SENATE ECONOMICS REFERENCES COMMITTEE

INQUIRY INTO THE EFFECTIVENESS OF THE *TRADE PRACTICES ACT 1974* IN PROTECTING SMALL BUSINESS

SUBMISSION BY

KPMG

AUGUST 2003

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1. INTRODUCTION

The Senate has referred an Inquiry into the effectiveness of the *Trade Practices Act 1974 (TPA)* in protecting small business to its Economics References Committee for report by 4 December 2003. The closing date for submissions is 22 August 2003.

In line with the Terms of Reference (TOR), KPMG wishes to provide comments and recommendations on the operation of S.46 TPA misuse of market power, S.51AC unconscionable conduct in business transactions under Part IVA TPA and Industry Codes under Part IVB TPA. We note that the TOR does not require an examination of the role of the Australian Competition and Consumer Commission (ACCC) in administering the legislation.

KPMG advises a variety of large, medium and smaller businesses that compete or otherwise participate in Australian markets. In this submission, we do not refer to, nor separately identify, any particular business or situation that has given rise to our comments or recommendations.

The primary contact for details discussed in this submission is Len Gainsford, Partner, Risk and Advisory Services, KPMG, 161 Collins Street, Melbourne VIC 3000 (613) 92886883 lgainsford@kpmg.com.au

2. RECOMMENDATIONS

At this Inquiry, we ask the Committee to consider:

- At paragraph (a) of the Senate's TOR - No change to S.46 TPA provisions, in line with *Dawson Committee* recommendations

- At paragraph (b) of the Senate's TOR – Unconscionable or unfair conduct appears to covered under S.51AC, although there may have been an insufficient number of cases heard so far to interpret matters considered by a Court under S.51AC(3) or S.51AC(4)

- At paragraph (c) of the Senate's TOR - A possible addition to S.51AE or regulations under Part IVB TPA Industry Codes, to require the active implementation of a trade practices compliance program under mandatory or (perhaps) voluntary industry codes, prior to gazettal.

- At paragraphs (d) and (e) and section (2) of the Senate's TOR – KPMG is unable to offer further suggestions

3. EFFECTIVE COMPETITION

Part IV TPA (restrictive trade practices), is designed to promote effective competition. Under this Part, S.46 (the misuse of market power), applies to a variety of market conditions. Relatively concentrated markets may appear more prone to the misuse of market power, but this is not always the case. In *Queensland Wire Industries Pty Ltd v. The Broken Hill Proprietary Company Limited* (1989) 167 CLR 177; 63 ALJR 181; 83 ALR 577; ATPR 40-925, it was said that:

"Competition by its very nature is deliberate and ruthless. Competitors jockey for sales, the more effective competitors injuring the less effective by taking sales away. Competitors almost always try to 'injure' each other in this way".

Recent decisions such as *Boral Besser Masonry v. Australian Competition and Consumer Commission* [2003] HCA (7 February 2003) appear to have done nothing to alter the High Court's position. As was said at paragraph 87 to the *Boral* judgment:

"The critical question in the present case is whether BBM's behaviour involved the taking advantage of a substantial degree of power in a market. If it did, then acting with one or more of the purposes set out in s.46(1) was illegal. If it did not, then BBM's conduct amounted to vigorous, competitive behaviour."

The simple possession of market power is not offensive. Using that power to substantially damage or eliminate a competitor, "substantially damaging or eliminating competitors generally, a class of competitors or any particular competitor and preventing or deterring anyone from engaging in competitive conduct in any market", may be offensive under S.46 TPA.

In taking advantage of market power, there need not be any predatory intent. "Taking advantage" need not be for anti-competitive or unfair conduct motives. As the decision in *Melway Publishing Pty Ltd v. Robert Hicks Pty Ltd (2001)* ATPR 41-805; [2001 HCA 13 has shown, while it may be appropriate to infer purpose from conduct, it is not necessarily appropriate to infer from a finding of purpose that a firm has taken advantage of its substantial degree of market power to achieve that purpose.

In its 14 May 2002 submission to the Senate Legal and Constitutional References Committee, the ACCC argued both for an amendment to S.46 TPA to change the current "purpose test" to include an "effects test" and a reversal of the onus of proof under S.46 TPA, whereby companies would need to prove that their actions were not in breach of the provision. When put to the *Dawson Review*, neither argument was accepted in the Committee's final report.

To answer paragraph (a) of the Senate's TOR, it appears that S.46 TPA was never intended to address (in the Senate's words),"abuses of market power by big businesses" nor "the implications of the inadequacy of section 46 for small businesses (and) consumers". In short, the

legislative provision and the notions set out in the Senate's TOR presently appear to be mutually exclusive.

