



## REDUNDANCY STAKES GO HIGHER

**I**t is the Spring racing season throughout much of Australia, and the first week of November is synonymous with the Melbourne Cup. That week saw the ACTU conclude another gamble of a major economic kind – the completion after twelve months of union claims to increase redundancy obligations on employers in what has become known as the 2003 National Test Case on Redundancy. Although the test case received less publicity than the Spring racing carnival, it involves union claims for increased costs to business that well exceed what Australians wager on horses. Indeed, the case has the potential to damage business activity, reduce job security and substantially increase the cost of employment in 2004 and beyond.

When the five member Full Bench of the Australian Industrial Relations Commission reserved its decision in the national test case on redundancy on 29<sup>th</sup> October 2003, all parties knew that the stakes in this case were very high.

It was no glib remark by one of the advocates leaving the court that what now stands between billions of dollars in increases to costs of business restructuring and insolvency in Australia are only two things – the weight and force of employer submissions led by ACCI, and the wisdom of the five members of the Commission who have patiently and diligently sat on the case throughout 2003.

What makes this case especially significant are three characteristics:

It is a national test case. The decision carries authoritative weight that history says leads to variations in federal and State awards across the country.

It is the first review by the Commission of redundancy since its 1984 arbitration that established the current standards.

Third, the union claim is far reaching. Apart from seeking massive increases in redundancy payments unions also want to remove exclusions won by ACCI in 1984 for small business and for employers of casuals employees.

There are hundreds of thousands of employers bound by awards and, on the available evidence, up to two hundred

### I N S I D E

**Backing Australia's Ability Mark II.** The national innovation strategy, Backing Australia's Ability, was announced in January 2001. At this stage the strategy appears to have been a success. However, there is scope for improvements to its operation and perhaps needs greater focus on commercialisation of public research.

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**Technical Barriers to Trade.** Technical regulation, standards and conformance assessment procedures have a vital role to play in facilitating international trade if they are done right. However, poorly designed or administered arrangements can impede competition and trade acting as substantial non-tariff barriers.

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**Voluntary Codes of Conduct.** Business has grave concerns about the proposal by the competition regulator to introduce a system for endorsing voluntary industry codes of conduct. It appears as if there will be few, if any, incentives for business sectors to pursue such codes of conduct.

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thousand redundancies occur across the economy each year. The activity of termination, and the activity of redundancy, and the regulation of such activities by awards means that award regulation of redundancy has substantial impact on an ongoing basis.

The federal award system reflects mandatory minimum obligations of Australian employers. Unless bargaining agreements exist, employers have no choice, but to comply with award obligations.

Awards have extensive multi industry, multi regional scope. They also act as the basis that underpins bargaining and the operation of the statutory 'no disadvantage test', as well as community standards such as the Commonwealth's General Employee Entitlements and Redundancy Scheme (GEERS) scheme.

## A HORROR SCRIPT

In closing the employer case and summarising the evidence, ACCI's National Advocate and Manager of Workplace Relations, Scott Barklamb, put it this way:

"Whilst the adverse economic and labour market consequences of this case may not literally occur overnight, they will surely emerge. The detriment that would inevitably flow from the ACTU propositions will undoubtedly flow through the economy over time.

"When one combines the test case character of this case with the huge increases sought by the ACTU it is apparent that the reach and effect of this matter is of the highest order, with the potential for very direct and very substantial new costs associated

with business restructuring or failure, and the act of redundancy.

"In this matter we do not need to call a spade a shovel, it is a shovel.

"The effect of increasing redundancy obligations can only be one of two things. Either the ratio of labour costs to turnover is altered making the business insolvent or marginal, or other expenditure on labour costs (that is, hours of work on offer to other employees) are cut back to maintain the labour cost ratio. They are the only two options that are apparent."

