# Towards a modern Trade Practices Act
## A regulator's perspective

Speech to

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Ladies and Gentlemen

I want to discuss competition policy generally, then the ACCC and finally the Dawson inquiry.

The fact is that there are a number of vital issues concerning competition policy that are largely outside the scope of the Dawson inquiry, important, though it is.

First there is the need for ongoing basic micro economic reform. Competition issues are central. We need substantial reforms in energy, telecommunications, transport and, up to a point, in health, education and perhaps labour markets.

Taking energy as an example, we need further reforms. There needs to be more interstate competition through enhanced interconnection arrangements and more structural reform, that is, a further breaking up of power generation into competing units to avoid too much market power and inflated prices in electricity generation.

We also need faster and better progress on competition at the retail level and a minimisation of the differing arrangements between states that are hindering the ability of interstate players to compete. If there is to be continuing public ownership, it is important that it not distort the ongoing development of a national market. They key thing is to achieve a market which treats government and non government owned facilities in a neutral way. An essential part of this is strong, independent regulation that is separate and is seen to be separate from governments who are also owners.

There is a plethora of regulation. Each State and Territory has regulators. At the national level, we have the ACCC and NECA, each playing a role. There is also NEMMCO that manages the national electricity market. There is scope for rationalisation and more can be done to achieve greater consistency amongst regulators.

Energy reform is of the very highest importance to the continuing efficiency of the Australian economy. It is probably the single most important sector needing reform.

Secondly, the massive ongoing change to the economy stemming from globalisation, new technology and international and domestic deregulation whilst bringing significant benefit to consumers and business by widening choice and by providing expanded business opportunities also raises important policy challenges.

Often the changes reduce the need for regulatory action. For example, the ACCC does not need to oppose mergers where there is significant import competition. That is why we did not oppose Email's acquisition of Southcorp nor Amcor's acquisition of APPM nor BHP's acquisition of New Zealand Steel even though in the days of tariff protection we might have done so.

It needs, however, to be recognised that these changes have created new forms of anti competitive behaviour, of market power and of consumer scams.

There has been a startling rise in the number of international cartels, such as the international vitamins cartel and the Archer Daniel Midlands case concerning lysine, the art houses case and so on.

The Microsoft case illustrates how new technology, although generally good for competition has, in fact, created new important sources of market power that can be misused to harm consumers and other businesses.

As to deregulation, when we deregulate public utilities and try to open them up to new competitors, we find extremely strong monopolies in place at the outset as we have experienced in telecommunications, energy, airports and transport generally. So paradoxically, deregulation has given rise to a need for more effective application of competition law.

We have still not got the instruments of regulation appropriately balanced. The telecommunication regulatory scheme has been less than ideal, due to extensive gaming and delaying tactics. We need processes that are far more effective and timely but also certain safeguards to ensure that the regulatory system does not harm investors.

Another important area concerns intellectual property that is becoming more important in the knowledge based economy. This is an area of policy that has been captured by the interest of countries that export intellectual property. I look forward to supporting the Government's proposal to remove parallel import restrictions on books and computers and hope the Senate will enact this as it did with CDs.

On the consumer protection side, new scams associated with the introduction of e-commerce on a global scale have arisen. There is a particular difficulty in enforcing the law when the scams originate from overseas.

One response to globalisation is that there has been a substantial stepping up of the international dimension of competition policy by such organisations as the OECD, the World Trade Organisation, and the newly formed International Competition Network, a body of regulators from around the world with very strong support from the Governments of the United States and the European Union. All are working towards a more international approach to competition law issues. Most countries around the world are now introducing or have introduced competition law, eg, China, India, Brazil, Indonesia, Southern Africa and Russia.

Whatever changes, if any, are made to the Trade Practices Act as a result of the current inquiry, the single most important requirement is continuing proper and, where appropriate, vigorous enforcement of the Act by the ACCC (as well as by private action). There are currently 72 cases before the Federal Court. These days there is hardly any more important policy instrument than the Act for achieving good economic outcomes for Australia. The ongoing application of the Act every day serves to protect and promote competition, efficiency and fair trading across all sectors – from aviation and airports to telecommunications, from agriculture to services, from banks to petrol – and helps make our economy more competitive, flexible and able to adapt to changes and shocks from overseas or local services. The efforts of the regulator to secure compliance with the Act in the interests of the public should not be undermined by interest group pressures. I believe the public would regard this as especially

inappropriate at this present time of concern at some corporate behaviour during the Review of the Act.

