

# SUPPLEMENTARY SUBMISSION TO THE TRADE PRACTICES ACT REVIEW

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*ACCI SUBMISSION  
TO THE  
DEPARTMENT OF TREASURY*

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OCTOBER 2002

Commerce House, 24 Brisbane Ave, Barton ACT 2600 • PO Box E14, Kingston ACT 2604 Australia  
**Telephone:** 61-2-6273 2311 • **Facsimile:** 61-2-6273 3286 • **Email:** [acc@acci.asn.au](mailto:acc@acci.asn.au)



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### **Background**

The Australian Chamber of Commerce and Industry (ACCI) is the peak council of Australian business associations. ACCI's members are employer organisations in all States and Territories and all major sectors of Australian industry.

Through our membership, ACCI represents over 350,000 businesses nation-wide, including the top 100 companies, over 55,000 enterprises employing between 20-100 people, and over 280,000 enterprises employing less than 20 people. This makes ACCI the largest and most representative business organisation in Australia.

Membership of ACCI comprises State and Territory Chambers of Commerce and national employer and industry associations. Each ACCI member is a representative body for small employers or sole traders, as well as medium and large businesses.

### **Submission**

This is a supplementary submission to the Trade Practices Act Review lodged on behalf of the Australian Chamber of Commerce and Industry.

This submission is a follow up to issues that were raised during ACCI's oral presentation to the Committee and is in the main the results of a survey of Australian business. This questionnaire on trade practices was attached as a set of supplementary questions to our October 2002 *Survey of Investor Confidence*. The questionnaire is attached as an appendix .

The main set of questions dealt with the problems caused for business as a result of their having to respond to s155 requests for information made by the ACCC. These were issues that ACCI indicated that it would seek additional information to assist the Committee.

The results of the survey show that the ACCC has sought information from 8.2% of Australian businesses and that of those which were approached, 42.3% found the process of accessing and providing this information costly. The data further showed that 7.7% found the cost of providing the information sought by the ACCC substantial.

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The data also showed that even though only 7.7% of businesses had legal proceedings initiated, 40.0% believed that the request for information was unreasonable.

The second aspect of the survey results related to business community attitudes to the ACCC itself. The results show that only 36.0% within business believe the ACCC has an adequate understanding of the commercial environment which it is asked to regulate. The data also show that the larger the firm, the less likely it was to believe that the ACCC had a sufficient grasp of business and the conditions under which it must operate.

There should be no doubt that business does want a strong Trade Practices Act and a regulatory environment that makes certain competition remains fair. As ACCI noted in its main submission, it is businesses themselves that are often at the wrong end of the misuse of market power by firms which wish to take an unfair advantage in the marketplace.

But what business cannot accept is a regulatory environment that makes it more difficult to compete because of a constant concern that the regulator will interpret its normal commercial actions as anti-competitive and subject to prosecution.

If there are any further questions about this submission and the manner in which the survey was conducted, we would be pleased to provide any information that would be of assistance to the Committee.

**ACCI Survey on Trade Practices  
October 2002**

**Apprehension within Business about the ACCC's Conduct  
and Level of Understanding of Commercial Realities**

One of the major concerns business has had with the administration of the Trade Practices Act has been the manner in which the ACCC has used its powers to obtain information. In particular, there has been a concern with the use of what are known as the Section 155 powers. Part I of Section 155 of the Trade Practices Act provides the following powers to the ACCC:<sup>1</sup>

- (1) Subject to subsection (2A), if the Commission, the Chairperson or the Deputy Chairperson has reason to believe that a person is capable of furnishing information, producing documents or giving evidence relating to a matter that constitutes, or may constitute, a contravention of this Act ... a member of the Commission may, by notice in writing served on that person, require that person:
  - (a) to furnish to the Commission, by writing signed by that person or, in the case of a body corporate, by a competent officer of the body corporate, within the time and in the manner specified in the notice, any such information;
  - (b) to produce to the Commission, or to a person specified in the notice acting on its behalf, in accordance with the notice, any such documents; or
  - (c) to appear before the Commission at a time and place specified in the notice to give any such evidence, either orally or in writing, and produce any such documents.

The trigger mechanism is thus whether 'the Commission, the Chairperson or the Deputy Chairperson **has reason to believe**' there is information of a breach of the Act. The ACCC can then enter premises, search for documents and compel testimony. The ACCC has thus been given powers that would in the view of business be more appropriately placed in the hands of the judiciary.

In its main submission to the Committee, ACCI made the following observations:

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<sup>1</sup> The full

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‘The TPA, at Part XII (in particular, s155) provides the Commission with very wide powers to obtain information, documents and evidence. The breadth of those powers is augmented by judicial decisions to the effect: common law privileges against self-incrimination do not apply for information, documentation and/or evidence provided under a s155; recipients can be required to ‘act as a detective’, undertaking an investigation to determine matters which are properly seen as within the control of those given the notice; and, the burdensomeness of compliance will not invalidate a s155 notice, nor will objective harshness, unreasonableness or oppressiveness constitute an independent ground of invalidity.

