

14 August 2002

The Chairman
Review of the Trade Practices Act 1974
Parliament House
CANBERRA ACT 2600

Dear Mr Chairman

Proposed Changes to the Trade Practices Act

As you may be aware, the Small Business Show on Channel 9 on ~~Sunday~~ ^{Monday} 28 July hosted a forum of interested parties to discuss the options for changing the Trade Practices Act.

I am very concerned about the opinions expressed by Professor Fels and the misleading way he chose to present them.

Professor Fels described the introduction of penal sanctions for company directors as a "no brainer". By this I assume he believes that the introduction of criminal sanctions is a forgone conclusion. This worries me greatly.

The problem with criminal sanctions in the Trade Practices Act is that they are being coupled to an "affects test". As you are aware, the introduction of an affects test will reverse the onus of proof for companies alleged to have breached the fair competition part of the Act ie guilty until proven innocent.

No where else in our criminal code is there an assumption of guilt. Before enacting such legislation, we have to ask what is so special or onerous about unfair competition that it warrants penal sanctions and a reversal of the onus of proof? I'll bet there are more than a few citizens of this country would wish that it was as easy to jail a drug trafficker or rapist. If we really want to change the onus of proof I think there are areas of much greater priority than allegedly unfair competition.

The whole area of competition is so artificial anyway. There are numerous areas where we accept that competition is not good. For example we have no objection to governments colluding to set prices for trade in agriculture. We have never accepted that competition is good in labour markets and allow unions to engage in all sorts of anti competitive behaviour. What about industries that require high levels of capital investment that present natural barriers to entry? If we make life too tough for them, all we get is a proliferation of small inefficient players.

I have absolutely no doubt that competition is good for business and good for customers. But only if it is real competition. What we shouldn't create is another form of protection for inefficient companies with an "effects test" that makes it illegal, under threat of imprisonment, for large companies to compete. Companies grow because they are efficient. If their competitors are protected from competition from the biggest and most efficient players, it just means that consumers will wind up paying more.

In any event, it is not clear cut that the exercise of market power in our country is so onerous and contrary to the public interest that it warrants a penal sanction. I work for a company which is the largest of its kind in Australia, but we compete internationally with the rest of the world. Our position of local market dominance is not disadvantageous to our customers. Instead, our dominant position in Australia allows us to cross subsidise our products so that we are able to offer a much more complete service to our customers than our local competitors. Far from making excessive profits at the expense of our customers, we hold prices down to try to increase demand and work hard on our level of service to increase customer satisfaction. Try to find an explanation for that in an economics text book!

Because of their lack of scale economies, our competitors only operate in the profitable sections of the market and have no desire to offer a comprehensive product or service. Under the proposed legislation, would we be expected to stand back (because if we are successful in hanging onto our market share and a competitor fails, our directors may go to jail) while new entrants plunder the most profitable parts of our business. If we can't compete, our only alternative would be to pull out of those sectors of the market which we cross subsidise.

Get serious, what do you think capitalism is all about. The basis of our system is that companies work hard to succeed, they grow and they compete to protect their market share. This proposed legislation threatens to prevent large successful companies from protecting their market share so that some small, and possibly inefficient competitors, can survive. In our industry, competition has brought prices down and forced rationalisation. If we were denied the opportunity to compete, as proposed by the "affects test" I guarantee that prices would not have fallen as much as they have. It's obvious to me that while the "affects test" would encourage more companies in industries which have a dominant player, it would be at the expense of real competition. The customers would be the ones who lose as costs go up because inefficient players are protected.

There were two opinions expressed by Professor Fels on the Small Business Show that really worried me.

Firstly, he defended the "affects test" because both the USA and the EC had legislation like it. On the face of it, this sounds like a good argument in support of the "affects test". However the question which has to be asked is whether legislation which is designed to protect consumers in markets of 280m and 500m people can have any relevance in a market of 20m? We don't necessarily have

a large enough population to support multiple competitors in all industries. With our small population, in some industries, it makes sense to allow one company to dominate. Fels' dogmatic pursuit of competition as an end in itself needs much closer investigation before it is accepted as being appropriate in a market the size of Australia.

Secondly, Fels rejected the criticism of having penal sanctions only for big business by drawing an analogy with stealing a pen and stealing a million dollars. He said that both rightly attract different penalties. What he did not say is that most crimes have a uniform maximum penalty, with discretion to impose a lesser penalty commensurate with the seriousness of the crime. What is wrong with applying the same logic to the Trade Practices Act and setting a uniform maximum penalty and allowing for the exercise of discretion to impose lesser penalties.

What worries me about these two statements by Fels is that his statements were deliberately misleading. He selectively presented the facts to support his argument in favour of changing the Act. This man is supposed to be administering an Act which makes it illegal to engage in deceptive or misleading conduct and there he was engaging in deceptive and misleading conduct of his own to try to influence public opinion. It makes me wonder whether this man has the right personal values for the job of administering this act.

In summary:

1. I think an "affects test" would decrease competition in Australia and be contrary to the interests of consumers
2. I think that the reversal of the onus of proof which is a consequence of the proposed "affects test" is the strongest reason why penal sanctions should not be considered
3. It is not conclusive that the exercise of market power in a market the size of Australia's is necessarily worse for consumers than the affect of dogmatic pursuit of competition
4. I seriously doubt that Fel's machiavellian approach to administration of the Act is in the best interests of Australian consumers and based on his misleading statements on the Small Business Show, I seriously doubt whether he has the right values to administer this Act



Rob Harden