The review of the Trade Practices Act provides an opportunity to review the Act and to bring its competition provisions into line with best international practice. The review will also examine the processes whereby the Act is administered by the Australian Competition and Consumer Commission.

To make the Act work better the Commission is seeking a number of changes.

**Criminal sanctions and fines**

The first change is the introduction of the possibility of there being criminal sanctions under the Trade Practices Act for hardcore collusion by big business.

Hardcore collusion in the form of secret price-fixing agreements, bid rigging and market sharing is extremely harmful both to business customers and consumers. The gains can be large and it is difficult to detect. The incentives for collusion are high in some areas of the modern economy.

Hardcore secret collusion is dishonest, ethically reprehensible, a form of theft and little different from classes of corporate behaviour that already attract criminal sentences. Business people generally regard it as abhorrent. Tax cheats who defraud the Commonwealth of revenue may be subject to criminal liability, depending upon the seriousness of their offence. Similarly, those who commit fraud or manipulate stock markets may, upon conviction, be imprisoned. Why should executives who deliberately enter secretive arrangements to defraud their customers be treated any differently? The possibility of criminal sentences seems appropriate for cartel behaviour that can do harm of far greater magnitude to millions of innocent consumers as well as to businesses.

We should join the United States, Canada, Japan, Korea, now Britain and some other parts of the world in having criminal sanctions for collusion. Many other countries are

now considering the introduction of such sanctions. In my view, it is only a matter of time before we do this. Hopefully, it will be a result of this review.

The Commission believes that pecuniary penalties – or 'fines' - are not a deterrent sufficient to prevent 'hard-core' collusion by big business. If a firm is caught, fines are just a cost to be passed onto consumers.

The possibility of gaol is a far more effective deterrent for the wrongdoer.

It could be argued that since 1993 penalties have risen sufficiently to deter hard core collusion.

It is now clear that the new fines, although having had a significant effect, are still not sufficient. There has been a considerable number of price-fixing cases since then:

- Australian executives were involved in the international vitamin price-fixing cartel well after 1993. Fines of around $26 million were imposed by the Federal court on the companies and executives.
- There has been extensive price fixing in the power transformers industry. Fines of $20 million have already been collected and the case has not concluded at this point. The behaviour persisted until 1999 - that is, the behaviour persisted even after fines were increased.
- There are many other cases.

In a recent judgment in the transformers matter[1], Justice Finkelstein stated:

> 'Generally the corporate agent is a top executive, who has an unblemished reputation, and in all other respects is a pillar of the community. These people often do not see antitrust violations as law breaking, and certainly not conduct that involves turpitude…There are, however, important matters of which the sentencing judge should not lose sight.

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[1] *ACCC v ABB Transmission and Distribution Limited (No. 2)* [2002] FCA 559, at para.28.

> 'The first is the gravity of an antitrust contravention. It is not unusual for anti-trust violations to involve far greater sums than those that may be taken by the thieves and fraudsters, and the violations can have a far greater impact upon the welfare of society…
>
> 'Secondly, there is a great danger of allowing too great an emphasis to be placed on the "respectability" of the offender and insufficient attention being given to the character of the offence. It is easy to forget that these individuals have a clear option whether or not to engage in unlawful activity, and have made the choice to do so.'

Gaol provides a deterrence not achievable under a civil regime. Work in the United States indicates that the optimal corporate fine would need to be extremely high if fines were to remove the prospect of profiting from participating in a cartel. Because not all cartels are detected, to effectively deter a corporation from entering a cartel, the maximum fine should be several times the profit arising from the unlawful conduct. Economists say that optimal deterrence occurs if the fine equals the economic harm multiplied by the inverse of the probability of detection. So, if the harm is $10 million and the chance of detection is 1 in 5, the fine should be $50 million.

Studies have calculated that had the optimal fine been imposed on more than 400 corporations founded to have participated in cartels in the US, it would have bankrupted more than 60 percent of the firms.

Let me give one example. It has been estimated that the total value worldwide of the commerce affected by the international vitamin cartel was in the order of $20 billion. Conservative estimates would imply a total gain to the three participants in that cartel of $1 billion - $2 billion. Once the risk of detection is factored into the calculation, the optimal penalty is between $6 billion and $14 billion. Taking into account record penalties imposed worldwide and civil damages the participants have paid out in the order of $2 billion. Executives have gone to gaol in the US for this cartel, but based on

the penalties alone, you would have to ask whether the companies involved (and others observing from the sidelines) would think participation in the cartel was worth the risk.

