Amending the Trade Practices Act — an Exercise In Attrition

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The process of amending the Trade Practices Act 1974 has proved a long and arduous one for the present Government.

Beginning with some very general objectives set out in the Australian Labor Party's 1983 election platform, and ending with the coming into force of the amendments in June and July 1986, it was considerably longer than the original legislation's gestation period or that of the major revision in 1977 following the Swanson Committee Report.[1] The resulting changes, although important, are neither as extensive nor as far-reaching as either of the earlier exercises, but they are a deal better than the proposals from which they sprang and this is a result, in no small measure, of the process of consultation engaged in by the Government and the role in that process played by the Law Council. The time taken also reflects the political realities of a Government without a majority in the Senate where a minority party holds the balance of power, and the effect of external contingencies, in this case the most recent takeover bids by Bell Resources Limited for The Broken Hill Proprietary Company, which injected a last minute element of uncertainty resulting in a delay of some five months in the operation of the amendments.

The involvement of the Law Council, through the Trade Practices Committee of the Business Law Section (hereafter "the Committee") began early in 1983. The Labor Government had been elected in March. Shortly thereafter the Committee was invited to participate in meetings in Canberra with officers of the Attorney-General's Department and the Trade Practices Commission to discuss options being considered by the Department for the implementation of the Government's policy objectives. A luncheon meeting was also held with the then Attorney-General, Senator Gareth Evans. These discussions were conducted on a confidential basis and enabled the Committee to formulate a written submission which was delivered to the Government in June of that year. The Committee was also able to develop views in relation to the major areas of change proposed. Those views, which were maintained throughout the ensuing period, are conveniently encapsulated in the summary with which the submission was prefaced:

"Competitive market behaviour requires:

(i) The Act to be of universal application. Industry-specific legislation (e.g. The Petroleum Retail Marketing Franchise Act) should be repealed.

(ii) Adequate funding and staff for the T.P.C., revocation of ministerial directions and repeal of ss.29(1) and (2).

(iii) Stimulus to self-enforcement through provision of adequate legal aid. Small business can best be served thus. Substantive amendments to protect small businesses would be misconceived and lead to reduced competition, increased prices and other detriment to consumers.

Therefore, the Committee recommends:

(a) *Sections 45-45E including S. 4D.* — No change.

(b) *S.46* — The threshold test should be 'dominance'. Any lower threshold would preserve individual competitors rather than protect the process of competition. The 'purpose' test could be retained but should be clearly expressed to be objective. It should be made easier to prove.

(c) *S.47* — No change.

(d) *Sections 48 and 96 to 100* — No change unless, contrary to our submission, Sections 45D and 45E are repealed, in which case provision should be made to prohibit price maintenance by unions.

(e) *S.49* — The section should be wholly repealed. If this is unacceptable politically, it should be substantially unchanged and enforcement by the T.P.C. should be encouraged so as to eliminate doubt as to its scope.

(f) *S.50* — No change. It is effective. The test of post-merger market power (control or dominance), which emphasises structure, is easier to apply than that of anti-competitive effect in a market, which emphasises conduct. There should be a failing company defence. Offshore mergers should be caught. There should be a fast-track notification procedure and the T.P.C. should have power to freeze a merger for 21 days pending investigation. S.80(1A) should be retained and the ruling in *Brisbane Gas* reversed.

(g) *So-called procedural amendments* — Some proposals with which we deal in detail are highly objectionable. Caution should be exercised lest amendments described as procedural deprive litigants of substantive rights."

It will be seen from this summary that the Government, in line with the broad statements in its platform, was minded to:

(a) repeal the secondary boycott provisions of Sections 45D and E;

(b) lower the threshold in the monopolisation provision — section 46;

(c) strengthen section 49 relating to price discrimination;

(d) revert to a test of anti-competitive effect in relation to mergers proscribed under section 50;

(e) introduce procedural changes to facilitate the evidentiary task of the Commission.

In addition a number of changes was proposed to Part V dealing with consumer protection and these too were debated in detail, although a written submission was not made.

The Government then indicated that it proposed drafting legislation which would be exposed for general discussion by the business community and other interested parties. This took some time to materialise. Eventually a "green paper" which, true to its title, was encased in glossy green covers and was entitled "The Trade Practices Act — Proposals for Change", was published in February 1984. It consisted of three parts, an explanation of the proposals (really a draft for the explanatory memorandum), an exposure draft bill, and a discussion paper in relation to trade unions and the Trade Practices Act. This latter section was intended as a justification for the proposed repeal of sections 45D and E. Submissions were sought by 4 May, 1984, but it was indicated that legislation would not be introduced until the Budget session in August of that year.