**In reply, the ACTU suggested that ACCI had portrayed such a bleak view of the union claims that employers would be well qualified 'to script a horror movie'.**

**If only it were so. One does not need to go too far back in time to expose the potential cost and impact of the union claims.**

**In a similar test case decided by the Queensland Industrial Relations Commission on 18 August 2003, a Full Bench of that tribunals concluded as follows:**

**"An obligation to make severance payments has the very real potential to result in the insolvency of a number of small business."**

**If this independent finding is true, then insolvency is indeed a horror script - but not one written by employers. It's worth carefully re-reading this conclusion because it sets the stakes where they are. It is not an equivocal conclusion. It is for some the difference between insolvency and viability, no less.**

## THE CLAIMS

The claims by the ACTU can be grouped under four major headings:

- To double the level of severance payments by employers on redundancy, taking post termination redundancy payments to up to five months pay;
- In addition, to remove the test case arbitrated exemption for small business, thereby imposing redundancy pay obligations for the first time on this sector, and at these higher levels;
- In addition, to remove the test case arbitrated exemption with respect to casual employees, thereby imposing redundancy pay obligations for the first time on employers with respect to casual employees, and also at these higher levels; and
- In addition, to impose a new obligation on all employers to pay each redundant employee a lump sum \$300 redundancy allowance to finance future job searching.

Prior to the closing submissions in the case, ACCI succeeded in having the ACTU abandon a fifth claim for employers to pay penalty rates and overtime in redundancy payments.

In response, ACCI has before the Commission a claim to vary the existing redundancy formula in line with the statutory formula for notice of termination, resulting in a reduction of the 2 and 4 year entitlement by 2 weeks and the 3rd year entitlement by one week.

There are also a number of claims which were agreed upon in a modified form following conciliation proceedings concluding in December 2002.

## CURRENT REGULATION SUFFICES

In its closing submissions to the Commission on 28<sup>th</sup> October, ACCI argued that the best starting point is the existing level of regulation – the 1984 test case determination:

“Those seeking to change it carry the onus to demonstrate that on the balance of probabilities the facts and circumstances are such that it can be confidently concluded that a variation to existing law must be made for awards to meet their statutory directive - of being a safety net of fair and enforceable condition of employment.

“Of course what is ‘fair’ is assessed by reference to both the interests of employers and well as employees, as well as the statutory directives to promote employment and labour market flexibility.”

The 1984 standard is not a formulation that is inherently tired and old. It does not set a quantum of severance pay that declines in real value to employees as the years go by as an award wage or an award allowance might. Rather, it is a formulation which relies upon current years of service, upon current age and upon current weekly pay. Its design is such that year on year as an employee’s wage increases so does the level of severance payment.

If wages are increased by something approximating indexation then so too is the quantum of severance payment. The claims are to change the formula and liabilities under the formula, not in a direct way a specified dollar entitlement that may be outdated. Redundancy

payments are currently paid at 2003 rates of pay and in that sense still very much reflect contemporary industrial standards.

Aside from the heavy onus to make out a case for the displacement of a national standard by the doubling of its quantum, what is being asked for by the ACTU is to vary a formula which already has and would continue to have (even if it were to remain untouched) the inbuilt character of increasing severance payments year in a year out.

## THE CASE FOR NO INCREASE

A major flaw in the ACTU case has been its narrow focus - it prosecuted its claim on the basis of the alleged impact of redundancy on an individual employee, and not on the broader effects on the economy and - it should be noted – on non-redundant employees.

That there are serious and unpleasant consequences for an individual employee when their employment is terminated on account of redundancy is self-evident.

In determining the scale of redundancy payments payable to an individual employee the Commission has been again asked by ACCI to consider broader interests, as it did in 1984.

The cost of redundancy to an individual employer affects the business of that employer as a whole, and the economy. As a consequence it affects not just the business and its capacity to trade and compete, but also its capacity to employ remaining or new employees, and the capacity to provide the services it renders to the community.

For example, if in the worst of scenarios the business of the employer fails completely, the cost of redundancy is added to the liabilities of the employer. This means that in cases of insolvency the quantum of severance payments owing to employees has implications for the extent to which other non-employee creditors of the business, such as trade creditors, receive monies owing to them in whole or in part.

Moreover, redundancy obligations apply not just when the economy may be stable but also when the economy slows. Indeed, they have wider application in such circumstances.

Beyond the narrow focus on employee disadvantage, redundancies are a common and necessary feature of the operation of the labour market. The rate of redundancies per employer or employee has not significantly changed since 1984. As Mr. Barklamb put it:

“Like taxes, no one likes redundancies, no one wants them but they are a fact of life in a competitive economy.

“And like taxes, there has to be limits on the level of redundancy payments or else the obligation loses its character as a necessary industrial entitlement to employees but becomes a penalty on business for restructuring and making what are necessary, responsible and lawful business decisions.

“Industrial law should not penalise what commercial commonsense, if not commercial law, requires. An obligation on a small business to pay four or even five months redundancy

pay after termination to each employee who the business has kept on, and might have struggled to keep on, for 5 years is, no more no less, such a penalty.”

