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Secretary,
Trade Practices Act Review,
Dept. of the Treasury,
Langton Crescent,
Parkes ACT 2600

Dear Sir,

SUPPLEMENTARY SUBMISSION TO THE REVIEW

As a comment on the Business Council's submission suggesting a way of controlling the ACCC's power, I wrote and sent an article to the Canberra Times. The Editor has informed me it will be published in the next day or so.

However, I also now make it a further submission to your Review, additional to those I made on 1 June and 3 July. A copy is attached.

Yours faithfully,

(R. S. GILBERT)

# THE POWER OF THE ACCC

Industry clearly thinks the Australian Competition and Consumer Commission has too much power. The Dawson Committee, appointed by the Treasurer to review the Trade Practices Act, will no doubt consider this - because excessive power makes a regulatory body more prone to mistakes. And the Business Council of Australia is right when it said, in its submission to the Committee, that errors by a regulatory body can be just as harmful to the economy as misuse of market power by a business.

However, the BCA's suggested solution, to create yet another bureaucratic body to oversee the ACCC, is not impressive. It doesn't recognise the two related causes of the 'power' problem, viz. that

- the Act is so all-embracing and uncertain in its reach, that it can be interpreted by the ACCC as covering just about any business conduct. It is not law whose reach is confined to specific, identifiable conduct that is deemed unacceptable; and
- there are very limited "rights of appeal" against whatever interpretation the ACCC puts on particular conduct by any business - so that, effectively, the ACCC's interpretation becomes the "decision".

Elaborating on this, fundamentally the Act says that any 'contract, arrangement or understanding' engaged in by any business that has the purpose, or has or is likely to have the effect, of substantially lessening competition in any market, is unlawful. Given the sweeping nature of this proscription, and the vagueness of the concepts involved ('competition', a 'substantial lessening' thereof, and 'markets'), the ACCC can form an opinion (often based on academic or economic theory, rather than hard facts or evidence) that a very wide range indeed of what a business does, or contracts it enters into, are in breach of the Act. And the scope for this is widened by the fact that the line between competitive conduct and 'anti-competitive' conduct is blurred. Conduct that most people would regard as simply part of the competitive process can itself lessen competition. After all, the very purpose of competing is to win, to eliminate or lessen present or future competition against you.

Elaborating on the second point (the 'right of appeal' point), many businesses, and some media, don't seem to understand that it is *not* the ACCC that has power under the Act to decide whether or not particular conduct contravenes the Act. That power vests in the Federal Court. With certain specialised exceptions (of which only one, mentioned later, is relevant here), the ACCC's role is supposed to be that of a 'public prosecutor' instituting proceedings in the Federal Court against businesses that, ***in its opinion***, have breached the Act. And if the matter does reach the Court, the Court might or might not share the ACCC's opinion.

However, in practice not many matters do go to the Court for decision. Most businesses seem to (often reluctantly) accept the ACCC's opinion as to the legality or otherwise of their conduct, even though they or their legal advisers might disagree. Perhaps this is because there is no process under the Act (other than one that poses a high cost risk) whereby the parties concerned can have the ACCC's, and their own, views as to the legality or otherwise of what they want to do tested in the forum where such matters are supposed to be decided, viz. the Federal Court.

True, an ACCC opinion that some particular conduct would be illegal doesn't stop the parties concerned from proceeding with that conduct, and putting the onus on the ACCC to decide whether it will institute legal proceedings seeking injunction *and penalty* against the parties. However, not many businesses take that route - perhaps for cost and delay reasons; perhaps

because they feel the Court will accept the ACCC's opinion; or perhaps because of the severity of the potential penalty if the Court finds against them (up to $ 10 million).

However, whatever the reason, it seems to have developed that, for all practical purposes, the ACCC's opinion on these matters has become the law, i.e. the ACCC has become the practical 'decision-maker'. And it is the above two factors combined, viz. (a) the all-embracing and uncertain nature of the Act, and the vague concepts it embraces; and (b) the fact that the ACCC's interpretations of the Act have come to be 'decisions' for all practical purposes - that make the ACCC a very powerful body, and create uncertainty and concern in the business world.

There are a number of possible solutions. One would be to provide in the Act that the ACCC can be required by any business whose conduct the ACCC has called into question, to make a formal declaration that it considers the conduct unlawful, or to issue a 'cease-and-desist' order - ***following which***, importantly, the parties concerned have a 'right of appeal' against that declaration or order. The 'right of appeal' could be either

- to the Federal Court, seeking a declaration as to the legality or otherwise of the conduct. In this way, *decisions* as to legality or otherwise would be made, as intended, by the Court; or
- to the existing Australian Competition Tribunal, a quasi-judicial body with the function of reviewing (on application) ACCC decisions on applications for authorisation of conduct that might be considered anti-competitive, on public benefit grounds. Under the Act, the ACCC does have the power to decide applications for authorisation of anti-competitive conduct, if it thinks that conduct yields some 'public benefit' that outweighs its anti-competitiveness. For reasons I won't canvass here, understandably this is not a much-used process these days. However, what is relevant is that the Act does give the parties concerned a right of appeal to the Tribunal against ACCC decisions on authorisation applications. And the Tribunal's decision is final.

  It would therefore not be unreasonable - and, indeed, quite logical - to also give parties a right of appeal to the Tribunal against ACCC 'decisions' as to the legality or otherwise of their conduct or proposed conduct, in cases where there is no concept of 'public benefit' involved (probably the vast majority of cases, as 'public benefit' should be regarded as something akin to 'national interest').

If such a process were in place (but only in that case), there could be no objection to more severe penalties for some kinds of conduct, including perhaps criminal sanctions and jail sentences, if businesses persisted with that conduct despite a declaration by the Court or the Tribunal that it was unlawful.

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R. S. GILBERT

16 JULY 2002