



Opinion Piece by Peter Hendy, Chief Executive – Australian Financial Review – 15 April 2004

Tw tweaking needed to balance the TPA seesaw

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However, if the weight of the law is loaded too much on one side, the seesaw simply doesn't work.

The Trade Practices Act is like a seesaw in a playground. It has to provide a balance between competing interests. Some parts of the act provide a balance between consumers and business. Other parts provide a balance between big and small business.

It is tricky to get this balance right. The TPA seeks to enhance community welfare through competition and also through the preservation of fair trading.

There are many aspects to fairness, including ensuring that firms with substantial market power act fairly with smaller firms. This is policed by section 46 of the act.

The Australian Chamber of Commerce and Industry has a keen interest in competition law and made submissions to the Senate inquiry into the effectiveness of the Trade Practices Act in protecting small business. We represent more than 350,000 businesses, 80 per cent of which are small businesses.

The ACCI has considered the recent Senate inquiry report, which was split between majority and minority reports, and decided to support the minority report. In particular, we agree with proposals to clarify the definition of substantial market power in section 46 and to expand access to unconscionable conduct provisions.

The ACCI is concerned about wholesale changes to the TPA proposed by some sectional interest groups. However, given that recent judicial decisions have cast some doubt on the effectiveness of the TPA in dealing with anti-competitive behaviour, and that section 46 on misuse of market power may not have achieved what parliament intended, we are now adding our voice to calls for changes to the act. The changes proposed in the minority report should give greater protection to small business from substantial market power and predatory pricing. The time is right to amend the act.

We also support the recommendations dealing with section 51AC, which protects small business from unconscionable conduct. Our support of a number of the other recommendations carries some caveats.

For example, we support a collective negotiation bargaining scheme with the proviso that it be drafted so it cannot be used as a de facto workplace bargaining scheme.

However, we could not agree with the majority report's sweeping proposals to change section 46 from a test of market dominance into one that meant that a company's strong financial position was a prima facie case for the application of the section. Further, the proposals for regulating creeping acquisitions of companies are simply unworkable and counter to effective competition.

Consequently, while we agree with parts of the ALP's seven-point plan for reforming the TPA, we cannot agree with its policy on divestiture and cease and desist orders. The ACCI acknowledges the case for changing the TPA and supports the moderate change proposed in the minority report.