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The Secretary,
Senate Economics Reference Committee
Room SG 64
Parliament House
CANBERRA ACT 2600

5 September 2003

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

Dear Sir,

I am involved in a number of the Submissions to your enquiry, especially those by major small business groups. I do not want to duplicate what is in those submissions nor debate what others have said to your Committee.

However, I do want to make some brief suggestions both on the substance of the law and on the administration of the Act that may assist small business.

The issues I wish to highlight are,

- Competition v Competitors
- Access to Courts/Tribunals.
- Small business complaint handling.

COMPETITION v COMPETITORS.

It is current 'economic correctness' to state that all the provisions of Part IV of the ***Trade Practices Act 1974*** are about promoting competition and not about protecting competitors. This has particularly been the situation since the High Court decision in ***Queensland Wire*** and reflected in High Court decisions since.

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However, the language of some of the provisions of Part IV does not reflect that correctness. In the context of this enquiry section, 46 does not. That provision talks of damage to competitors.

Section 46, and its predecessor in the Trade Practices Act 1965, has always had different language to the rest of the Act. If the section was solely about the negative effect on competition than the section would say,

- A corporation with a substantial degree of market power in a market shall not take advantage of that power in any market for the purpose of substantially lessening competition.

The law does not say that. The now repealed section 49 dealing with discriminatory conduct had an effect of competition requirement. Not so section 46.

Competition is about rivalry, rivalry is between competitors. Damage to competitors is more than likely to damage competition. If the purpose of a business with a substantial degree of market power is to engage in conduct to damage another business that conduct is intended to damage the competitive process.

If the 'economic correctness' limits the language of section 46 to effect on competition than it is a farce to have the ability to take private legal action under section 46, as such action will invariably be a dispute between competitors.

Section 46 is about conduct by those with market power using that power to either increase or maintain that power .As such section 46 should seek to curb such behaviour whether or not there is a lessening of competition in the market generally.

If there is doubt about that, and based on Court pronouncements there is, than the Parliament should clarify what section 46 is about, namely competitors.

The 'economic correctness' is similar to what happened in the US. Anti trust legislation of the early 1900's was aimed at the power of the US conglomerates. However in the 1930's the so called 'Chicago school' introduced various theories into anti trust law to water down the initial aims of the law.

Theories such as efficiency is paramount, the rule of reason, vertical restraints do not matter and that predatory pricing seldom occurs.

ACCESS TO COURTS/TRIBUNALS.

The TPA is enforced in the Federal Court of Australia and in some cases State and Territory Supreme Courts. These are rarefied jurisdictions and looking at the outcomes of section 46 cases not conducive to effective commercial outcomes.

If small business is to be able to utilise the TPA, whatever what the law may be, it needs to be able to get quick and commercially realistic results. Even the ACCC has great trouble in the Courts, let alone less well resourced private litigants.

It is suggested that this issue needs close attention. It may be that the Federal Magistrate Court be given jurisdiction in relation to smaller Part IV claims. Claims under a set monetary limit.

Conversely a Federal Commercial Tribunal has been mooted in the past. Such a Tribunal could hear various Federal commercial causes of action.

Further, as the Australian Competition Tribunal is to get a much wider jurisdiction post Dawson, it may be appropriate to give it jurisdiction in relation to certain provisions of Part IV or at least in relation to private actions for damages or injunction. In Canada the Canadian Competition Tribunal has such a jurisdiction.

In such a model in Australia, any action by the ACCC for penalty must go to the Federal Court but private, non penalty actions can be heard in the Tribunal.

Whilst law is about conditioning behaviour it is critical that the driver to that conditioning is the threat of sanctions for those who do not fall into line. That discipline is currently lacking in relation to inter business TPA disputes.

There has been too much emphasis on the role of the ACCC in enforcing the TPA. Whilst the role of the ACCC is very important, the role of private actions should not be overlooked and in fact facilitated.

SMALL BUSINESS COMPLAINT HANDLING.

Similar to the access issue there is also a void in relation to the effective and efficient resolution of small business TPA disputes.

Most disputes should not end up in Court. Some will and Courts /Tribunals must be accessible for those cases. Most should be resolved by discussion or clear up misunderstandings etc.

State and Territory Fair Trading agencies have for years acted as intermediatories in relation to consumer complaints. No one focuses on small business complaints. The ACCC will not and cannot resolve such small business matters. An agency such as the ACCC is there to handle broad market place issues and not individual complaints. In any case the ACCC must observe fairness and transparency in relation to its functions and not simply act to resolve individual complaints. Its role is also to set Court precedents.

What is needed is an unabashed small business Advocate who seeks to resolve small business complaints in favour of small business. Trade Associations could do this but many have both big and small business members and hence have internal conflicts or are poorly resourced.

There is a danger that the Advocate will get bogged down into all small business issue but that can be handled by firm administration. There are various existing Ombudsman or Dispute Resolution bodies but these by their very nature are slow and somewhat legalistic. Where the Advocate fails to get a result then the matter can be referred on to these bodies, if the complainant wants to pursue the matter further.

An Advocate can be jointly funded by business and Government. It should not be costly, as informality and speed will be its hallmarks.

At the end of the day it will relieve the workloads of bodies such as the ACCC, Ombudsman and Trade Associations. It will also cause small business to feel that someone is batting for them.

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