Redundancy occurs in circumstances of business restructure as well as business failure. At the point of redundancy an employee may be at their lowest, but so too may be the business.

Indeed redundancy carries costs to employers as well as employees, both direct and contingent. If the costs of redundancy are increased, so too are the adverse consequences of those costs.

Moreover, award regulation of redundancy does not occur in a vacuum. It is on top of all other employment regulation and the costs of doing business.

## CHANGES IN THE LABOUR MARKET

The evidence in the case pointed to changes in the labour market since 1984. That should surprise no-one; we have a dynamic and largely competitive labour market with higher levels of participation, more jobs, more job mobility; greater skills training and transfer and a decline in internal labour markets. And we have more publicly funded services and benefits available to unemployed persons through the social welfare system and the job network.

And also over this period we have had relevant changes in the regulatory environment – not just the 1993 and 1996 legislative changes to the nature of the award and agreement systems but also the further development of unfair dismissal laws and greater access to remedies on termination of

employment, including in cases of redundancy – both in respect to the *bona fides* of the redundancy and also the quantum of redundancy pay to an individual employee. ACCI put it this way:

“Although economists in the case disagreed on a variety of issues about the labour market, we say that the evidence about changes in the labour market on a fair analysis does not help the ACTU. Changes which have occurred we say, generally speaking, move away from the ACTU’s proposition that employee disadvantage on redundancy is increasing or mounting to the emergence of factors and attitudes which ameliorate some elements of employee disadvantage.”

## THE BOTTOM LINE

When all of the evidence in the case is boiled down, it comes down to this. The ACTU wants more because it says it is time for more and that employees are disadvantaged by redundancy.

There is no science to its claims. What ACCI suspected at the start of the case is what we found - a selective grab bag of claims – the best of what the ACTU can fossick around and cherry pick from jurisdictions. If its claims were granted, the federal standard would be the most severe in Australia when you combine the level of entitlements sought and the breadth of the obligation being sought.

For example, the claim seeks to adopt a NSW legislative standard but then cherry picks out the exemption the NSW standards (and subsequent NSW decisions) have provided for small business in that State.

The changed circumstances or the new circumstances since 1984 that the ACTU sought to rely upon are tenuous, debateable, open to conflicting opinions and interpretations from experts and lacking in evidentiary weight.

It is not enough to say that employees are disadvantaged by redundancy. What the unions failed to do was to gather evidence of why the disadvantage is not fairly reflected by the existing 8 weeks and why quantitative and qualitative changes in the nature of the disadvantage warrant a further 8 weeks after five years of service.

Whilst the ACTU asks for more, a lot more, the evidence does not lead to the conclusion that the existing standard is seriously deficient, or deficient at all.

The grounds of the ACTU claim, and its evidence, are not novel, not new and would not be a fair expression of rights and responsibilities between employers and employees in circumstances of redundancy. They would be heavy and unfair costs for industry to bear, and the price of them would be high – not just now but in circumstances of more widespread economic restructuring or downturn.

Australian employers are now in the hands of the wisdom and foresight of the Commission, which has reserved its decision. The Commission has much careful thinking to do. Undoubtedly its decision will be a media headline in the days following. More importantly though, if it increases the cost of doing business or going out of business, its industrial and economic impact will be felt for many years to come.

# BACKING AUSTRALIA'S ABILITY MARK II

**T**he national innovation strategy, *Backing Australia's Ability*, was announced in January 2001 following two years of public debate amongst industry, researchers and government. At this early stage the strategy appears to have been a success. However, there is scope for improvement to the operation of programs and perhaps a greater focus toward commercialisation of public research.

The Government is currently reviewing the National Innovation Strategy, *Backing Australia's Ability* (BAA) with a view to announcing improvements to the strategy next year.

BAA included a suite of programs aimed at promoting innovation, research and development and ensuring that Australia was able to realise commercial opportunities from inventions and research.

ACCI believes that there is sufficient funding overall through BAA and that the goals established under the strategy remain relevant.

ACCI is not supportive of significant changes to the suite of innovation programs for two main reasons.

Firstly, it is important to maintain one of the aims of BAA which was to promote a culture of innovation, particularly within business. Achieving cultural change is a long-term objective and it is difficult to measure the success of this goal in such a short time frame.

