose the unlawful activities to the ACCC.

Investigation and Prosecution of matters

In conjunction with introduction of criminal penalties for hard-core cartel conduct, the ACTU supports the retention of the ACCC's role in the investigation of criminal matters, with the DPP being the prosecuting authority.

In this regard, the ACTU notes calls by the BCA and the Australian Chamber of Commerce and Industry for creation of a Board to oversee the operations of the ACCC. The ACTU rejects such calls as an attempt by big business to control the ACCC.

Increasing the existing pecuniary penalties for corporations

In addition to the introduction of criminal sanctions, to increase the deterrent effect of the civil pecuniary penalties available, the ACTU supports the ACCC proposal to link the penalties with the value of the gain or harm caused:

- the maximum penalty for a contravention of the Act be the greater of \$10 million or three times the value of any commercial gain from the contravention; or
- in matters where it is difficult to quantify the commercial gain from the contravention, the courts to have the power to substitute a percentage of turnover - 10 per cent of the firm's Australian turnover for the duration of the infringement for a maximum of three years.

The enforcement powers of the ACCC to ensure that market power is not abused, so that competition is protected and that fair trading is promoted, would be enhanced if the s.46 "purpose" test was complemented by an "effects" test - that a corporation may not take advantage of a substantial degree of market power with the effect or likely effect of:

- Eliminating or substantially damaging a competitor;
- Preventing entry of a person into a market;
- Deterring or preventing a person from engaging in competitive conduct.

Cease and desist orders

Similarly, to ensure that the market power of big business is not abused and that fair trading is promoted, the ACTU supports creation of ACCC powers to issue "cease and desist" orders, in matters in which the ACCC is satisfied that that there is prima facie anti-competitive use of market power and immediate, interim action is required in the public interest.