Not only do large penalties jeopardise the continued existence of the majority of firms, they penalise innocent people - employees, shareholders and creditors.

Some have argued there is no evidence that criminal sanctions and the possibility of gaol will be more effective than pecuniary penalties. Of course there is no empirical evidence. How do you show that conduct that did not occur would have occurred had criminal sanctions not been in place?

Let me quote to you what James Griffin, the Deputy Assistant Attorney General of the US Department of Justice Anti-trust Division said on a recent trip to Australia. When discussing the deterrent effect of gaol sentences, he said:

> 'Of course, it is not possible to quantify the undetected. That is, cartel behaviour that does not occur because it is deterred by the perceived risk of incarceration. However, it seems clear that when the risk of gaol is introduced into the equation, the conventional businessman's risk/reward analysis breaks down, and it is that breakdown which is critical to the effective deterrent of anti-trust crime.'

I do not believe that the possibility of criminal sanctions should be of concern to the vast majority of businesses and business leaders in Australia.

Secret, unlawful collusion of a major kind is not the practice of the vast majority of Australian business.

When it occurs, however, it is very harmful, and business is most often the first victim. This is because in most price-fixing cases, the customer is a business, not a household consumer.

I endorse the Business Council of Australia's endorsement of criminal sanctions in the Act as well as their endorsement by small business. I believe there is very strong public support.

However, it is essential that such provisions be accompanied by safeguards.

Firstly, the forms of behaviour to which it would apply need to be defined. For example, criminal sanctions would only apply to defined acts of collusion such as price fixing, market sharing and bid rigging agreements. They would not apply to the rest of Part IV of the Act.

Secondly, proof beyond reasonable doubt would be required.

Thirdly, the Director of Public Prosecutions, rather than the Commission, would conduct the case.

Fourthly, the matter would be dealt with by a judge and jury, as the Constitution requires. A jury of twelve is required and, its verdict must be unanimous.

Fifthly, in the case of a guilty decision, a judge would then decide at his or her discretion whether or not someone should be fined or jailed.

Finally, most cases would be likely to be conducted under the present, not the new, provisions of the Act. There would be relatively few criminal cases.

**Section 46**

One of the disappointments of the Trade Practices Act is the experience of section 46.

Section 46 of the Trade Practices Act prohibits corporations with a substantial degree of market power from taking advantage of that power for the purpose of:

- eliminating or substantially damaging a competitor

- preventing the entry of a person into any market
- deterring or preventing a person from engaging in competitive conduct in any market.

Situations in which it may arise include: predatory behaviour; refusal to supply in an anti-competitive manner; the illegitimate leveraging of market power in one market to damage competition in another market; and some vertical practices. Cases, in practice, are hard to bring and are hard to win.

This provision, which is similar to laws in North America and Europe, is intended to steer a balance between preventing illegitimate anti-competitive conduct and not deterring genuine pro-competitive conduct.

Section 46 gives legitimate protection to new entrants and to small players in industries dominated by major businesses. Such protection is limited to anti competitive behaviour harmful to competition.

**Effects test**

The Commission supports adding the words “or effect” after the word “purpose”.

In other countries effects is a normal test and is not the subject of controversy.

The reason is that competition law is seen to be about protecting the process of competition in the modern economy.

If a firm with substantial market power engages in illegitimate anti competitive behaviour and causes damage to competition, then such behaviour should be prohibited.

To put this another way: if a dominant firm seriously damages the competitive process with illegitimate behaviour of the kind proscribed in the Act, such behaviour is not unlawful, no matter the harm to competition, unless purpose can be shown.

Would an effects test dull competition?

This question is not a matter of argument in other countries.

Section 46 is written with ample safeguards to protect legitimate competitive conduct.

The High Court's view on this matter is very clear. This section is about protecting competition and interests of consumers. I believe that this would not alter with the introduction of an effects test.

In fact, the competitive process would be helped by the addition of an effects test.

**Faster action under section 46 – cease and desist**

Competition can be damaged by corporations misusing their market power before legal outcomes can be achieved. The Act would operate more effectively with appropriate provision to stop misuses of market power quickly. Relief to damaged parties should not take five to seven years, which has been the time required for courts to come to a final decision in a number of particular cases.