In its submission on the Green Paper the Trade Practices Committee made the following opening comments:

". . . The criterion which we apply to the suggested amendments is whether they are a necessary or effective way of furthering the policy of providing a framework conducive to competition, not especially favouring or inhibiting any particular class of competitor.

We regret the absence from the green paper of any unifying or consistent policy which could explain the suggested amendments as a whole . . .".

The submission dealt with 13 areas where significant amendments were proposed. This paper will trace the progress of those amendments over the ensuing two years.

In the event, the Trade Practices Amendment Bill 1985 was not introduced until October of that year, a federal election which saw the return of the Labor Government having intervened late in 1984. Opposition to that Bill in the Senate resulted in its being withdrawn during the Christmas recess and the Trade Practices Revision Bill 1986 being introduced in February 1986. It was this Bill with certain Government and other amendments, together with the Trade Practices (Transfer of Market Dominance) Amendment Bill, that was eventually enacted in May, 1985, some three years after the original moves to introduce amendments.

1. Definition of consumers

The Green Paper proposed two amendments to the definition of consumer in section 4B: an increase in the "prescribed amount" from $15,000 to $200,000 and special protection for purchasers engaged in "farming business". The Committee opposed the special treatment of farmers on the grounds that the legislation should, as far as possible, apply equally to all industries.

The Committee stated that the level of the prescribed amount was a matter of policy, but suggested that it was time for an overhaul of the definition of "consumer" generally.

The 1985 Bill reduced the prescribed amount to $40,000, said to be in line with inflation since 1974, and omittted the special treatment for farmers; instead it provided that all "commercial road vehicles" should be caught within the scope of consumer goods, regardless of the $40,000 prescription.

2. Repeal of Sections 45D and E

The Committee's comment on the proposal speaks for itself: . . . (T)he manner of the repeal indicates that the Government also contemplates removing virtually all constraints on actions by unions having an anti-competitive effect. This obviously goes much further than the stated aim. The only conduct which would remain proscribed is that which results in resale price maintenance and which is proposed to be dealt with by an amendment to section 96. The Committee does not agree that this is the only area in which union conduct in the market place can lead to anti-competitive detriment, and, even where union conduct is caught by the proposed amendments to section 96, the impact of the contravention, and accordingly of any remedial judicial intervention, will be much less immediate than is the case under the present sections 45D and 45E.

12. The Committee considers the Discussion Paper issued by the Government seriously misrepresents the Swanson Committee by suggesting that it was concerned only with price maintenance activities of unions.

13. The Discussion Paper does not come forward with any realistic or workable alternative to coverage of union activities having an anti-competitive effect

by the provisions of the Act. It includes the rather pathetic statement:

'While it will be by no means easy to resolve . . . definitional difficulties, a clear statement of the precise extent of exemption for union conduct should be able to provide a sound basis for ensuring that action taken by unions in pursuit of their legitimate industrial objectives does not infringe the Trade Practices Act, and that other conduct by unions is not excluded from the application of the Act merely because it is engaged in by unions, without considering the reason for the conduct.'

It is submitted that the Act already adequately exempts legitimate union conduct, in sub-section 51(2) and sections 45D and 45E themselves.

14. Yet the paper goes further to suggest the removal of common law remedies for union intimidation and inference with economic relations. This is unacceptable, and no case has been made out for such legislative protection.

15. One of the main arguments of the Government is that sections 45D and 45E have never been accepted by unions. Yet a significant number of actions has been brought under the provisions and no union has so far acted in disregard of an injunction granted by the Federal Court. On many occasions the commencement of section 45D action has led to a resolution of the dispute. Certainly the unions do not like section 45D, but there would be a few companies who would like the prospect of being fined up to $500,000 for conduct which they might regard as being in their own narrow best interests."

Considerable pressure on the Government from the trade unions developed in 1984, and a bill proposing the repeal of sections 45D and 45E was introduced ahead of the other proposed changes and before the election. The Bill was rejected by the Senate and nothing further has been heard of the proposal. The intervening period has seen the long-running Mudginberri dispute in which section 45D was invoked and orders made under it by the Federal Court were defied, for the first time, by a union, resulting in sequestration orders being made. At one stage more recently it was suggested that the Builders Labourers Federation would make use of section 45D in its campaign against the consequences of its deregistration, but no decision has been reported on this matter at the time of writing.

It has remained the view of the Trade Practices Committee that trade unions should not be exempt from the provisions of the Trade Practices Act or other legal consequences of their actions as suppliers of labour, often with significant market power. The industrial relations system has proved inadequate to deal with abuses of this market power by the imposition of secondary boycotts.