Many of the programs commenced operation on 1 July 2001, or even later, and as a result have only been operational for a little over two years. This timeframe includes the initial set-up of the programs, seeking applications for funding, processing and assessing each claim. It also includes the time taken for businesses successful in this process to establish their research activities.

This leaves little time to achieve substantial outcomes and therefore it is too early in the life of BAA for there to be substantial changes to the package.

Secondly, one of the great strengths of BAA was that it demonstrated the Government's commitment to supporting business investments in R&D.

Following the reduction of the R&D Tax Concession in 1996 from 150% to 125%, Business Expenditure in R&D (BERD) declined to one of the lowest in the OECD.

Since the announcement of BAA however BERD has increased in current dollar terms from 0.73% of GDP in 2000-01 to 0.78% of GDP in 2001-02. This is an early indication that BAA has had a positive impact on business investment in R&D. However, these are very early indications and business expenditure on R&D remains well below the OECD average.

Investment in R&D is generally a long-term investment strategy for business with returns from investment not being realised, in some instances, for decades. While returns on investment in information and communications technologies may provide returns in less than a year, other investments particularly for engineering and mining can extend for up to 50 years from the initial concept to the sale of a product.

Therefore, for business to commit significant resources to conducting R&D, and particularly where there is an element of risk, it is essential that business is able to know with certainty, what the Government's contribution will be.

Certainty and continuity in government funding of programs is essential to ensuring business investment in R&D.

For these reasons ACCI is not supportive of major changes to the BAA programs.

## THE PROGRAMS

The lead program R&D Start, despite initial administrative problems, has received strong support from business. It remains too early to determine the success of the program, though early indications are positive.

Whilst the larger programs will receive close scrutiny to determine their effectiveness, a number of the smaller programs announced under BAA should also receive close scrutiny to determine if this money would be better allocated through the lead programs such as R&D Start.

The R&D Cash Rebate has also been extremely well received and ensures equity for small business R&D. The program provides a cash rebate for small businesses, particularly those in early stages of development, which do not have a positive cash

flow and are therefore not able to gain the benefit of the R&D Tax Concession. However, awareness of this relatively new program is not as high as the R&D Tax Concession.

### THE CRC PROGRAM

The Cooperative Research Centres Program is an extremely effective vehicle for promoting the collaboration between industry and researchers. It has been operational for over 10 years and has broad industry support.

However, ACCI has become concerned that there is an increasing focus toward funding public good activities through the CRC program.

One of the main aims of the program is to foster collaborative research between research agencies and business. By focusing government funding through the CRC program to research activities which do not have a direct commercial outcome, but instead public good outcomes, business input to CRCs becomes peripheral. This undermines the ability of the program to then achieve the aim of fostering collaboration between industry and researchers.

The CRC program should be focused toward commercial outcomes and meeting the needs of business. The program should not become an alternative source of funding for public research agencies.

To achieve this objective it is essential the selection process for new CRCs focus on industry driven research activity. Furthermore, CRCs should aim to achieve their objective or have gained alternative funding by the end of the seven year government funding commitment.

### BITS PROGRAM

There is also a potential problem with funding for the Building IT Strengths (BITS) Program.

The program was initially funded out of the first sale of Telstra. This funding is due to run out in June 2004 and no announcement has been made regarding the continuation of the program.

The Program has earned the support of industry, science and small business. However, the program has not reached its full potential because of the downturn in the IT industry and due to the relatively short timeframe in which it has been operational.

ACCI believes that the activities of the program should, at some stage in the future, be self/industry funded. Government funding for this program should be considered as seed funding for commercial research, not funding for public research agencies.

Within this context, we recommend that the BITS Program be extended through the *Backing Australia's Ability Mark II* package and that this funding should be announced shortly to ensure the continuity of the program.

### BERD

Business Expenditure on R&D (BERD), whilst improving, remains a concern.

The decline in the value of the concession has had a significant impact on business expenditure on R&D and as the company tax rate has declined the incentive of the concession, and the relative cost of the concession to government, has declined.

The R&D Tax Concession should be returned to a minimum of 150%. It is a simple and effective measure to promote business R&D.

### CAPITAL GAINS TAX

Capital Gains Tax (CGT) is another source of concern for investors in R&D.

The simplest way to engender greater business investment in R&D, innovation and venture capital in Australia is to go directly to the issue of returns on investment.

Tax policies which create a disincentive to invest are not in Australia's long term interests. Removing barriers to investment in capital and increasing the returns on investment in R&D have consequences for job creation, productivity, economic growth and subsequently on living standards.

