Submission on the
Review of the Competition Provisions of the
Trade Practices Act 1974

Summary of Recommendations

August 2002

Canberra Consumers

Summary of recommendations

The Trade Practices Act (TPA) was put in place to promote and foster competition, fair trading and consumer protection.

Maintenance of a fair marketplace through effective regulation such as that provided by the ACCC is crucial to the welfare of consumers and the economy.

It is also crucial for the economy that consumers can have confidence that markets are operating honestly and fairly.

Competing locally and globally *(Term of reference 1a, 1c, 1f)*

Proposals for softening competition law and changes to the merger provisions will reduce marketplace diversity and have the potential to blunt the competitive edge created through diversity and competition.

Global success can only be achieved in a marketplace which is responsive to customer desires and is competitive. While reduced competition may produce short term profits for those companies with a marketplace advantage, like the Australian automotive industry of the seventies, these companies become complacent and uncompetitive.

Accountability of the ACCC – Governance Structures, Use of Publicity
(Term of Reference 1d, 1e)

The ACCC is currently accountable to the elected representatives in Parliament and to the public. Its enforcement activities are open to challenge in the courts. Appeals against ACCC conduct or decisions can be made through administrative appeals structures, the Commonwealth Ombudsman, and the Australian Competition Tribunal.

These mechanisms of accountability are accepted by the general community, and they are the same as those applied to other agencies such as the Australian Taxation Office, Centrelink and the Australian Federal Police.

Moves to place an additional layer of bureaucratic scrutiny over the ACCC are clearly attempts to decrease the effectiveness of the ACCC. They would slow down the Commission in carrying out its duties. None of these outcomes would benefit Australian consumers or the economy.

The ACCC's use of publicity provides an extremely cost effective compliance and education message to business and consumers.

Those found guilty of breaches of the Act will suffer in terms of reputation, and there will be cases where reporting of an ACCC investigation may infer some level of guilt on the organisation subject to the report. However, most people can distinguish between an allegation and a conviction, and overall the small amount of damage that may be done through such publicity is outweighed by the public benefit created through the strong compliance/education message.

The highly public activities of the ACCC and the high public profile of its Chairman make consumers more aware of their rights and allow a greater level

of comfort and security in the market. This is welcome in a society where transparency, openness, and public accountability are valued. These initiatives also promote a fair and effective marketplace for consumers and business.

Mergers, authorisations - section 50, section 87B (term of reference 1a, 1b, 1c, 1e)

The current mergers regime in Australia is a highly transparent process. Consumers, consumer organisations, businesses and other stakeholders who may be affected by a merger are invited to become involved in those merger proposals that they believe would reduce competition.

These stakeholders have a right to examine the claimed public benefits of a merger and to offer their views as to whether the claimed benefits are realisable and sufficient for them.

Proposals to amend s 50 and s 87B, which would see the public benefits test inserted into the initial consideration of a merger mean that the supposed benefits of a merger would not be subject to public scrutiny before a merger is agreed.

There is no reason to accord businesses this level of confidential privilege, in addition to having accorded to them the privilege of considering a merger even in situations where competition detriment occurs.

The Australian Competition Tribunal would effectively lock out consumers, small businesses and other poorly resourced stakeholders from the decision-making process. The cost of legal representation would be prohibitive for most, if not all, smaller parties. As well, it is very difficult for bodies involved with tribunal process to properly research whether a merger should proceed.

For reasons of public accountability, Canberra Consumers does not support amendments to s 50 or 87B which inserts the public benefits test early into a consideration of a merger; it does not support the proposal that businesses have the option of going directly to the Tribunal for a merger decision; nor do we accept that the authorisation process is truly problematic.

Our view is that business is reluctant to make its arguments in public because it does not wish to subject itself to public scrutiny. This goes against societal requirements for the transparency and the process of public scrutiny that supports and promotes an effective marketplace and many other democratic principles.

Specific improvements to the Trade Practices Act

Canberra Consumers believes that the Trade Practices Act should be strengthened to ensure that the ACCC can be vigilant and forceful in the pursuit of firms which breach the law. Eight suggested changes to the Act are outlined.

1. Effects test – section 46 (term of reference 1b, 1c, 1e, 2)

The current test in s 46, a purpose test, creates enforcement difficulties. It is difficult to obtain sufficient evidence to prove the proscribed purpose.

Companies with a substantial degree of market power should face a law that proscribes misuse of market power where the regulator can show that a company's behaviour has clearly taken advantage of its market power to the detriment of a competitor — whether or not documents about purpose were obtainable.

> ***Submission****: that s 46 be amended to include an additional phrase such that corporations with substantial market power cannot take advantage of their power for the purpose or effect of damaging competitors or potential competitors.*

Penalties, deterrence, compensation, disgorgement

For a breach of the Trade Practices Act, the penalties available to the courts should allow for:

- punishment of individuals by gaol sentences or through fines;
- the setting of possible fines at a level that acts as a deterrent; and
- an opportunity to compensate wronged parties and ensure that firms do not retain ill-gotten gains, even where the class of consumers harmed by the breach of the law is dispersed.

