

Thank you for your inviting me to make a submission to the Senate's Inquiry into the above legislation. This submission is personal. It does not (necessarily) represent the views of my firm or any organisation of which I am a member.

I have advised on and written about this topic over a number of years. The most recent contribution I have made on it was part of a presentation I made to the Graduate School of Management at The University of Melbourne on 27 February 2008 in the first of what will become a permanent series of lectures and presentations on Law and Economics. I attach for the benefit of the Committee, but not for public release, the full paper that I presented on February 2008. I refer the Committee in particular to pages 9-13, and 24-27 of that paper in which I address matters relating to Part III of the Trade Practices Act and its weaknesses.

Whilst the amending legislation deals with certain aspects that I addressed, it does not go far enough in my view. The major deficiencies in the legislation are:

- (i) It adopts a 2 stage process when a one stage process would seem to me to be the most efficient and effective way of dealing with questions of access to facilities. If parties want access to an essential facility they will have a good idea of what it will cost and what they should pay to obtain that access. To divide the process into 2 stages and to force the parties to seek access and then if successful address terms and conditions through a similar process utilising the National Competition Council (**NCC**), and then later the Australian Competition & Consumer Commission (**ACCC**), in my view is wasteful.
- (ii) Why should there not be a direct application to Australian Competition Tribunal to consider the application with the NCC acting as amicus Tribunal. This model now exists in relation to authorisation applications in relation mergers under the TPA.

A workshop to finetune any amendments

When then Minister Chris Bowen first discussed the potential for the government introducing a version of the current Bill into Parliament in 2008, I suggested to him that the Bill, when it was finalised, should be the subject of a workshop to be attended by selected leading practitioners (legal, economic and financial) as well as Treasury, the NCCC, the ACCC and this committee, to address and settle the critical questions surrounding proposed amendment legislation.

I wrote many years ago in the Australian Business Law Review (which I edit) that Part IIIA of the Trade Practices Act presented a stark example of 'the businesspersons' nightmares and lawyers' dreams'. It is full of anomalies and difficulties which create enormous cost to the Australian community even allowing for the fact that there are many who would not support any kind of regime such as contained in Part IIIA of the Act at all.

I would be happy to address the Committee on the issues raised in my 2008 paper, this email and to discuss other issues that it may feel warrant some further attention.

Yours sincerely

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