Whilst ACCI welcomed the reform of CGT over the past few years the US and UK have both made substantial changes to their regimes in recent years and to remain competitive we need to, at least, maintain parity.

ACCI is currently looking at ways in which the CGT system can be changed to promote investment in productive assets.

### COMMERCIALISATION

One aspect of BAA which, at this stage, has not been as successful as others has been the commercialisation of research, particularly from public research agencies.

There are currently a number of activities aimed at achieving this outcome, however to date they have

not been as effective as anticipated. Again, these outcomes will take time to be realised and there are activities currently being undertaken by the CSIRO to significantly increase the level of business involvement with the aim of commercialising research.

A key focus of BAA Mark II should be on fostering the linkages between industry and research agencies with the aim of commercialising public research.

Furthermore, private sector R&D, can also fail to achieve commercialisation within Australia due to a range of factors including limited market size and a small venture capital market in Australia. For these reasons the Commercialising Emerging Technology program (COMET), which was established to deliver marketing and management skills in technology markets, needs to be enhanced.

## IP MANAGEMENT

Concerns have also been raised regarding the administration of legislation by IP Australia.

There have been recent reviews of legislation that IP Australia administers, however no recent review of the efficiency and

effectiveness of IP Australia in administering legislation relating to patents, trademarks and design.

IP Australia is due to be reviewed against the Government's policy on cost recovery during 2004/2005. It would be prudent to bring this review forward and extend it to be an independent analysis of the operations of IP Australia in administering legislation relating to patents, trademarks and designs.

## PORTFOLIO MANAGEMENT

ACCI remains concerned that moving science away from the Industry Portfolio to the Education Portfolio will, in the long term, undermine the building of linkages between industry and researchers/agencies. Whilst discovery oriented research is important, it is through building linkages between industry and researchers that we will be able to achieve the greatest return on research expenditure.

## PROGRAM REVIEWS

There are also a number of reviews, which were commissioned by the Government, into the efficiency and effectiveness of a number of key programs including for example, the Review of Comet (July 2002) and the Review of R&D Start (2002).

Inevitably whenever a government program is reviewed there is an increase in the complexity for businesses in either making an application or in ongoing reporting requirements. It is important to maintain that innovation, from a business perspective, is risky. Selection criteria and reporting requirements should seek to ensure the greatest return on government investment in private and public research. They should not however, aim to remove any element of risk.

More thinking needs to be done around linking all the players in the innovation system and ensuring a continuum of support. In particular, the links between small business and universities need to be built up. Access to overseas research and its application also needs to be improved.

## CONCLUSION

A robust innovation system is a vital component to stimulating Australia's economic growth, environmental sustainability and social well-being. BAA has been extremely well received by business and this is evidenced by the increased R&D activity. However, there is a need to fine tune a number of programs and to increase the priority for commercialisation.

# TECHNICAL BARRIERS TO TRADE

**T**echnical regulation, standards and conformance assessment procedures have a vital role to play in facilitating international trade and commerce. Well-designed and administered standards can promote consumer confidence in the quality of products, and be useful in winning and retaining export markets. But, poorly designed or administered arrangements can impede competition within markets and exports between countries, acting as substantial non-tariff barriers to international trade and commerce.

Such poorly designed arrangements can work as technical barriers to trade (TBTS) in several ways.

For example, foreign products can be denied access to domestic markets by a refusal to recognise overseas testing procedures either *per se*, or as being equivalent to those in the domestic market; different national interpretations of the regulations *et al* in question, for example over 'acceptable health and safety risks' or 'necessary labelling requirements'; and/or, the additional costs of multiple compliance and testing arrangements in different countries.

Reforming technical regulation, standards and conformance assessment procedures (TRSCAPs) within the international trade context is not without its challenges. Strategies for liberalising such arrangements are very different to those for more conventional trade barriers, such as quotas and tariffs.

In contrast to quotas and tariffs, TRSCAPs cannot be reduced or eliminated through concessions made in multilateral negotiations. It would be wholly inappropriate, and impractical, to abolish all TRSCAPs.

Rather, they have to be made subject to generally agreed rules by relevant national governments for their development and administration – which is the underlying thrust of the WTO's Agreement on Technical Barriers to Trade.

Simplifying the global system of TRSCAPs can be achieved on a number of planes.