Monopolisation

Abuse of market power by firms in a dominant position has always been a controversial area of regulation in competition law. The boundary between legitimate competitive behaviour and conduct which is predatory has proved difficult to define in satisfactory objective terms and in workable legislation. One has only to consider the decision in the *Nordenfelt* case[2] and the fate of the Australian Industries Preservation Act (as illustrated by the *Coal Vend* case[3]) and the Monopolies Act, 1923 (N.S.W.) (as illustrated by the *Brickworks* case[4]) to appreciate the reluctance of the courts to acknowledge that the boundary can be drawn short of a clearly demonstrated subjective purpose to cause competitive injury.

Experience in other jurisdictions has shown either that predatory conduct occurs only rarely or alternatively that it is difficult to prove[5] (See U.S. and E.E.C. cases cited by WJP.)

Section 46 of the Trade Practices Act has been invoked successfully on only two occasions (*Parkwood*[6] and *Shell*[7]), and the Government indicated that it considered the market power threshold ("in a position substantially to control") and the purpose test should be altered to give the section wider application and make it easier to establish a breach. The Green Paper proposed that the threshold be "a substantial degree of market power" and that a showing of purpose *or effect* should be sufficient to attract the section in relation to conduct which led to one of the consequences set out in paragraphs 46(1)(a), (b) or (c). It also proposed that the reference in sub-section 46(3) to power to determine prices be altered to refer to a power "substantially to affect prices".

The Committee expressed concern that the section as so amended would have the potential to apply to legitimate competitive conduct, and that the notions of abuse and of predatory purpose should be clearly spelled out.

The Revision Bill saw the Government going some considerable way to take account of these comments.

The reference to effect was removed and a new sub-section (3) introduced requiring the Court to take account of the extent to which the corporation's conduct is constrained by the conduct of competitors and customers.

Sub-section (7), which was to assist in establishing predatory purpose, was further amended, and amended again in the Senate by the addition of the

words "after all the evidence has been considered", so that as enacted it reads:

"(7) Without in any way limiting the manner in which the purpose of a person may be established for the purposes of any other provision of this Act, a corporation may be taken to have taken advantage of its power for a purpose referred to in sub-section (1) notwithstanding that after all the evidence has been considered the existence of that purpose is ascertainable only by inference from the conduct of the corporation or of any other person or from other relevant circumstances."

A further feature of significance in relation to section 46 particularly is the content of the Explanatory Memorandum which, by virtue of section 15AB of the Acts Interpretation Act, may be referred to in the event of ambiguity. The draftsman has gone to some trouble with this document. In the case of section 46, after commenting on each of the elements of the prescribed conduct, the document suggests that, in certain circumstances, inducing price discrimination, refusal to supply and predatory pricing could breach the provision.

It is difficult to predict whether the new provision will result in an increase in the number of successful section 46 cases. Clearly a greater range of activity will be exposed to its operation, but applicants may well be deterred from litigation by the prospects of significant financial outlays in relation to a result which, at least for a while, except in the clear case, is likely to be impressionistic.

Resale Price Maintenance

The Committee supported the retention of this provision which as remained untouched.

Price Discrimination

The Green Paper canvassed two alternatives: either the deletion of the word "substantially" from the competition test, or a concentration on the effect on the competitiveness of the business or businesses discriminated against. New defences were proposed.

The Committee opposed the changes stating that they were likely to result in price rigidity and recommending that no change be made until evidence had been produced to demonstrate "the real causes of the perceived problems of small business."

When the Amendment Bill appeared it left the section intact, and so it has remained. It is thought that the revised section 46 will have no role to play in relation to price discrimination by those with a substantial degree of market power.

Mergers

The proposal contained in the Green Paper, in line with the Labor Party's election platform, was to revert to the test of substantial lessening of competition. The Committee observed:

"While it may be superficially appealing to adopt a lessening of competition approach in controlling mergers because that is the test applied to anti-competitive agreements, and mergers can be an alternative to collusion, the latter is the case only in a limited number of instances. Where such mergers are proposed it is more useful to examine the degree of market power of the merged group rather than trying to determine whether that market power will be used in an anti-competitive way. The Committee also believes that this analysis of structure, rather than actual or potential conduct is likely to prove more readily justiciable.

The Green Paper also canvassed a proposal for compulsory prior notification of mergers. The Committee initially was in favour of a procedure where the Commission could be required to indicate, within a short time, its attitude to a prospective acquisiton or the reintroduction of clearances. In reviewing the Green Paper the Committee raised a number of practical difficulties with a compulsory notification scheme, many based on the U.S. experience under the Hart Scott Rodino Antitrust Improvements Act 1976. The absence of a private right of action to restrain a merger by injunction in Australia was seen by the Committee as introducing a different element into the proposal.

