

Dawson Committee

TRADE PRACTICES ACT REVIEW

**Submission by
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First I acknowledge the importance and value of this independent review of the competition provisions of the *Trade Practices Act 1974*. The Prime Minister and the Coalition Government deserve credit for establishing the inquiry as fulfilment of its commitment in its *Securing Australia's Prosperity* policy (released during the last Federal election).

In reviewing this important piece of law, we need to acknowledge that we are part of a growing international and global marketplace. We also need to provide adequate opportunity for Australian business to grow in this market place. In this context however we must maintain a balanced and fair competitive environment in Australia.

In addition we must provide an environment that promotes small business growth and development free from the excessive use of market power by major corporations. This aim should be couched in a framework that protects and enhances the public interest particularly in rural and regional Australia.

PROBLEMS WITH THE ACT AS IT STANDS

The stated aim of the Trade Practices Act is to boost the interests of Australians by backing competition, fair-trading and consumer protection. In particular it focuses on: unfair prices; the abuse of market power; and the violation of consumer rights.

However, Australia has been witness to the increased market concentration in several key industries over recent years despite the presence of the Trade Practices Act and a vigilant ACCC. A failure to adequately scrutinise and address these changes puts at particular risk the role of small business in the competitive environment and will, in turn, inevitably hurt the consumer.

I, along with many other colleagues and small business representatives wish to promote vigorous competition in the Australian marketplace – in which both small and large corporate entities can compete for market share, and provide choice for consumers, and jobs for Australians. It must be added, however, that a distinction is drawn between “fair trading” and “no-holds-barred” trading. Market situations where a competitor obtains substantial amounts of market power by degrees (albeit through legitimate means, perhaps through creeping acquisitions) and obtains an unfair advantage must be discouraged – and perhaps even deconstructed. It is fair and reasonable for small business entities to be expected to provide a product or service on competitive terms in the ambient market. But the greater the concentration of power the more likely the possibilities for misuse of that power will increase.

In summary, the problem areas include:

- Anti-competitive creeping acquisitions
- Inadequacy of purpose test in section 46, misuse of market power
- Lack of opportunity for collective bargaining for small business
- Lack of powers for ACCC to impose cease and desist orders, divestiture orders and criminal sanctions where appropriate.

In addition, I see no need for another layer of regulation in the form of a Review Board to oversee the ACCC.

In the advent of a time where some industry sectors face an uneven playing field, it is appropriate to periodically review the provisions of the Trade Practices Act to reflect our society's values in respect of corporate efficiency and trading fairness. Throughout all of these endeavours, we must be mindful of our obligation to develop a system of evolving best practice in competition regulation.

I consider it wise to introduce to our regulatory framework more precise definitions of anti-competitive conduct. By spelling out more clearly the differences between anti-competitive conduct and pro-competitive conduct, industry players, consumers and competition regulators may be better assured of their position and role throughout. We will have a more efficient and competitive environment where vagueness is removed to the extent that it is reasonably possible.

I support the principles espoused by numerous small business groups where vigorous competition requires that entities with significant degree of market power do not:

- *Extract from suppliers more favourable prices on the same quantities to prices given by suppliers to competitors of those entities.*
- *Coerce, intimidate or induce suppliers to discriminate against competitors of the entity;*
- *Engage in predatory pricing involving anti-competitive below-cost or unreasonably low pricing;*
- *Strategically target a smaller competitor by charging prices in a market in which the entity competes with the smaller competitor that are lower than those charged by the entity in other markets in that State or Territory;*
- *Undertake anti-competitive creeping acquisitions.*

Small business has answered the demand of the free-market economy: to compete, to evolve and to be operationally efficient. I note that since 1996 and the advent of the Howard Coalition Government we have seen an extra 600,000 small businesses come into being. This number being half of the 1.2 million today.

Small business operators deserve no special concessions in our liberal-democratic capitalist economy – but they do deserve a level playing field and fair competition. In market environments where small and big businesses operate with similar efficiencies but with disproportionate market share, small players do deserve protection.

To this end, I submit that the Trade Practices Act ought to be revised with the following principles embedded within:

- ❖ A fundamental return to the first principles of national competition policy – in particular, a restatement of the commitment to the public interest test, especially in its application to rural and regional areas and the interests of small business. Additionally consideration should be given to the ‘plain-English’ redrafting of the Act.
- ❖ The ACCC should be empowered to issue cease and desist orders to stop anti-competitive conduct or where corporations have misused their market power. It is reasonable to add the corollary that if, in the future the ACCC has applied such orders in cases where there was no chance of success in the Federal Court, disciplinary action ought to be applied to the ACCC. Vexatious and frivolous orders must not be allowed.
- ❖ The ACCC should be mandated to create a second small business commissioner at the level of deputy chairman to deal specifically with issues affecting small business.
- ❖ The ACCC should have a defined role within Federal Government industry policy to oversee restructuring within a sector such as telecommunications and ensure deregulation does not lead to a transfer of monopoly power from public to private hands.
- ❖ Criminal sanctions ought to be applied in cases of ‘hard-core’ or blatant collusion by business or obvious anti-competitive behaviour. This should include prison terms as appropriate for the individuals involved and substantial personal fines that cannot be mitigated by any indemnification by the private companies involved.
- ❖ The addition of an effects test in section 46(1) of the Act and a strengthening of the current purpose test, for example, by including a list of factors to assist in the identification of purpose.
- ❖ Divestiture for repeated or intentional breaches, for example the misuse of market power provisions.

- ❖ Collective bargaining by small businesses with their suppliers or buyers as a way of providing a degree of countervailing power against entities with a substantial degree of market power.
- ❖ The establishment of fair and transparent processes for ACCC conduct in the franchising sector that recognise that small business franchising enforcement issues are different from those that may be appropriate for large businesses.

The implementation of a sensible combination of these reform proposals will ensure that the Australian economy will not only grow but also remain competitive. Additionally, consumers will continue to benefit from efficient industry players. As previously mentioned, the merit within each of these proposals is couched in a presumption that small business and big business should be expected to perform in terms of efficiency. It is recognised that inefficient entities deprive consumers of those benefits and should not be protected by legislation.

I again express my gratitude for this inquiry and submit these views for consideration by the Committee. At the end of this process, our aim should be to have an improved Trade Practices Act that: is readily understood by all stakeholders; encourages true competition something similar to 'good sporting spirit'; and engages with its society such that it continues to fulfil its functions irrespective of the economic changes that may occur throughout its life.