These include: adherence by individual countries to accepted international standards, for example those developed by the International Standards Organisation (ISO); harmonisation of existing arrangements between countries; and/or, the adoption and implementation of mutual recognition arrangements.

## PRACTICAL TBTS

Technical barriers to trade, where they are divergent between (and even within) countries, are non-transparent, or applied in a discriminatory manner, can involve substantial costs to those active in the international trade chain, such as exporters, importers, and their suppliers and consumers.

Indeed, some in the international trading community regard TBTS, no matter what their nature or justification, as dead-weight costs to business and trading.

The costs of these TBTS can be grouped into four main categories: losses of economies of scale; conformity assessment costs; information costs; and, surprise costs.

Losses of economies of scale arise when a manufacturer has to adjust their production facilities to comply with varying technical

requirements in different markets, resulting in increases in the unit costs of production. Such costs can be particularly burdensome for smaller to medium sized enterprises.

Conformity assessment costs arise because compliance with technical regulations has to be confirmed through testing or inspection at laboratories or other examination facilities, the charges and costs for which are generally passed back to the manufacturer or exporter.

Information costs involve the expenses involved in evaluating the impact of foreign regulations, translating and disseminating product regulation, and the training and/or engagement on staff of technical expertise. Surprise costs arise when foreign producers are disadvantaged, relative to domestic producers, by new regulations.

While some firms, especially those with economies of size which enable them to operate multi-nationally, may see commercial opportunities in 'regulatory arbitrage' – where the market most efficiently regulated attracts the most trade, commerce and investment – such possibilities are not generally available to most businesses, especially smaller enterprises.

## INCIDENCE AND IMPACT OF TBTS

Identifying and then measuring the incidence of TBTS has been a major challenge for analysts and policy-makers.

Given many TBTs are non-tariff barriers (NTBs) to trade, their existence has been clouded, with considerable effort required to even identify them. These problems are magnified when robust efforts are made to make reliable estimates measuring their commercial, economic and trade impact.

The main vehicles for identifying TBTs, both *per se* and as NTBs to trade, have been surveys, either of business in general or of specific sectors or industries. Such surveys have been undertaken by business associations alone, governments alone or jointly between the two.

An OECD study of trade barriers made a number of useful findings regarding the incidence, and by inference the impact, of a number of forms of NTBs on international trade and commerce, several of which have a TBT dimension.

The overarching finding in the TBT context made by the OECD study was businesses generally feel constrained by a broad set of NTBs and related obstacles in their capacity to access foreign markets.

While quantitative import restrictions cause some difficulties, 'behind-the-border' policy issues constitute a greater burden on exporters and producers. Such policy issues cover a spectrum of administrative, procedural and institutional factors.

The NTBs most frequently subject to complaint within the various business/governmental surveys reviewed by the OECD included: technical measures (broadly analogous to TRSCAPs); internal taxes and charges; customs rules and procedures; and, restrictions on market access arising from competition laws and policies.

CONCERNS RELATING TO TECHNICAL MEASURES

Market	Specification/Standard	Conformity Assessment Procedures
Europe	Additional costs to alter products to comply with national specifications	Unusual testing, certification or approval procedures
Indian Ocean Region	Product labeling; quality assurance requirements; compliance with safety or technical standards	Costs and delays in testing; consistency and transparency of requirements; multiple testing
Asia and the Pacific	Labelling, marking or packaging requirements; arbitrary enforcement of procedures; non-use of accepted international standards; overly complex regulations; lack of transparency in standards	Delays in obtaining approvals from conformity assessment procedures; non-recognitions of foreign test results; excessive cost of testing; need for multiple testing.
Latin America	Labelling requirements; inspection and testing rules	Exporter and product registration; pre-shipment inspection

Source: Compiled by the Australian Chamber of Commerce and Industry

Other, less frequently cited, NTB problems included: quantitative import restrictions; general administrative procedures; government procurement practices; subsidies and related government support arrangements; investment restrictions or requirements; and transport costs and regulations.

The table provides a broad summary of the specifications and standards, and conformity assessment procedures identified by producers and/or exporters in selected countries or regions. A number of common threads can be identified.

In terms of specifications and standards, these revolve around the importance attached to: product labelling, markings and packaging; the use of national, rather than international, requirements; and, lack of transparency in appropriate specifications and standards.

For conformity assessment procedures, these common threads include: the costs of testing; the

burden of multiple testing; delays in obtaining test results; and, non-standard testing arrangements and procedures.