In the event the Government decided not to proceed with compulsory notification. It did however introduce amendments to provide a shorter (45 days instead of 4 months) period for dealing with authorisations for mergers, subject to the Commission obtaining the requisite information to make a decision within that time.

The remaining changes contained in the 1985 Amendment Bill and the 1986 Acts were largely technical, but nevertheless important, and their genesis should be mentioned here.

First, the words "control or" were omitted from the test of "control or dominance". The *Ansett/Avis* case[8] had established that dominance was something less than control, hence rendering the higher threshold otiose.

Second, the section has been amended to extend to acquisitions by person other than corporations of shares in or assets of corporations. (Note for constitutional reasons, not "bodies corporate", as in the pre-existing substantive provision.) The original proposal for the acquisition of Swan Breweries had been by Mr. Alan bond personally, and this was seen as a route for circumvention which should be eliminated. See also *Cope Allman (Aust.) Ltd. v. TPC*[9].

Third, another loophole had emerged by way of the use of a 50/50 joint venture company as the acquiring vehicle. Since neither shareholder in such a company was related to it (the Federal Court so holding in the *Bowral Brickworks* case[10], the path had been clear for one or more competitors to gain indirect control of a company without contravening section 50. The amendment by way of new sub-section 50(2A), introduces the notion of "associated corporations", being those with respect to which another corporation is in a position to exert, whether directly or indirectly, a substantial degree of influence, disregarding competition in the same market and the supplier/customer relationship.

Fourth, the definition of market has been extended to include a market in a Territory, which may have some unpredictable results in relation to the A.C.T.

Finally, it was sought to overcome the result of the *Ansett/Avis* case whereby an aquisition of a company by another from outside the market in which the target operated was exposed to the operation of section 50 where the target itself was already in a dominant position. These situations, the so-called "transfer of bare monopoly power" had been the subject of several changes of policy by the Commission. After the *Residential Developments* case[11] it said it would not intervene in such cases. This position was modified in a Guideline issued in November 1982[12]. Finally, during the debate over the amendments, the Commission appeared to depart from the Guideline by seeking an interim injunction to prevent Bell Resources proceeding to acquire BHP. The issue became politically heated. In order to ensure the passage of this particular provision the Government placed it in a separate Bill, eventually enacted as the Trade Practices (Transfer of Market Dominance) Amendment Act 1986.

The provision immunises from the operation of section 50 those acquisitions where:

"before the acquisition, the body corporate was in a position to dominate a market for goods or services; and as a result of the acquisition, [the acquirer] is not, and is not likely to be, in a stronger position to dominate that market."

Thus some conglomerate mergers will remain to be examined under the section.

Offshore Mergers

The Green Paper pointed out that section 50 did not apply to overseas mergers of companies with Australian subsidiaries. A new section 50A was proposed as a means of regulating the effect of such mergers on the Australian market. The inspiration for the new provision appears to have come from intensive lobbying of the Government in relation to a proposed merger in the United States of two tobacco companies. The proposal did not provoke much critical comment, but a number of technical difficulties were pointed out and changes were made before eventual enactment.

The structure and operation of section 50A is very different from that of section 50, although it adopts the same dominance test where a "controlling interest" in an Australian corporation is acquired as a result of a foreign merger. The Tribunal is given a role and may make a declaration taking into account any countervailing public benefit. Some commentators consider this procedure may offend constitutional provisions relating to the judicial power of the Commonwealth, since the consequence of the Tribunal making a declaration is a requirement that the Australian corporation cease trading after six months. The remedies of injunction and divestiture are also available.

Anomalously the section would apply to bare transfers of monopoly power.

The somewhat convoluted procedure adopted by section 50A and the corresponding divestiture provision (section 81(1B)) is designed to avoid giving the Act extraterritorial operation insofar as its enforcement is concerned.

Section 52 — Defamation and Predictions

Section 52 of all the provisions of the Act is by far the most productive of litigation. Originally designed as a provision to protect consumers, it has seen service in other more commercially-oriented, battlefields. It has become an alternative to common law passing-off actions, an adjunct to breach of contract actions where innocent misrepresentation if pleaded would have been denied a hearing, and showed promise, briefly, as a substitute for defamation proceedings. It was this last extension which caused consternation in media circles because none of the common law defences proved to be available. The case which illustrated the scope of the new remedy most glaringly was *Australian Ocean Line Pty. Limited v. Estern Australian Newspapers*[13].