Sometimes, after such time, appropriate relief may no longer be possible.

The Commission's preferred approach to this problem is the introduction of cease and desist orders, similar to the approach adopted in New Zealand.

Such orders would be made when the Commission was satisfied that a company was using its market power anti-competitively and urgent action was needed in the public interest. Cease and desist orders would operate for a strictly limited period.

Currently, interlocutory injunctions are not sufficient to stop anti-competitive conduct quickly, and their use can limit the Commission's ability to fully investigate and litigate

a matter. Interlocutory injunctions therefore do not have the same practical, positive effect as would cease and desist orders.

Cease and desist orders would maintain the market status quo until judicial enforcement proceedings could be brought for alleged breaches of s.46. These orders could, for example, prevent a small business from going bankrupt before a matter is fully investigated and enforcement proceedings instituted.

The proposed amendments therefore would promote both effective competition and fair trading by all market participants, and the interests of consumers and business.

**Transparency, public confidence and institutional performance**

Two issues raised about the ACCC are its accountability and publicity.

The criticisms verge on the contradictory. One of the best mechanisms for accountability is to be available to the media as much as possible to answer questions.

Contrary to business claims, the ACCC is highly accountable. We cannot affect anyone's legal rights against their will. We are in the Federal Court in 72 cases. Most of those CEO's complaining about us are fighting us in Court – the Commonwealth Bank over alleged unconscionable conduct, Qantas over alleged misuse of market power, Woolworths over a couple of matters. Harvey Norman unsuccessfully took us to Court over our investigations. We expected the oil companies to challenge us over our raids but they chose not to – we had QC's opinion that the raids were justified.

Today we rejected the API/Sigma proposed merger authorisation application. We thought it would harm competition to have a market share of over 60 per cent in NSW, Queensland and Victoria and, combined with the share of their competitor Mayne Nickless, 90 percent. The benefits of the merger were not large. Are we accountable? Yes, they may appeal to the Australian Competition Tribunal.

As well, the ACCC is accountable to many Parliamentary Committees; to Ministers in a general sense, though we are independent; to the Ombudsman when there are complaints; and to the Australian Administrative Tribunal.

In s.28 of the Act, Parliament formally provides for the Commission to make general information about the Act available to those engaged in trade or commerce, the general public, and consumers.

In addition, the GST legislation explicitly provided for the release of public notices by the Commission (quickly dubbed shame notices) in instances where we considered that overcharging was occurring under the GST.

There are also adverse publicity orders authorised by the Court.

By publicising details of our activities, the Commission explains actions against those alleged to have breached the Act and those penalised by the courts for breaches, and detailed court enforceable orders to prevent any future breaches.

To provide information the Commission engages in a discourse on a number of levels.

Comment by the Commission about investigations (which is very rare as I explain below) or cases is unpopular with the businesses. Some claim this should not happen and that it is 'trial by media'.

It is not.

The public is entitled to know.

It is also an intrinsic part of accountability.

It is also not 'trial by media' to report the commencement or outcome of a trade practices case at court. The Courts have said this often.

Public discussion leads to a clearer understanding of important issues. That said, the Commission however, is careful in its handling of investigations. We think procedural fairness essential.

As a general rule, when there is an investigation or when there is a complaint made to the Commission against a particular company by a person or a competitor, the Commission does not make that matter public. Sometimes the complainant does. Occasionally there is a leak from within a firm, which wants to make matters public for reasons of its own. Occasionally, when the Commission is conducting investigations, people who are being questioned let the press know. These are matters the Commission does not control.

Out of 365 media releases last year, only 1 per cent related to investigations. Of the 1 per cent, all but one concerned investigations made public by whistleblowers or by Ministers who referred issues to us.

