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Date: 5/5/03

The Secretary
Senate Economics References Committee
Room SG.64
Parliament House
CANBERRA ACT 2600

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

The South Australian Government is pleased to make a submission to the above inquiry.

A copy of our submission to the recent Review of the competition provisions of the *Trade Practices Act 1974* (the Dawson Review) is attached for your information.

You will note that this submission was largely based on providing small businesses greater opportunity to collectively negotiate with larger buyers or suppliers, and outlined suggested options on how to implement a modified version of the current notification provisions. This issue was addressed in the Review's recommendations, and endorsed by the Commonwealth Government, which has announced a proposed modified notification process, with a transaction value limit of $3 million and provision being made for third parties to make a collective bargaining notification on behalf of a group of small businesses.

Some small business advocates have expressed dissatisfaction with the outcomes of the Dawson Review, with their primary concerns relating to recommendations on issues such as misuse of market power (section 46) and unconscionable conduct (section 51AA). Anecdotally it appears that small business has lost confidence in the ability of the Trade Practices Act to enable them to compete fairly with larger businesses. Whilst many small businesses may not be aware of Section 46 of the Trade Practices Act, the perception of misuse of market power, as intended to be resolved by the Act, remains widespread.

Hon. Rory McEwen MP

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The recommendations of the Dawson Review were discussed at length at the recent Small Business Ministerial Council meeting[1]. The Council resolved to recommend that the Commonwealth undertake to work with the States and Territories to ensure that the original intent of Section 46 of the Trade Practices Act is preserved and that a workplan be agreed to by Ministers to meet this aim.

The South Australian Government recognises that addressing the issues of concern with regard to Section 46 would involve a complex balancing of legitimate competing interests. Nonetheless, we commend that further work be done in this area and support and reaffirm the recent recommendation of the Small Business Ministerial Council.

Yours sincerely

Hon Jay Weatherill MP
A/MINISTER FOR INDUSTRY, TRADE AND REGIONAL DEVELOPMENT
A/MINISTER FOR SMALL BUSINESS
A/MINISTER FOR LOCAL GOVERNMENT
A/MINISTER FOR FORESTS

Att.

[1] Involving the Commonwealth Minister for Small Business and Ministers responsible for small business from all States and Territories.

MINISTER FOR TOURISM
MINISTER FOR SMALL BUSINESS
MINISTER FOR SCIENCE AND INFORMATION ECONOMY
MINISTER FOR EMPLOYMENT, TRAINING AND FURTHER EDUCATION

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MSB 02/3135

Mr John Jepsen
Secretary
Trade Practices Act Review
C/- Department of the Treasury
Langton Crescent
PARKES ACT 2600

Dear Mr Jepsen

SUBMISSION TO THE TRADE PRACTICES ACT REVIEW

The South Australian Government welcomes the opportunity to make a submission to the Trade Practices Act Review.

It is imperative that the *Trade Practices Act 1974* ("the Act") supports the operation of a competitive and fair business environment. This is essential for promoting small business, investment, jobs and ultimately lower prices and greater choice for consumers. The terms of reference for the Review clearly encompass a number of important issues affecting these interests in relation to the competition provisions of the Act. The South Australian Government acknowledges that, in many cases, addressing these issues will involve a complex balancing of legitimate competing interests. Accordingly, at the present time, the South Australian Government does not propose to address its submission to the more controversial issues – such as the possible introduction of an "effects test" for the misuse of market power – covered by the terms of reference. Rather, it proposes to address its submission to one area of particular concern to small business.

In this respect, it is the strong view of the South Australian Government that the *Trade Practices Act 1974* ("the Act") should be amended in such a way as to give small businesses greater opportunity to collectively negotiate with larger buyers or suppliers. This should be done in a way that lowers the cost and provides more certainty in respect of collective bargaining for small business.

It is already recognised in a number of submissions made to the Review – including the submissions made by the Fair Trading Coalition (FTC), the National Association of Retail Grocers of Australia (NARGA) and the Australian Competition and Consumer Commission (ACCC) – that one of the key issues facing small businesses is their lack of bargaining power when negotiating with larger buyers and suppliers. This is especially the case in the retail sector, in which the major retail chains dominate the market. It also applies in other sectors including

manufacturing and primary production. In circumstances where they would otherwise be forced to accept unfavourable terms and conditions, small businesses often see collective bargaining as an effective strategy to redress the power imbalance and to achieve more appropriate commercial outcomes in their dealings with larger buyers and suppliers. The current prohibitions on misuse of market power and unconscionable conduct, which deal with extremes of anti-competitive and unfair conduct, do not provide an effective means for small business to overcome this imbalance of negotiating power. This limits the ability of small businesses to compete effectively against larger businesses.

