



AUSTRALIAN COMPETITION TRIBUNAL

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Senator George Brandis
Chair
Senate Economics Legislation Committee
Australian Senate
Parliament House
CANBERRA ACT 2600

Dear Senator Brandis

RE: REFERENCE: TRADE PRACTICES LEGISLATION AMENDMENT BILL (No 1) 2005

I have had the opportunity of reading today a proof copy of the Hansard transcript of evidence before the Senate Economics Legislation Committee yesterday, 14 March 2005.

To assist the Committee in its inquiry, I would like to make the following observations.

The Australian Competition and Consumer Commission (“the Commission”) will have a critical and substantive role in relation to the merger authorisation jurisdiction proposed for the Tribunal in the bill. It will be for the Commission to consider, evaluate and report on the material filed with the Tribunal in support of an application for merger authorisation. It is anticipated there will be a preliminary report by the Commission to the Tribunal at an early stage after the application for authorisation is filed in relation to the material filed in support of the application. It is also anticipated that if further material is filed by the applicant the Commission will have the opportunity to file any material in response which it considers appropriate for consideration by the Tribunal. The Commission will also have the opportunity to file submissions in relation to the relevant facts and applicable law and will also have the opportunity to call witnesses and cross-examine any witnesses called in support of the application.

The proposed merger authorisation procedure will not work unless the Commission undertakes all these activities. The Tribunal does not have the staff or resources necessary to undertake the

research, the collection of evidence and any inquiries required as a result of a merger application being made.

It is not correct to say (at page 14) that “there is no obligation on the part of the tribunal to consider or to entertain any of the material put by the ACCC to the tribunal”. Any material put by the Commission to the Tribunal, indeed, any material put by any party appearing before the Tribunal must be considered or entertained by the Tribunal in the sense that it must look at it. The Tribunal may after such consideration and examination of the material accept the material or it may reject it, or it may seek further information in relation to it. However, the Tribunal cannot turn a blind eye to the fact that a party or the Commission wishes to put material before it.

It is true that the processes for the merger authorisation jurisdiction have yet to be established. Nevertheless, whatever those processes may be does not diminish the fact that the Commission will have a significant and important role to play in the placing of material before the Tribunal and the critical analysis of material before the Tribunal.

It is no part of the process or procedure of the Tribunal to curtail, either severely or otherwise, the role of the Commission before the Tribunal. In any given case the Tribunal may not accept a submission from the Commission but that is a matter common to any tribunal or court.

The point was made yesterday by the Commission to the Committee (at page 16) that:

“But I suppose the crucial issue which the chairman is flagging is that we will no longer be making a decision on the basis of the material we gather. ... I think the issue is fundamentally that, as I say, under the bill, we are no longer a decision maker with the Tribunal reviewing our decision and the material we use to reach that decision”.

Under the present scheme, the Tribunal is the final decision-maker. Under the proposed scheme the Tribunal continues to be the final decision-maker. There is essentially no difference in the ultimate process. If, as occurs under the present scheme, the Commission decides not to grant an authorisation in respect of a merger, an application can be made to the Tribunal to “review” the Commission’s decision. In other words, the Tribunal is the decision-maker.

Under the proposed scheme, if the Commission opposes a merger and the merger is pursued, the Tribunal will deal with the application for authorisation in a similar way to the way in which it presently deals with a refusal to grant an authorisation by the Commission.

Yours sincerely

ALAN H GOLDBERG
President

cc: Mr Peter Hallahan
Secretary to the Senate Economics Legislation Committee