**Oil Company Walk In**

Regarding the recent oil company walk in, there has been some misinformation. The facts are that a whistleblower contacted the Commission last year with information of concern. The Commission advertised for the whistleblower to come forward without disclosing which industry was concerned. The whistleblower provided some information including documents. The whistleblower contacted the ACCC again by letter. This letter was copied to *The Daily Telegraph,* which wanted to publish and told us so. The Commission requested *The Daily Telegraph* not to publish until further notice from the Commission. The Commission conducted its walk in, then afterwards during the morning told *The Daily Telegraph* that it withdrew its request for non publication. *The Daily Telegraph* requested and was given some basic and factual information about the walk in. It also requested a photo. The walk in had already occurred. Contrary to claims by many business people such as the Australian Chamber of Commerce and Industry, no photographers or cameras were present at the walk in. However, *The Daily Telegraph* was advised that staff would be returning during the afternoon from the Caltex head office to the nearby ACCC office. They took a

photograph of them bringing back boxes containing ACCC material and when the photo appeared there was a caption which may have left the impression the boxes contained Caltex material. At no time was *The Daily Telegraph* told nor was it implied or suggested that the boxes contained Caltex material. The boxes removed from various sites later in the day and on other days contained Caltex material but those particular boxes did not. Caltex has chosen to criticise the ACCC not *The Daily Telegraph* for the caption.

One matter which surprised the Commission was that there was no challenge by the oil companies to the ACCC raid. The Commission cannot investigate under the Trade Practices Act unless it has reason to believe there may have been a breach of the law. The Commission formed the view that this precondition for the walk in had been satisfied. More than that, it took the matter to independent Counsel, an experienced QC who gave us his independent opinion that the walk in was justified.

We expected a challenge from the oil companies. There have been many challenges to the use of our powers. We have won nearly all of them. But we were still surprised that the oil companies chose not to challenge us but instead later to conduct a public relations campaign about the caption concerning the boxes.

Caltex claims that its reputation has been harmed. The fact is that the public is well able to distinguish between investigations, allegations and Court verdicts and knows that an investigation does not mean that someone has broken the law.

If oil companies have a bad reputation with the public, this is not the fault of the ACCC. It is the fault of the oil companies. There have been strenuous efforts in recent weeks mainly by Caltex to put the blame on the ACCC for their reputation with the public.

**Should there be oversight of the Commission?**

There have been suggestions that the Commission needs oversight. There have been particular suggestions that the Chairman in some fashion makes the decisions and that

these need oversight. This is based on misconceptions. Prior to 1974 there was a single Commissioner, Mr Bannerman in charge of competition law enforcement. Partly in recognition of the issues that can be raised when there is one person responsible, it was decided to establish a Commission. There are currently five Commissioners including myself. All are independent. We meet frequently, debate and vote on issues. The Act makes clear that issues are to be decided by majority vote of the Commissioners. The decisions generally reflect the summation of the collective views of individual Commissioners.

It is true that there is a Board of Review of the Commissioner of Taxation but the Taxation Commissioner is not part of a Commission but a single decision maker. Moreover, the Board is purely advisory. In addition the Taxation Commissioner's decisions are of a different kind to those of the Commission. Those decisions are binding although they can be appealed to a Court.

The Commission on the other hand cannot affect anyone's rights against their wishes. It must go to Court to get the verdict. Unlike the Tax Commissioner, the Commission can affect no-one's legal rights against their will under the Act. It must go to Court, prove its case and get Orders from the Court before someone's legal rights are affected against their will. We are highly answerable to the Courts before anything occurs. We are currently involved in over 70 cases, many vigorously contested.

There are obvious problems with an ACCC Review Board. What would it do?
Overrule Commission decisions? Resolve disputes with firms rather than have them go to Court? Would it consider complaints or objections to our decisions by customers or consumers eg. say a consumer opposed a bank or retail or oil company merger, could they take it to the Board? Who would be the members - business people with potentially conflicting interests? Small as well as big business? Farmers? Consumers? Or would it be just another set of expert independent people like the Commissioners (presumably people who do not have active interests as consultants for business)? Would this not create another layer of bureaucracy? Isn't this just an attempt to nobble the Commission which is already highly accountable to the Courts? What is wrong with the ACCC Consultative Committee which meets regularly and is well attended by

business people, although I note that neither the President nor more particularly Executive Director of the Business Council of Australia have attended for the last 5 years despite invitations which are sent to the Executive Director, unless as happened for a time, the Director diverts them to other staff.

## Conclusion

Ladies and Gentlemen. I want to conclude on this note.

I believe that the Commission faces an important and busy year. I understand that the Review is of considerable importance. However, I also believe that it is essential the Commission pays close attention to our normal and usual business, which is the firm and proper enforcement of Australia's competition law.

I want to assure you that this is the Commission's exact intention. Thank you for your time today.