THE TBT AGREEMENT

The WTO Agreement on TBT is the principal legal mechanism for dealing with TRSCAPs within the rules-based, multilateral trading system

The TBT Agreement sets down a number of underlying principles to which all WTO Members have made commitments for addressing technical barriers to trade. These principles include:

- recognition that international standards and conformity assessment systems can make an important contribution to improving efficiency and facilitate the conduct of international trade;
- support for the development of such international standards and conformity assessment systems;
- ensuring technical regulations and standards, and related

conformity assessments, do not create unnecessary obstacles to international trade.

Unnecessary obstacles to trade can result where:

- the technical regulation or standard is more restrictive than necessary to achieve a given policy objective; or, where it does not fulfil a legitimate policy objective; and,
- accepting Members are not prevented from taking measures for the protection of human, animal or plant life or health, of the environment or the prevention of deceptive practices at the level it considers appropriate.

However, Members should ensure such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or are disguised restriction on international trade.

## PROMOTING CONVERGENCE

TRSCAPs remain an important administrative issue for governments, and compliance issue for commerce and industry.

As noted, poorly designed and/or administered arrangements can involve substantial compliance costs for business, which can result in higher prices for domestic consumers and loss of competitiveness in international markets.

Completely eliminating such arrangements is neither desirable nor realistic; appropriate, well designed and administered TRSCAPs are an essential element of good public policy.

However, efforts to rationalise and/or reduce such arrangements are legitimate policy objectives. In the international context, a number of practical approaches are available to simplify such arrangements, most notably harmonisation, and mutual recognition.

Harmonisation of TRSCAPs can be a viable policy option for dealing with some of the commercial and trade problems associated with divergent regulatory requirements.

This policy option is particularly relevant where the countries concerned share common regulatory goals, the transitional costs are manageable, and the benefits from greater transparency and improved economies of scale are likely to be substantial.

Harmonisation can also be calibrated to reflect the capacities and interests of the parties involved, ranging from harmonisation of detailed technical specifications through to agreement only on general requirements, leaving countries to deal individually with specific matters. It can also extend to adoption of accepted international standards, in place of domestically determined approaches.

The direct benefits of meaningful harmonisation, either between major trading partners or with accepted international standards,

can be substantial, most obviously in reducing the costs for business of complying with divergent technical regulations, standards and conformity assessment procedures. Other benefits include harmonisation today encouraging convergence in regulatory arrangements and practices in the future.

While harmonisation of TRSCAPs (in particular, to acceptable international practices) is a desirable policy objective, it may not be achievable in all circumstances.

Individual governments may not, for example, be able to make the appropriate policy adjustments to meet the necessary thresholds for effective harmonisation.

Another path, which can be regarded as complementary, rather than an alternative, to harmonisation that has attracted policy and practical support around the world involves mutual recognition of TRSCAPs.

The essential characteristic of mutual recognition agreements (MRAs) is the commitment by the parties involved to recognise the other jurisdiction's regulatory requirements, or the results of analytical assessments and testing as equivalent to their own.

The benefits of MRAs for conformity assessment include: expanded trade opportunities resulting from the elimination of duplicative testing practices; and, increased efficiencies resulting from competition between assessment bodies, evident in superior quality of service and lower costs to business users.

# ACCC'S PROPOSALS FOR VOLUNTARY CODES OF CONDUCT

**B**usiness has real concerns about the proposal by the competition regulator to introduce a system for endorsing voluntary industry codes of conduct. It appears as if there will be few, if any, incentives for business sectors to pursue codes of conduct.

On 11 August 2003, the Australian Competition and Consumer Commission (ACCC) announced that it proposed to introduce a system of endorsement for high quality voluntary industry codes of conduct. The ACCC believes that effective voluntary codes deliver benefits for both businesses and consumers and are more likely to deliver increased compliance and reduced regulatory costs. The proposal covers business to consumer codes, and business to business codes.

At the time of the announcement, the ACCC did not receive the support it expected from the consumer movement, nor much support from the business community.

On 15 October 2003, the ACCC released a discussion paper, *Guidelines for developing effective voluntary industry codes*. Comments are sought on the discussion paper by 17 November 2003. There will be stakeholder consultations in early December with a view to the ACCC launching the guidelines in early 2004. We do not believe that the ACCC should proceed with this timetable.