‘Other important judicial decisions relating to the breadth and reach of s155 have dealt with: the reversal of onus of proof on the complainant that the Commission did not act in good faith/with requisite reason in the execution of a s155 notice; absent evidence of invalidity, Courts on application from recipients of notices will not provide orders for discovery or allow interrogatories; and orders cannot be acquired under the Administrative Decisions (Judicial Appeal) Act (1977(Cth) to obtain the reasons for the issuance of a s155 notice.

‘The Courts have also given broad meaning and reach to the important ‘reason to believe’ test within s155 – that is, the Commission must believe a person is capable of providing information, documents or evidence, and there must be reasonable grounds for that belief. It is not necessary there be a belief such material(s) would or tend to establish a contravention, ‘merely that they relate to the matter.’

‘ACCI is greatly concerned with a number of elements of s155 of the Act, generally regarding the very wide, if not sweeping, powers granted to the Commission in such matters, and the very low thresholds (and hence checks on its conduct) applied by judicial authorities.

‘It is concerned s155 provides the Commission with the quite broad powers granted to the ACCC to compel recipients of notices to provide information, even that which may incriminate themself(ves). The grounds for the issuance of a notice – ‘reason to believe’ – have been given a very low threshold (‘merely relate to the matter’) by judicial authorities.

‘ACCI is also concerned at the seemingly low level of transparency, and potentially arising from this situation, accountability of the ACCC for the execution of Section 155 notices. Judicial authorities have greatly limited the potential for

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aggrieved parties – usually recipients of such notices – from obtaining information on the reasons and processes behind their issuance, something which does not sit comfortably with our view of the common law and administrative law.

‘Against this background, it is recommended that legislative amendments to introduce more stringent thresholds on the powers of the ACCC to initiate searches for information, documents and evidence. In this regard, ACCI would propose an amendment to s155 of the Act requiring the Commission, where it has reasonable grounds to believe there is a contravention of the Act, to seek a warrant from the Federal Court of Australia.

‘Such a reform would introduce appropriate checks and balances into the processes by which the Commission exercising this sweeping power, and go some small way to redress what commerce and industry considers the inadequate threshold – ‘reason to believe’ – contained in s155 of the Act.’

In order to look more closely at the problems caused to business by section 155 of the Trade Practices Act, a survey was conducted that looked at the experience firms have had in complying with Section 155 orders and then, secondly, at the views business has of the understanding that the ACCC has of commercial realities as they apply the Trade Practices Act in a business situation.

The questionnaire was attached to ACCI’s quarterly *Survey of Investor Confidence* for October 2002. There were 316 responses from firms of all sizes, all industries and from across Australia.

### **Survey Results**

The first question asked whether the respondent had been approached by the ACCC to provide information. The questionnaire asked:

Have you ever been approached by the ACCC to supply information as part of an investigation into breaches of the Trade Practices Act **by your own business?**

The data showed that 8.2% of respondents had been approached which is a proportion number in the circumstances.

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	Percent
<b>HAVE YOU BEEN APPROACHED BY THE ACCC?</b>	
Yes	8.2
No	91.8

The next questions asked about the form of contact. Question 2 asked:

‘Did the ACCC write to you asking for information?’

	Percent
<b>WROTE TO YOU FOR INFORMATION</b>	
Yes	84.6
No	15.4

The survey showed that of those who had been contacted, 84.6% received a written request for information.

The questionnaire then asked about the provision of documents. It asked:

‘Did the ACCC ask you to provide documents?’

The results showed that 61.5% of those who had been approached had been asked to supply documents to the ACCC.

	Percent
<b>NEEDED TO PROVIDE DOCUMENTS</b>	
Yes	61.5
No	38.5

The questionnaire then went on to ask about the entry of ACCC officers into the company premises. The questionnaire asked:

‘Did employees of the ACCC enter your premises with or without notice looking for information?’

The results showed that 23.1% of respondents who had been contacted by the ACCC had been visited by the ACCC.

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	Percent
<b>ENTERED YOUR OFFICE</b>	
Yes	23.1
No	76.9

The questionnaire then sought information on the difficulty in providing information sought by the ACCC. The next question read as follows:

‘How difficult was it for your business to supply the information sought by the ACCC?’

The results showed that for the majority of firms, the information was not difficult to obtain. The results showed that 59.3% of firms did not find it difficult to provide the information sought.

However, what was also clear was that for many firms the provision of information came with some difficulty. The results show that 33.3% of firms found the provision of information moderately difficult. A further 7.4% of firms found the provision of such information actually to have been very difficult.

