SPIER CONSULTING
REGULATORY STRATEGIES & SOLUTIONS

Dr. S. Batchelard
Secretary
Senate Economics Reference Committee
Parliament House
Canberra ACT 2600

21 November 2003

Dear Madam,

EFFECTIVENESS OF THE TRADE PRACTICES ACT 1974 IN PROTECTING SMALL BUSINESSES.

I have been reading the transcripts of the Committee hearings as well as having read many of the written submissions.

I wish to make some observations in relation to certain matters raised during the Committee's Inquiry.Especially issues raised by Committee members.

'Cease and desist'.

The Committee raised with the ACCC the issue of 'cease and desist' orders.

The TPA is about market conduct and consequently it is essential that the Act have a mechanism whereby the ACCC can move to stop potentially unlawful market behaviour quickly yet fairly. The Court mechanisms are too slow, too expensive and too public for interlocutory actions where it is not yet proven that there is conduct in breach of the TPA.

The 'cease and desist' proposal put to the Dawson Committee by the ACCC was too onerous on business and gave the ACCC too much power. Further, we should not get hooked up on the 'cease and desist' language and look for a mechanism that helps in r quickly eliminating unacceptable market behaviour. ASIC has some powers that may be a useful model for the ACCC but the ASIC powers do operate in a different

92 JERVOIS STREET DEAKIN ACT AUSTRALIA 2600 - 61-2-62812030 – FAX 61-2-6282 5183
MOB 0419 624 993 - spierconsulting@netspeed.com.au - ACN 093 621 455
QUEENSLAND OFFICE: 30 LINDEN CRESCENT BUNDABERG QLD 4670 - PH/FAX 07-4155 6823

regulatory environment and do not apply to the spectrum of offences or the seriousness of conduct that similar ACCC powers might target.

I **suggest** that the ACCC should be able to issue a Compliance Notice in relation to **all** the offences in the TPA... Such a Notice would indicate possible breaches of the TPA and ask the business to respond to the Notice within 14 days. This is similar to ACCC current informal process but gives it legislative backing, some safeguards and Court recognition.

An ACCC Compliance Notice is to be accepted by the Court as prima facie, yet rebuttable, evidence of a breach when the ACCC brings a matter to Court for an Interim Order to stop the conduct alleged to be in breach.

The Notice will not be evidence of breach in any substantive proceedings, but if the Company is found to be in breach by the Court, a refusal to abide by a Notice will be relevant to penalty and/or costs including investigation costs.

If the ACCC fails in any eventual Court proceedings, action may be taken for damages by the Business which received the Notice and/or the ACCC is liable for party/party costs.

Such Notices not to be made public by the ACCC until a matter is in Court.

The NZ Commerce Commission has a cease and desist power. The US FTC has had the power for years. A similar Notice power to what I suggest above existed in GST provisions of the TPA in the period 2000-2002. .In the Australian Law Reform Commissions 2003 Report on '***Compliance with the Law***' it advocated an Infringement Notices system, albeit for minor offences.

Coat Tails action

A question was asked by the Committee whether the coat tails action under section 83 of the TPA was utilised or was it a dead letter?

In my experience it has been seldom used and then mainly by big business. It was for instance used by the larger clients in the Qld Concrete cartel case.

The advent of representative action for Part IV cases has made using section 83 less attractive even if representative actions have proven difficult and not the valuable tool these were expected to be. Further in a coat tails action the plaintiff still has to prove damage and this is not always easy and will be vehemently opposed by the respondent.

My **suggestion** is that section 83 coat tails action be made more accessible and be able to be taken in the Federal Magistrates Court or some other Tribunal .

Collective bargaining.

The Dawson Committee of Review of the Competition Provisions of the ***Trade Practices Act 1974*** proposed a notification process along the lines of the current

notification process in section 93 in the ***Trade Practices Act 1974*** in relation to collective bargaining by small business.

The Government has accepted that recommendation, although has left some of the detail still to be finalised.

The Committee Report states that 'the purpose of a notification process would be to provide a speedy and simple means of enabling **small business to take themselves outside the provisions of Part IV of the Act** in order to be able to bargain collectively with businesses possessing a large degree of market power'.

The Committee saw a public benefit in small businesses being able to negotiate collectively to overcome an imbalance with businesses having market power.

This philosophy is similar to what was said in May 1979 in a **"Report by the Trade Practices Consultative Committee on the operation of the Trade Practices Act in relation to primary production in Australia."**

The Dawson Committee also recommended that collective boycotts can be part of the notification process and that third parties, such as trade associations, can represent small businesses in any negotiation process.

The ACCC has long authorised collective negotiation arrangements but almost exclusively relating to primary producers or quasi master and servant relationships.The recent AHA authorisation is the first real exception to that. Having said that the recent ACCC draft determination on an application by Newsagents shows all the ACCC long held hang ups about collective negotiation.

However, the ACCC will not authorise collective boycotts, it puts an enormous burden on the applicant to prove public benefit i.e. a benefit to the wider community. It has not accepted collective negotiation as a benefit by itself and was generally opposed to trade associations representing bargaining groups. The authorisation process generally takes a long time and is expensive for **all** concerned.