4. UNCONSCIONABLE CONDUCT

These provisions apply to corporations under S.51AC TPA. To paraphrase subsections (3) and (4), it says that the Court may have regard to:

- The relative bargaining strengths of the parties
- Whether the consumer was able to understand the documentation
- Whether undue influence or pressure was exerted or unfair tactics used
- Whether the consumer was required to comply with conditions which were not reasonably necessary for the protection of the legitimate interests of the supplier
- The amount for which, and circumstances under which, the consumer could have acquired equivalent goods or services from another party.

It is therefore up to a Court to decide on the applicability of some or all of these grounds to a case before it. It is interesting to note that the term "unconscionable conduct" is not defined under the TPA. Because S.51AC TPA is a relatively new provision, there are also few legal cases decided so far that assist in interpretation of the legislative provision. Cases include *Monroe Topple & Associates Pty Ltd v. Institute of Chartered Accountants (Aust)* (2001) ATPR 46-212; [2001] FCA 1056; *ACCC v. Leelee Pty Ltd* [1999] FCA 1121; (2000) ATPR 41-742 and *ACCC v. Simply No-Knead (Franchising) Pty Ltd* [1999] FCA 1842; (2000) ATPR 41-744.

KPMG's position on paragraph (b) to the Senate's TOR is that the legislative provision "deals effectively" with unconscionable or unfair conduct in business transactions. If the question is whether Courts have "dealt effectively" with such conduct in cases heard so far under this provision, the answer is "probably".

5. INDUSTRY CODES

Since 1991 and the decision of French, J in *Trade Practices Commission v. CSR Ltd* (1991) ATPR 41-475, there has been a greater willingness for the ACCC (and its predecessor, the Trade Practices Commission) to seek orders for the imposition of a trade practices compliance program for companies found to have breached the legislation.

The existence and active implementation of trade practices compliance programs has assisted to mitigate against penalties that would otherwise have been imposed by the Courts. Under recent corporate governance guidelines imposed on listed entities by the Australian Stock Exchange, companies have been encouraged to improve compliance and report on an "if not, why not" basis.

On 11 August 2003, ACCC Chairman Graeme Samuel announced an initiative to introduce a system of endorsing voluntary industry codes of conduct. In doing so, he said:

"The Commission has a vested interest in ensuing compliance with the Trade Practices Act in the public interest and in seeing the regulatory burden minimised on individual companies. We understand that regulation has to be effective, but we also have an interest in seeing it administered in the most efficient manner".

He then went on to say that "co regulation" (or voluntary codes) "is a halfway measure between industry self regulation and mandatory government regulation". Graeme Samuel also highlighted "in house compliance", "sanctions for non compliance" and "accountability".

With codes, it is our understanding that an actively implemented compliance program is not a standard requirement. It is KPMG's view that organisations subject to mandatory or (perhaps) voluntary codes should actively implement trade practices compliance programs conforming to Australian Standard AS3806-1998 (or an equivalent). By encouraging the development of a suitable "compliance culture", the risk of anti-competitive, unconscionable or unfair conduct could be significantly reduced.

Graeme Samuel has also said that:

"Currently, the Commission is actively discussing industry codes with nearly 40 industry groups – ranging from informal consultations, including working parties formed either to develop or review a code of practice such as the Car Rental Industry Code, or to review the effectiveness of a particular code, such as the Franchising Code or the Australian Direct Marketing Code. Some other industry codes in which we are involved include the Australian Communication's Industry Forum, Cinemas, the Furniture Industry Association and the Retail Grocery Industry".

It is KPMG's view that implementation of trade practices compliance programs should be required prior to gazettal of industry codes of the type mandated or otherwise reviewed by the ACCC. Compliance program implementation is consistent with recommendation 1.5 from the *Dawson Committee* report.

6. CONCLUSIONS

The Senate Committee has an important task in reviewing the trade practices legislation, to ensure that it meets the needs of Australian businesses and consumers. Under the Senate's TOR, there are a number of aspects to consider, including whether change is warranted and, if so, in what areas.

KPMG welcomes the opportunity to contribute to the Committee's deliberations. On the topic of effective competition, there are benefits to be had in examining ways to achieve better market outcomes for all levels of business and consumers. There is a potential to increase economic efficiency, as larger Australian businesses continue to deal with smaller suppliers, contractors, agents and tenants.

While the Senate may find that there are insufficient grounds to alter S.46 TPA (consistent with *Dawson Review* findings), and unconscionable or unfair conduct under S.51AC TPA, a change to S.51AE or regulations under Part IVB TPA Industry Codes could be contemplated. Such a change lies in a requirement for the active implementation of a trade practices compliance program under mandatory or (perhaps) voluntary industry codes, prior to gazettal.