The Green Paper proposed a seemingly simple solution: that conduct should not be taken to be misleading or deceptive by reason only that it was defamatory. The solution simply did not work: the respondent in order to rely on the defence would have had to establish that his conduct was in fact defamatory. The Committee recommended against blanket exemption for the media, but before the 1984 the Government succumbed to pressure from that

quarter and enacted section 65A which exempts, subject to certain exceptions, the activities of "information providers in relation to prescribed publications".

A further area of concern in relation to the operation of section 52 related to predictions, or statements as to the future. Early interpretation had suggested the section had only limited operation in this area, but the Courts had more latterly been working towards a sensible solution. Nevertheless the Government proceeded with the introduction of new section 51A. The provision, incredibly, deems representations as to "future matters" by a corporation to be misleading, unless the corporation had reasonable grounds for *making* the representation, the onus as to which lies, at least initially, with the corporation. This means that an injunction (but probably not damages) could be obtained in respect of a representation which subsequently proved to be true, and is likely to be productive of much mischievous or at least disruptive litigation.

Unconscionable Conduct

The Swanson Committee in its 1976 Report recommended that unconscionable conduct be proscribed with civil but not criminal sanctions. The recommendation was not adopted by the then Government in the 1977 or 1978 revisions of the Act. The Green Paper proposed that this omission be remedied. The draft section 52A proposed that the section would be of general application, that is it would not be limited to claims by consumers, although contracts of employment governed by statutory industrial law would be excluded. There was a long list of matters which the Court was to take into account, to the extent it considered relevant, in determining whether, "in all the circumstances of the case" the conduct was unconscionable. It was also required to have regard to the "need for certainty in commercial transactions".

The Committee was divided in its views about the utility of and need for such a provision. Assuming the proposal were to proceed, the Committee criticised the list of circumstances the Court would have to consider as being productive of uncertainty and unnecessary dispute. The provision as contained in the 1985 amending bill and as enacted in 1986 was modified in several respects. Only five general circumstances were listed for the Court's guidance; the section would be limited to consumer goods or services and would not apply to goods purchased for re-supply or business use.

Section 82 has been amended to make it clear that no action for damages can lie as a result of a contravention of section 52A. The remedies will be confined to sections 80 and 87. It remains to be seen whether the section becomes a fertile litigious field or languishes like its State counterparts.

Accepting Payment

The Committee commented on the proposed revised section 58 — "accepting payment without intending or being able to supply as ordered" — recommending that a subjective rather than an objective test of reasonable grounds be applied. The new section as introduced goes a long way towards meeting this objection.

Procedural and Interpretation Provisions

The Committee voiced strong objection to a proposal to legislate to give the Commission the right to discovery in proceedings for recovery of a pecuniary penalty — reversing the rule in *Guests Garage*[14]. The proposal was abandoned.

A proposal to extend the time for commencing a prosecution for a contravention of Part V to three years as compared with the general provision under the Crimes Act 1914 of one year was opposed by the Committee, but remained and has been enacted.

Time and space do not permit a discussion of other important provisions, but it will be seen from the above that the Law Council, through the Committee, played a constructive role in contributing to a more workable and reasonable review of this important legislation. I should add that the Committee was ably led during the entire period under review by its Chairman, Mr. Alan Limbury.

Footnotes

1. Trade Practices Act, Review Committee, Report to the Minister for Business and Consumer Affairs, August, 1976.
2. Nordenfelt v. Maxim Nordenfelt Guns and Ammunition Co. [1894] A.C. 535.
3. Attorney-General v. Adelaide Steamship Co. Ltd. (1915) 18 CLR 30.
4. Attorney-General v. Brickworks Pty. Limited (1941) 41 S.R. (N.S.W.).
5. See W. J. Pengilley, Background Notes re Part IV Amendments, Changes to Monopolisation Provisions, in "The 1986 Trade Practices Briefing", National Focus Seminars, May 1986, p. 5.
6. The Victorian Egg Marketing Board v. Parkwood Eggs Pty. Limited (1978) ATPR 40-462.
7. MacLean & Anor. v. Shell Chemical (Australia) Pty. Limited (1984) ATPR 40-462.
8. (1978) ATPR 40-071.
9. (1983) ATPR 40-347.
10. (1984) ATPR 40-480.
11. (1982) ATPR (Com.) 50-038.
12. Information Circular No. 34, 5, Nov. 1982.
13. (1983) ATPR 40439, (1985) ATPR 40-538.
14. Trade Practices Commission v. Guest's Garage Pty. Ltrd. (1976) ATPR 40-016.