There are 13 key questions in the discussion paper grouped under three headings. But left unasked were the real questions from a business perspective which relate to the outcomes that can be achieved for business from developing and participating in endorsed voluntary codes of conduct, and whether the costs outweigh the benefits.

On either question, there is little to commend the concept to business.

It is important to be clear that there is a distinction between 'endorsed voluntary codes of conduct', and 'voluntary codes of conduct'. ACCI unequivocally supports voluntary codes of conduct initiated by industry. There are a number of industry sectors that have successful voluntary codes already in operation without the 'endorsement' of the ACCC.

However, some of these codes, such as the Supermarket Scanning Code, which has operated successfully for many years, as we have already been told by the ACCC, would not receive endorsement under the proposed guidelines as it does not meet the core criteria. The very fact that the ACCC would reject as inadequate a model code of practice which has been in operation for many years provides a picture of how inappropriate the process proposed by the ACCC actually is.

It also appears that meeting the requirements for endorsement would be onerous and expensive.

The hurdles, for example, include: addressing specific consumer concerns; consultation with stakeholders; coverage; complaints handling; sanctions for non-compliance; independent review of complaints handling decisions; data collection; industry awareness; monitoring; accountability; review of the code;

and competitive implications and performance indicators. The costs across most industries would far outweigh the benefits.

The draft guidelines are littered with onerous and excessive requirements. For instance, they currently propose that for any code to be endorsed by the ACCC that there would have to be 'commercially significant sanctions'. The ACCC argues that 'commercially significant sanctions are necessary to achieve credibility with and compliance by participants and also engender stakeholder confidence in the industry code'.

While sanctions are necessary for voluntary codes, the limit of sanctions for such codes should be expulsion from the scheme, and for a code administrator to advise that a business no longer complied with the code and had become ineligible to advertise that it was a member of a scheme. Provisions of the *Trade Practices Act 1974* would then cover any misrepresentations. If the ACCC were to interpret its guidelines as meaning it was mandatory to impose fines by a code administrator then that would be totally unacceptable.

The draft guidelines in a number of places also propose that the codes should comply with Standards Australia standards on complaints handling and compliance programs including compliance manuals. This is far too prescriptive. It is totally inappropriate to direct that the proponents of a *voluntary code must*

comply with Standards Australia standards in non technical areas.

The relevant business sector should determine the best way to handle complaints and to help promote compliance with its code. Adopting the ACCC process would, in effect, make standards from Standards Australia *de facto* regulation placing yet another tier of unnecessary regulation on the operation of business.

The list of issues goes on. It includes: the independent review of complaints handling decisions; measuring to ensure that 70 per cent of stakeholders are aware of the scheme and how to access it; and the notion that the code sets benchmarks for industry or businesses, that 'do more than restate existing obligations'. So many elements of the draft guidelines are counterproductive to the orderly operation of business and to the improvement of living standards that it concerns business that it is even being proposed.

In addition, any code would have to be in operation for 12 months before it could be endorsed. That means that an industry sector would have

to go to considerable expense to develop a code, advertise and implement it for a year before the code would be eligible for endorsement by the ACCC.

The industry sector could then be severely damaged in the marketplace if for some minor breach – such as for example, that it did not have equal number of industry and consumer representatives on the code administration committee – the ACCC might not endorse it after a year's operation. The ACCC has already made it clear that it would publicise that it had refused endorsement of an industry code.

The ACCC has considerable resources to publicise its decisions. A sector would need to carefully weigh up the benefits of seeking endorsement, and even whether to develop a code.

If a sector chooses to develop a code and then chooses not to seek endorsement, there would potentially be criticism from consumers and regulators, that somehow the code was ineffective. Whereas the code may well be effective, but the sector has decided

it did not wish to meet the bureaucratic requirements of the ACCC's guidelines on reporting. We believe that the desirable policy outcome should be to have effective voluntary codes, and nothing should discourage their development and maintenance.

Potentially codes offer business a less prescriptive framework than regulation, but there are major risks for business associated with the ACCC's endorsement model.

The ACCC has said that endorsement will be 'hard to get and easy to lose'. Business says that endorsement of codes put forward by the ACCC is excessively impractical, onerous and prescriptive.

Business is opposed to the implementation of yet another arbitrary set of standards to meet a bureaucratic desire for regulation but which does nothing to assist or protect the consumer. Protection from over regulation is what is needed by business. The *mandatory* version of voluntary codes of conduct proposed by the ACCC should be shelved.

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