Further, an ACCC authorisation decision can be appealed to the Australian Competition Tribunal. This will add to delays and costs.

Generally the authorisation process pits small businesses against the might of the ACCC, when all that small business wants is to negotiate collectively with much **larger business suppliers.**

The collective notification does in no way guarantee any positive or detrimental outcomes for small business. It just allows a process.

In the recent AHA application for collective negotiation the ACCC [27 June 2003] the ACCC has added ' improved dialogue .....as a result of collective bargaining and the implementation of a dispute resolution process which is likely to ,in turn ,minimise any inefficiencies associated with current contractual terms and conditions' as being a public benefit.

It is this newly accepted concept that most collective negotiation is all about and why in most cases collective negotiation should be seen as a public benefit. The ACCC has finally accepted that but absent some legislative recognition of that will easily fall back to its bad old ways.

The ACCC would appear to see the Dawson Committee collective negotiation recommendation more in terms of the authorisation process rather than the traditional notification process with the onus still being on the Notifying party.

The collective bargaining recommendations is a major cultural shift.It is now recognised that aggregation of power is no longer the province of big business and that small business can act collectively the same as a chain can.

The cultural shift is important in the post National Competition Policy environment. Small business is being given some recognition of its unequal position. Competition law is moving away from the purist economic theory of the last century to an acceptance of the continual market power changes in the Australian **economy.**

I **suggest** that the Committee strongly support this move and recommend that the Fair Trade Coalition proposals contained in the FTC submission to the Committee be adopted by the Government in the final model of the collective negotiation regime.

Collective negotiation is not a panacea for all small business concerns. An improved section 46 is still needed as is section 51 AC. But the change is an important message. No longer can it be that small business cannot aggregate its power. Yet big business can. The TPA was the bogey person for small business in relation to the so called level bargaining field. It may have been an unfair view but was a real perception. Now there is an opportunity to dispel that.

Codes of conduct.

The Committee spent some time discussing Codes of Conduct issues with the ACCC.

Codes are a valuable compliance tool but only one such tool. The ACCC proposal to endorse certain codes is a brave initiative and hopefully will succeed. Similar attempts both here and overseas have been fraught with problems. The ACCC proposal will face problems re enforcement and further I am strongly of the view that no public body such as the ACCC should allow others to use its logo. It is bad public policy.

There is an issue whether the ACCC has the power to do what it is proposing. It is a moot point. The Regulation (28 A) referred to by the ACCC at its hearing on 7 November, as giving it the power is not relevant. It relates to the ACCC being able to charge for assisting in the development of codes- something it, and its predecessor, has done for years. Such codes were not endorsed by the ACCC and in many cases needed ACCC authorization.

I **suggest** that the Committee ask that ACCC to report specifically in its Annual report on any Code it endorses and if none are endorsed, why.

Section 49. Discriminatory conduct.

There was some discussion with the ACCC about section 49.That section was repealed in 1995.

Despite what was said section 49 was not about the protection of individual competitor's .Unlike section 46 it had a competition test.

The reasons for its repeal was that due to the competition test it was felt to be of little value to small business, economists hated it and small business were told that section 46 and the projected section 51AC would serve them better.

The TPC did not take any legal action under section 49, which was unfortunate as that may have given the Courts a chance to interpret it. The TPC did investigate some major section 49 cases but advice from Counsel was always too negative. The ACCC of more recent years may have chanced its arm.

I **suggest** that if section 49 conduct was thought to be covered by section 46 then perhaps section 46 should include some of the language of section 49.

Settlement of matters.

The Committee raised the issue of settlement of ACCC investigations in a more efficient way than litigation .Options such as arbitration were canvassed.

I understand this concern but ACCC actions are not private litigation and public policy probably requires more than settlements along the lines of private Litigation.

Having said that the current litigation process is very expensive and time consuming but then so is all commercial litigation and parties have a right to defend themselves.

Any competition case will be complex and time consuming. One option is to take away from competition cases the possibility of a fine and focus on market related remedies such as injunctions and damages.This may lead to more settlements. Interestingly most cartel cases are settled.

I **suggest** that the ACCC and the Federal Court have some major completed cases reviewed on process etc to see what can be done better in future aimed at cutting time and cost- yet still having procedural fairness and transparency. Such a task was carried out after the Santos/Sagasco merger case of the early 1990's.This was a valuable exercise.

Litigation costs.

There was discussion between the Committee and the ACCC about litigation costs and whether the ACCC was able to keep costs where it was successful in litigation.

This has long been an issue. It is also an issue that cannot be viewed in the isolation of the ACCC. Further it is great to say that the ACCC keep costs but what about when it looses. It then may need to go to Finance for funds. There are swings and roundabouts.

What I do **suggest** is that costs recovered by the ACCC be placed into a trust fund to be used solely for cases where the ACCC looses. In fact if the ACCC is to be effective it must always be confident that if it looses a case that the Government will assist the ACCC in meeting the payment of costs.

I would be pleased to expand on any of the above.

HANK SPIER
Director