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AUSTRALIA

Keeping good companies

6 November 2001

The Secretary
Senate Legal & Constitutional Committee
Suite S1.108
PARLIAMENT HOUSE
CANBERRA ACT 2600

Dear Secretary,

Comments on Senate Legal and Constitutional References Committee Inquiry into Section 46 of the Trade Practices Act 1974

Chartered Secretaries Australia (CSA) is pleased to make this submission to the Senate Legal and Constitutional References Committee Inquiry into Section 46 of the Trade Practices Act. CSA is the Australian Division of the Institute of Chartered Secretaries and Administrators, an international professional association with over 46,000 members worldwide.

CSA is Australia's peak membership body for corporate governance, and is fully qualified to comment on the Trade Practices Act. In Australia there are over 8,000 members representing the majority of public companies listed on the Australian Stock Exchange as well as non-listed public companies and proprietary companies. Members of CSA deal on a day-to-day basis with the ASX, ASIC, APRA and the ACCC.

Given the nature of the role of a Company Secretary and the professionalism of Chartered Secretaries we believe our members are ideally placed to comment on aspects of the Trade Practices Act. In addition, we would welcome the opportunity to appear before a public hearing if and when these are conducted.

We note that the Committee has been asked to consider whether:

1. Section 46 should be amended to provide for reversal of the onus of proof in relation to the "purpose" element, and

2. The ACCC should be given a power to order divestiture where an ownership situation exists that has the effect of substantially lessening competition ("SLC").

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1. Reversal of the onus of proof in relation to the "purpose" element of Section 46

CSA understands that the proposal would reverse the burden of proof in relation to the "purpose" element. That is, if the plaintiff showed that the defendant had market power and had taken advantage of that power, the defendant would then be obliged to show that it did not have a prohibited purpose. We also note that a proposal of this kind was rejected by the Cooney Committee in 1989.

CSA concurs with the decision of the Cooney Committee and opposes the proposal. The reasons for this are:

(a) The presumption of innocence is an important principle of our legal system. Reversing the onus of proof in this part of section 46 presumes guilt. In any event the reversal is unlikely to achieve anything meaningful in terms of the law, because whichever way the onus lies, corporations are alerted to the need to generate records indicative of a proper purpose and to avoid generating records that could be interpreted as indicating a prohibited section 46 purpose. The most that the reversal could achieve would be to shift some of the costs of litigation from the small company plaintiff to the large company defendant.

(b) The existing subsection 46(7) is a more useful tool than a formal reversal of the onus of proof, because it allows the court to infer a prohibited purpose from the conduct of the corporation or the surrounding circumstances. This provision can also operate as a de facto reversal of the onus of proof because, as the High Court has indicated, the court may draw inferences of a prohibited purpose if the corporation does not offer a "legitimate reason" as to why it engaged in the conduct complained of [1]. For example, in the Queensland Wire case, the fact that BHP could not give a valid business reason for refusing to supply the product to Queensland Wire was a major factor in the court's finding that BHP did have a prohibited purpose.

(c) Where new products and concepts are being developed, a company having market power should be able to utilise that market power, within reasonable limits, to commercialise the product of its research and development. A reversal of the onus of proof in the "purpose" element of section 46 could have a dampening effect on R and D and discourage companies from exploiting technological advances. As the High Court said in the Queensland Wire case:

> "The object of section 46 is to protect the interests of consumers, the operation of the section being predicated on the assumption that competition is a means to that end. Competition by its very nature is deliberate and ruthless… Competitors almost always try to 'injure' each other in this way… these injuries are the inevitable consequences of the competition section 46 is trying to foster" [2]. Note that despite the breadth of this endorsement of competition, the court was still able to find that a prohibited purpose existed in the circumstances of the case.

To implement this proposal would detrimentally affect the direction in which both political parties are currently headed (eg Knowledge Nation) - where both are seeking to improve the exploitation of new designs and concepts in Australia rather than have them moved overseas. Merely the bringing about of a new technological change could quite validly give a corporation a market advantage and likely dominance in the market place. This proposal if adopted, would enable the ACCC to take action against an innovative company or market leader and to then force it to defend itself even though all it had done was to exploit its invention.

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[1] Queensland Wire Industries v. BHP Co Ltd and Anor (1989) 167 CLR 177, per Mason CJ and Wilson J at 191.

[2] Queensland Wire op cit Mason CJ and Wilson J at 192-3.

There does not seem to be a similar reversal of onus of proof in overseas jurisdictions and there is no need for Australia to do so.

2. The proposal to give ACCC power to seek divestiture where ownership of assets has the effect of substantially lessening competition.

The proposal is that where it is proved that there has been a "substantially lessening of competition" then the ACCC should have the right to seek divestiture of the assets that are enabling the corporation to substantially lessen competition.

CSA opposes the proposal. The mere use of an asset, even if it results in a substantial lessening of competition, should not trigger this disposal right. If a right to divest is to be brought into existence it should only be permissible when other remedies under the Act would not be appropriate.

This proposal has very serious implications for corporations developing new products or making major plant acquisitions. In addition to the practical difficulties of divesting a company of an expensive asset, there are jurisprudential difficulties. For example, how will the divestment power reconcile with the law of patents. If the asset in question is a patented invention, is it intended that the ACCC's divestment power will remove the statutory monopoly granted by patent law? If the power is to permit this, how can innovative companies be sure that they will have a chance to commercialise their inventions? If major items of property or equipment are to be divested, what is to happen if an appropriate buyer cannot be found or appropriate price cannot be obtained? Is the government prepared for job losses that might accompany divestment of a major asset?

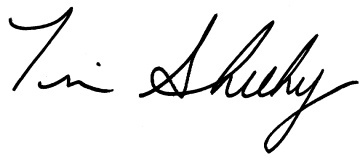
Again as mentioned in respect to (1) above there should be recognition that Australia is endeavouring to create assets and developments that will be able to be exploited within Australia and exported. The proposal has a serious risk that it will prevent corporations from exploiting the fruits of their research and development, or deter them from undertaking development.

There are already effective measures in Part IV of the Trade Practices Act to prevent a firm misusing market power that may flow from ownership of valuable assets to prevent two or more firms arriving at any competitive agreements and to prevent any acquisitions. There is no need to expand these safeguards further.

Such a measure would give the ACCC and the Courts too much discretion in determining how a firm acquires and uses it assets, and would cause uncertainty and discourage firms from acquiring assets or developing their facilities.

Part IIIA of the Trade Practices Act establishes a general access regime that allows facilities to be opened up for competitor access where such access would promote competition and is in the national interest. This has already been used in relation to Sydney Airport, various railway networks and other infrastructure.

Yours faithfully,



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