Under the current Act, collective bargaining by small businesses would run a significant risk of breaching the competition provisions in Part IV of the Act. To be sure, the ACCC can grant immunity from legal action on public benefit grounds through the authorisation process, thereby enabling arrangements that would otherwise risk breaching the Act. However, there are a number of problems with the current authorisation process, not the least of which are the cost and uncertainty for the businesses involved. For example, preparing an application for authorisation involves considerable time and expense, including an application fee ($7,500) and the cost of any legal advice, with no guarantees regarding the final outcome. Even if the ACCC grants authorisation in the first instance, this can be appealed by any interested party. As a rule, the costs and uncertainty associated with this process create greater disincentives for smaller businesses, because of their size.

Accordingly, the South Australian Government supports calls made by organisations like the Council of Small Business Organisations of Australia Ltd and the ACCC for the introduction of a modified version of the current notification provisions (related to exclusive dealing). In this respect, the South Australian Government proposes a bargaining option for small business. However, the South Australian Government also favours the introduction of an automatic exemption for "micro" businesses in respect of short-term contracts involving no more than 5 businesses.

It is expected that, together, these modifications would enhance competition across a wide range of markets by permitting small businesses to create "clusters". This would enable them to seek the critical mass needed to compete more effectively with larger competitors in Australian and overseas markets. It is noted that Section 45A(4) of the Act already acknowledges there is competitive benefit in allowing collective acquisitions. Further, the joint venture exemption from the price fixing rules in Section 45A (2) also recognises that collective action may have competitive benefits. The proposals suggested below build on these policy approaches.

Option A – "Micro" business exemption

For certain transactions, the South Australian Government proposes that "micro" businesses be exempt altogether from the existing sections 45 and 47 of the Act. This would apply to a series of transactions over 12 months or one-off transactions, for which no more than 5 micro small businesses wish to undertake collective bargaining. It would cover arrangements for both the

supply and purchase of goods. However, it is not proposed that this option extend to the retail level for direct supply to end consumers.

For these purposes, a micro business would be defined as a non-subsidiary, non-listed business, with less than 5 full-time equivalent employees (in accordance with the ABS definition). This would include non-employing businesses.

This proposal is based on an assessment that collective action by a small number of micro-businesses, for a short period of time, excluding the retail functional level, would not cause a substantial lessening of competition in a market. If the proponents wish to extend the arrangement, it is proposed that they do so through the notification process outlined under Option B.

Option B – Small business notification

For the majority of small businesses, or for small businesses engaged in transactions other than those described in Option A above, the South Australian Government proposes a notification process that would operate in the following manner:

- notification would provide immunity for small businesses for all conduct covered by the existing section 45 and section 47 of the Act;
- notification would cover arrangements for both the supply and purchase of goods;
- immunity would not come into effect until 14 days after the notification is lodged;
- if the ACCC wishes to examine the matter further, it would be able to extend the time at which immunity comes into effect to 30 days;
- The test to be employed by the ACCC is the substantial lessening of competition test, not a net public benefit assessment. The ACCC would be able to prevent a notification from coming into force where it or another interested party has concerns about a substantial lessening of competition. The ACCC would also be able to prevent notification where the notification does not contain sufficient information to enable the Commission to make an informed decision; and
- immunity would operate for three years, after which time parties would need to lodge a new notification.

In terms of the eligibility criteria, this modified notification process would be available to non-subsidiary, non-listed businesses, with less than 20 employees (in accordance with the ABS definition of small business). There would be no limit on the numbers of small businesses that could be involved in an application.

Options A and B

The following provisions would apply for either option:

- mere discussions between small or micro businesses about proposed collective bargaining arrangements would never be a breach of the Act;
- the application fee would be $500 per business; and
- to support their application, small businesses would be required to provide details of the small businesses involved, the large supplier or acquirer, the products involved, the term of the contract, other relevant information the proponents consider relevant and a declaration by the proponents that the small businesses satisfy the relevant small business test. This should be reflected in guidelines issued by the Commission.

Conclusion

In respect of both Option A and Option B, the South Australian Government envisages that the proposed amendments would be incorporated into part VII of the Act. They would provide for a faster, simpler and more cost effective regime for small business, in a way that address the inequality of bargaining power that exists in some sectors of the economy.

The operation of these provisions should be reviewed after 3 years of operation to ascertain their effectiveness.

Yours sincerely

Jane Lomax-Smith
MINISTER FOR TOURISM
MINISTER FOR SMALL BUSINESS
MINISTER FOR SCIENCE AND INFORMATION ECONOMY
MINISTER FOR EMPLOYMENT, TRAINING AND FURTHER EDUCATION

2 / 10 /2002