

Parliament of Australia

Senate Economics Committee

**Inquiry into the Australian Business
Investment Partnership Bill 2009
and the Australian Business
Investment Partnership
(Consequential Amendment) Bill
2009**

**Submission
by**

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Section 51(1) exceptions to the competition law provisions of the *Trade Practices Act*: The need for transparency and ongoing scrutiny

Under the proposed section 16 of the *Australian Business Investment Partnership Bill 2009* ABIP and its activities are to be exempted from the competition law provisions of the *Trade Practices Act*. The proposed exemption is very broad and invokes s 51(1) of the *Trade Practices Act*. In doing so, serious questions are raised regarding the use of s 51(1) exceptions.

Indeed, since an exemption pursuant to s 51(1) of the *Trade Practices Act* can operate as a total exemption to the competition law provisions of the *Trade Practices Act* such an exemption should only be granted following a detailed assessment of how the conduct to be exempted will potentially impact on competition. There is currently no requirement under s 51 of the *Trade Practices Act* that a “competition impact study” be undertaken and tabled along with any Bill incorporating a s 51(1) exemption under the *Trade Practices Act*. The absence of such a requirement is a significant gap in the *Trade Practices Act* and should be closed.

Similarly, once granted by legislation or through a regulation, there is no requirement for any ongoing scrutiny of the conduct exempted pursuant to s 51(1) of the *Trade Practices Act*. This lack of ongoing scrutiny represents a clear threat to competition and consumers. Circumstances may change or the full impact of the exempted conduct may not have been appreciated, particularly in the absence of a competition impact study.

Within this context, this submission recommends that:

- (1) a new requirement be inserted in s 51 of the *Trade Practices Act* that s 51(1) exemptions are to be subject to a competition impact study and regular scrutiny by the ACCC;
- (2) a new requirement be inserted in the *Australian Business Investment Partnership Bill 2009* that (i) a competition impact study regarding ABIP and its activities be prepared by the ACCC and tabled within 3 months of the Bill coming into force; and (ii) the ACCC table on a yearly basis during the life of ABIP a “s 51(1) competition report” that expresses an opinion as to (a) whether the benefits to competition and consumers from ABIP and its activities during the preceding 12 months outweigh the costs to competition and consumers; or (b) whether there have been any material changes in circumstances such that the costs or potential costs to competition and consumers from ABIP and its activities now outweigh the benefits to competition and consumers.

The need for a competition impact study in relation to s 51(1) exemptions

A key principle underlying the effectiveness of competition laws is that exemptions should only be granted if they can be justified on public interest grounds. Indeed, unless competition laws operate universally, there is real danger that conduct detrimental to competition and consumers will escape scrutiny. Clearly, since effective competition laws are essential to the proper and efficient functioning of a market economy such as Australia, it is essential that there be as few exemptions as possible and that they be scrutinised very closely before being granted. In short, any exemptions to the competition law provisions of the *Trade Practices Act* should only be granted following a detailed analysis of how the conduct to be exempted will potentially impact on competition and consumers. Such an approach underpins the authorisation process under the *Trade Practices Act*.

The longstanding authorisation process is transparent and allows for detailed scrutiny of the conduct in question from a competition and public interest point of view. Such transparency is completely appropriate given that an authorisation, once granted by the ACCC (or the Australian Competition Tribunal in relation to mergers), effectively exempts the conduct from the competition law provisions of the *Trade Practices Act*. Importantly, the *Trade Practices Act* allows for the revocation of an authorisation if there has been a material change in circumstances. Clearly, the high degree of transparency and scrutiny surrounding the granting of an authorisation is a fundamental safeguard that protects competition and consumers.

The competition and consumer safeguards built into the authorisation process are missing in the granting of s 51(1) exemptions. There is no requirement in s 51 of the *Trade Practices Act* that a competition impact study be tabled with the Bill or regulation containing the proposed s 51(1) exemption. This means that currently a very broad exemption to the competition law provisions of the *Trade Practices Act* can be granted under s 51(1) without (i) any assurance that a detailed assessment of the competition impacts have been made and (ii) without any assurance that the expert regulator – the ACCC – will, in relation to the proposed s 51(1) exemption, play the same central role it plays in scrutinising conduct under the *Trade Practices Act*.

Recommendation 1

That s 51 of the *Trade Practices Act* be amended to require that a “competition impact study” prepared by the ACCC be tabled concurrently with any legislation or regulation proposing to grant a s 51(1) exemption. A competition impact study must identify the potential costs and benefits to competition and consumers arising from the exempted conduct; and consider whether those benefits outweigh the costs.

The need for ongoing scrutiny of s 51(1) exemptions

Given the typically very broad scope of exemptions pursuant to s 51(1) of the *Trade Practices Act* it is appropriate that such s 51(1) exemptions be scrutinised on an ongoing basis. Such public scrutiny allows for a regular monitoring of the s 51(1) exemptions and ensures that they remain in the interests of competition and consumers. The ACCC is best placed to undertake this monitoring role.

Recommendation 2

That s 51 of the *Trade Practices Act* be amended to require that the ACCC table on a yearly basis in both Houses of Parliament a “s 51(1) competition report” in which (i) it lists all exemptions in force under s 51(1) during in the preceding 12 months; and (ii) it states whether the benefits to competition and consumers from the exempted conduct during the preceding 12 months outweigh the costs to competition and consumers; and whether there have been any material changes in circumstances such that the costs or potential costs to competition and consumers from the exempted conduct now outweigh the benefits to competition and consumers.

The need for ABIP and its activities to be scrutinised from a competition and consumer perspective

In view of the very broad exemption being granted to ABIP and its activities pursuant to s 51(1) of the *Trade Practices Act* and given the very large actual and potential taxpayer funding of ABIP and its activities, it is clearly in the public interest that the impact of ABIP and its activities on competition and consumers be carefully and comprehensively assessed.

In particular, it would be prudent that a competition impact study be prepared by the ACCC within a reasonable period of time. Given that many aspects of the ABIP and its activities are still being finalised, it would be appropriate to allow the ACCC a period of 3 months from the Bill coming into force to table in both Houses of Parliament a competition impact study. Similarly, in view of the considerable taxpayer exposure to ABIP the ongoing impact on competition and consumers needs to be carefully monitored. Again, the ACCC is best placed to undertake this ongoing monitoring.

Recommendation 3

A new requirement be inserted in the Australian Business Investment Partnership Bill 2009 that (i) a competition impact study be prepared regarding ABIP and its activities by the ACCC and tabled in both Houses of Parliament within 3 months of the Bill coming into force; and (ii) the ACCC table on a yearly basis during the life of ABIP a “s 51(1) competition report” in both Houses of Parliament that expresses an opinion as to (a) whether the benefits to competition and consumers from ABIP and its activities during the preceding 12 months outweigh the costs to competition and consumers; and (b) whether there have been any material changes in circumstances such that the costs or potential costs to competition and consumers from ABIP and its activities now outweigh the benefits to competition and consumers.