	Percent
<b>DIFFICULTY IN FINDING INFORMATION</b>	
Not Difficult	59.3
Moderately Difficult	33.3
Very Difficult	7.4

The level of difficulty in providing information was clearly reflected in the cost of providing the ACCC with the information it sought. The next question in the survey asked:

‘How costly to your firm was it to supply the information sought by the ACCC?’

The response is similar to the answers to the previous question. The data show that for 57.7% of firms there was little cost involved in meeting the ACCC’s request. In another 34.6% of firms there was a moderate cost while in a further 7.7% of firms the cost was substantial.

	Percent

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	Percent
<b>COST OF PROVIDING INFORMATION</b>	
Little Cost	57.7
Moderate Cost	34.6
Substantial Cost	7.7

The next question asked whether in the view of the firm whether the request made by the ACCC was reasonable in the circumstances. The survey asked:

‘Did you believe that the request for information was reasonable?’

To some extent this is asking whether the intrusions into one’s business was acceptable to the business that had been intruded upon. The results however, showed that 60.0% did not object to the fact of the ACCC seeking the information it sought.

Yet the data show that in the remaining 40% the request for information was seen as unreasonable. The businesses believed that the ACCC was not justified in seeking the information it sought to find.

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	Percent
<b>REQUEST WAS REASONABLE</b>	
Yes	60.0
No	40.0

The next question asked about whether the ACCC instigated legal proceedings following the investigation of the firm. The questionnaire asked:

‘Following its investigation, did the ACCC initiate proceedings against your business for a breach of the Trade Practices Act?’

The data show that in only 7.7% of circumstances did the ACCC instigate legal proceedings. Thus, even though less than ten percent of firms were taken to court by the ACCC, it remains that 40% of firms believe that the request for information had been unreasonable.

	Percent
<b>ACCC INSTIGATED PROCEEDINGS</b>	
Yes	7.7
No	92.3

The final question was asked of all of the respondents to the survey, and this dealt with the commercial understanding of the ACCC. The questionnaire asked:

‘From your own understanding of the actions taken by the ACCC do you believe it has an appropriate understanding of commercial realities?’

The overall response shows that only a minority of business people believe that the ACCC has a proper understanding of the commercial environment it is asked to regulate. Across the economy, some 36.0% of businesses people believe the ACCC has an appropriate grasp of the business environment while 64.0% do not.

Breaking the results down by size of firm, even amongst small business the data show that there is a 50-50 split between those who believe the ACCC do have a reasonable grasp of the environment that it regulates.

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	Number of Employees			All
	1-19	20-99	100+	
	percent	percent	percent	percent
<b>UNDERSTANDING OF COMMERCIAL REALITIES BY SIZE OF FIRM</b>				
Yes	50.0	42.9	31.2	36.0
No	50.0	57.1	68.8	64.0

But as the data also show, the larger the firm, the less likely it is that business will believe the ACCC has a proper understanding of the commercial realities that surround it. Amongst medium sized firms, 57.1% of firms believe that it does not understand the commercial realities while amongst large business, 68.8% of firms believe the ACCC does not have an appropriate understanding of commercial realities.

There is thus a large degree of apprehension within the business community over whether the ACCC has a sufficiently deep understanding of the business environment to conduct the regulation that it has been asked to undertake.

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**Appendix**

**Trade Practices Review**

There is now a Review of the Trade Practices Act being conducted under the Chairmanship of former High Court Justice Darryl Dawson. Amongst the issues being looked at by the review committee are the information gathering approaches used by the Australian Competition and Consumer Commission (ACCC). Under the Act (section 155) the ACCC has the power to obtain information, documents and evidence when investigating possible contraventions of the Act. The following questions seek information on any interactions your business has had with the ACCC as part of its information gathering capacity.

**ALL OF THE INFORMATION RECEIVED WILL BE TREATED IN CONFIDENCE**

1. Have you ever been approached by the ACCC to supply information as part of an investigation into breaches of the Trade Practices Act **by your own business**?

Yes       ➔ If 'yes', please continue with question 2  
 No       ➔ If 'no', please continue with question 9

2. Did the ACCC write to you asking for information?

Yes       No

3. Did the ACCC ask you to provide documents?

Yes       No

4. Did employees of the ACCC enter your premises with or without notice looking for information?

Yes       No

5. How difficult was it for your business to supply the information sought by the ACCC?

Not difficult   
 Moderately difficult   
 Very difficult

6. How costly to your firm was it to supply the information sought by the ACCC?

Little cost   
 Moderate   
 Substantial

7. Did you believe that the request for information was reasonable?

Yes       No

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8. Following its investigation, did the ACCC initiate proceedings against your business for a breach of the Trade Practices Act?

Yes  No

9. From your own understanding of the actions taken by the ACCC do you believe it has an appropriate understanding of commercial realities?

Yes  No