2. Criminal sanctions (term of reference 1b, 1c, 2)

In the interests of equality of justice, there is no reason that corporate criminals engaged in cartel behaviour should be immune from jail terms.

There is clearly insufficient personal deterrence at the moment. Overseas experience suggests that a jail term is far more feared than a pecuniary penalty.

> ***Submission:*** *That a new section be inserted into the Trade Practices Act to provide for criminal sanction for serious or 'hard-core' cartel behaviour.*

3. Civil penalties for Part V (term of reference 2, 3)

It is possible for the ACCC to get criminal penalties in the form of fines (but not jail sentences) for Part V offences, but not civil penalties.

The addition of civil penalties for contraventions of Part V would help to provide a deterrent to offences. It would also allow more fairness in the enforcement of Part V, and it would enable justice to be carried out promptly and at lower cost.

> ***Submission****: that a new section for contraventions of Part V be introduced into the Trade Practices Act providing for civil penalties.*

4. Fines (term of reference 1b, 1c, 2)

The level of fines does not appear to be sufficient to deter breaches of law by those companies that assess the benefit/risk favourably.

Fines need to be set at a level that can ensure that a company suffers a financial disadvantage in relation to its competitors as a result of its illegal behaviour. By preference, it should not be possible for a company to base its decision-making

on a calculation that the benefits of illegal action outweigh the likely impact of fines.

> ***Submission:*** *that the Trade Practices Act be amended to allow for the appropriate pecuniary sanction of companies such that the company can be fined as a percentage of its gross turnover or as a multiple of the ill-gotten gain from which it has benefited.*

5. Cy-pres solutions (term of reference 2, 3)

While the perpetrators of collusion who are caught and found guilty are fined, Australian courts have not generally ensured that the ill-gotten gains of a company are disgorged and returned to consumers in some form.

The doctrine of cy-pres provides not only for the compensation of consumers who have been wronged where they can be identified, but also for the disgorgement of gains through a distribution of funds to be used for consumer benefit broadly.

The Act is currently silent in providing direction to the Court on how penalties might be distributed. Consumer welfare in Australia could be enhanced through the use of the cy-pres doctrine.

> ***Submission:*** *that provisions be introduced into the Trade Practices Act 1974 (with mirror provisions in the ASIC Act) formulating cy-pres solutions in Australian consumer protection law.*

6. Regulatory intervention in unjust contracts (term of reference 1c, 2, 3)

There is increasing recourse by companies in Australia to contracts which shift business risks to consumers (including small business in its dealings with large businesses) or unjustly burden consumers with inappropriate contractual terms.

Terms in these contracts include: unilateral change clauses, tendentious default provisions, clauses that confer a particular evidentiary value upon certificates or other documents issued or held by a business or third parties, onerous obligations on the customer, apparent attempts to contract out of 'fit for purpose' warranties under the Act, and onerous terms in 'clickwrap' contacts for e-commerce services.

Australia has no systematic process or effective law for dealing with such unjust terms in contracts and the Federal Government has been completely lenient about this. Other governments have addressed or are in the process of addressing this problem and are not simply leaving consumers to the 'mercies' of an unequal power relationship between consumers and business.

Submissions:

- *That a new Part IVB – Unfair Terms be inserted into the TPA.*
- *That this new part be modelled on the key features of the UK Unfair Terms in Consumer Contracts Regulations 1999, appropriately adjusted to fit within the TPA framework.*
- *That, consistent with the UK Regulations, the new Division:*
  - *• declares that unfair contract terms, as defined, are not binding on consumer parties;*
  - *• imposes a positive duty on the ACCC, as regulator, to consider complaints about unfair terms; and*
  - *• gives the ACCC (and, perhaps, other specified bodies) the power to seek both enforceable undertakings and injunctions to restrain the continuing use of unfair terms.*
- *That mirror provisions dealing with contracts in relation to financial services be inserted as a new subdivision within Part 2, Division 2 of the ASIC Act.*

- *That additional resources be provided to both the ACCC and ASIC to ensure that the new legislative responsibilities proposed are effectively and actively administered.*

Canberra Consumers considers that extensive work needs to be carried out on the magnitude and nature of unfair contract terms in the marketplace. It recommends that as a priority the three key regulators — Australian Competition and Consumer Commission, Australian Securities and Investments Commission and Australian Communications Authority — jointly undertake a wide-ranging study into the matter, consider what terms should be 'black listed' and report on their findings.

Small business issues

7. Cease and desist orders (term of reference 1b, 1c, 1f)

In situations of misuse of market power against a small business, before a decision can be obtained in the courts (which can take a number of years) the small business may well be bankrupt.

Canberra Consumers supports introduction of 'cease and desist' orders to provide a breathing space while evidence is collected to injunct such behaviour.

8. Collective bargaining by small business (term of reference 1b, 1c, 1f)

With the caveat that certain protections would need to be in place, Canberra Consumers can support an amendment that would permit small businesses to bargain collectively in some cases.

The protections would include:

- no blanket exemption from the law;

- the ability of the Commission to intervene to redirect a proposed collective bargaining arrangement to the authorisation process in situations where such bargaining could significantly harm competition; and
- that the collective bargaining be permitted only in relation to dealing with businesses which have a significant degree of market power.