SHELL AUSTRALIA LIMITED
SUBMISSION TO THE COMMISSION OF INQUIRY INTO THE TRADE PRACTICES ACT 1974

EXECUTIVE SUMMARY

1. In Shell's view the Trade Practices Act ("Act") has generally proven to be a robust piece of legislation. As such, Shell believes that there would need to be strong evidence of deficiency before proposing amendment to any particular part of the Act and that great caution should be exercised in making amendments.

2. Shell believes that the proposals to change s.46 of the Act - in regard to the introduction of an "effects" test, the reversal of the onus of proof in respect of establishing "purpose" and the giving to the Commission of "cease and desist" and "divestiture" powers - are not justified, in that there is not sufficient evidence of deficiency in the current provisions. Shell further believes that, if changes of the kind proposed were made to s 46, then there is a real likelihood that the impact of those changes would lessen competitive conduct and distort normal market behaviour.

3. There is justification for amendment to the Act in respect of the following areas:
   - The third line forcing provisions of s.47(6) should not be a "per se" offence.
   - The related corporation exception should be extended to the resale price maintenance provisions of s.48 to correct an anomaly in the Act.
   - The authorisation process involved in the assessment of mergers and acquisitions under s.50 should be more efficient so as to ensure that the process itself is not the factor which causes or discourages a merger from proceeding.
   - The informal clearance process should be given statutory recognition to allow those proposals which have obtained informal clearance to proceed with certainty.
   - The joint buying exemption to price fixing in s.45A. should be clarified.
   - The availability of Legal Professional Privilege should be confirmed.
   - The powers of the Commission to issue Section 155 Notices should be circumscribed.

4. Shell supports the principle that penalties under the Act should be sufficient to act as a deterrence to conduct in breach of the Act. However, Shell strongly believes that the current penalties achieve that end and there is no justification for further reinforcement of current penalties, particularly by the inclusion of gaol sentences, as is actively being promoted by the Commission.

5. Shell submits that considerable improvement could be made to the administration of the Act in the following areas:-

- The Commission should be bound to be even-handed in its treatment of all sectors of the community: "big business" is as legitimate a constituency of its administration as "consumers". Currently this is demonstrably not the case.
- In the same context, the Commission, or a separate supervisory body, should be instructed to ensure that the considerable powers created by the Act are administered with detachment, objectivity and maturity: it is not sufficient (as the Commission argues) that this surveillance is already provided by the courts.
- The Commission should be constrained in the adverse media publicity which it is able to create over allegations or investigations before the party involved has been found to have breached the Act.
- The Commission should be required to complete investigations on a timely basis, with as prominent publicity for the outcome is for the commencement of an enquiry.

SECTION 46 – MISUSE OF MARKET POWER

The introduction of an "effects" test in s 46 would have dangerous market ramifications. The objective of all businesses is to compete vigorously. To the extent that a business fails in that objective, then it is likely that the business itself will not survive. Vigorous competition of its very nature inevitably impacts on competitors and ultimately those competitors who can't find a way to respond to vigorous competition are unlikely to survive. That is a healthy market at work.

There is a fine line between vigorous competition and unfair competition. It is within the provisions of s 46 that this line must be defined and the distinction between competing vigorously and competing unfairly drawn. Further, there have now been a number of cases in which the courts have considered s 46 and which are progressively providing a significant level of certainty as to the operation of the section. There is a significant risk that an "effects" test will deter vigorous competition and, by doing so, cushion inefficient businesses and permit a sub-optimal allocation of economic resources. This distortion of normal market behaviour is not in the interests of the economy, business or consumers.

The proponents of introducing an "effects" test argue that the provisions should be focussed on assessing economic behaviour and outcomes rather than moral behaviour and outcomes, which the current "purpose" test does. While there is obvious merit in this argument, there has been no proposal as to how the merit of that argument can be achieved without exposure to the dangerous outcomes described above. Satisfying the merit of the argument without eliminating that exposure would be neither a desirable nor sensible policy outcome. We presume that the restructuring of s46 to facilitate an "effects" test would have to focus on behaviour which has the "effect" on competition generally and not, for example, on behaviour which has the "effect" of producing any one of the three outcomes currently proscribed as purposes under s 46. Clearly the "effect" of legitimate, vigorous, competitive behaviour could be one of those three proscribed outcomes, while the "effect" on competition generally of such behaviour could be positive and highly desirable. In such circumstances, to make the behaviour illegal would, again, not be a desirable or sensible policy outcome.

Reversing the onus of proof with regard to establishing "purpose" under s 46 would change one of the fundamental tenets of Australia's legal system – that which allows for the presumption of innocence until proven guilty. A decision to undermine that fundamental tenet has far reaching consequences and would set a precedent for similar intrusions into civil liberties in other areas of the law. As such there would need to be an unambiguous and profoundly obvious justification for that change to be made.

The proponents of reversing the onus of proof argue that to establish a breach of s 46 under its present format is an onerous forensic task and reversing the onus would assist that task. While there is merit in those arguments, they do not provide justification for reversing the onus. It is entirely appropriate that there should be a high level of probity required in the forensic task of establishing the requisite "purpose" under s 46 and that the task should remain with those who contend that a breach of the section has occurred. To reverse the onus would introduce an undesirable level of timidity in the behaviour of organisations, lead to a bureaucratic focus on establishing documentary substantiation of decision making and provide a weapon to be exploited by weaker competitors against stronger competitors which could ultimately deter vigorous competitive behaviour.

It has also been suggested that the granting of "cease and desist" and "divestiture" powers to the Commission should, in conjunction with either of the "effects test" or "onus reversal" proposals discussed above, be considered. The "cease and desist" power would bring with it much of the same issues and problems which are apparent with the proposal to reverse the onus of proof, while the "divestiture" power is the equivalent of a sledge hammer being used to crack a nut and would be quite unworkable. In Shell's view, neither of these reforms are justified.

Although there has been a significant amount of rhetoric accusing large companies of misusing their market power, there is often a paucity of evidence to substantiate such claims. A specific example of this in respect of the oil industry is set out in Annexure A to this submission.

Shell contends that the dangers inherent in the proposed changes to s.46 are real and significant. Further, Shell believes that the proponents of change have not sufficiently made out the case for change. In fact, the evidence suggests that s. 46 is working perfectly well, the Commission is not being inappropriately impeded in bringing cases under the section and that the section should therefore remain unchanged.

SECTION 47(6) - THIRD LINE FORCING

It is inappropriate that third line forcing should be a "per se" offence. Australia, as far as Shell is aware, is the only country in the world which treats third line forcing in this way. The fact that the notification process is available does not justify leaving the conduct as a "per se" offence when there are sound reasons for putting third line forcing onto the same basis as the other provisions of section 47, namely, requiring the adverse effect on competition to be made out before conduct constitutes an offence.

There are circumstances where third line forcing is fundamental to the success of a business and where there is no detrimental effect on competition as a result of the third line forcing. Franchising is an example where, often, the very essence of the franchise involves the establishment of an absolutely consistent offering to the consumer and where the franchise is ultimately only as successful as the weakest link of that consistency. As such, the success of the franchise and the business success of its franchisees is dependant on the franchisor's ability to enforce consistent standards and offerings throughout all franchisees. Third line forcing can be a necessary tool in the attainment of that success. It is not anti-competitive in that context. It is in fact pro-competitive in that it enhances the ability of franchisees to compete in the market in which they operate.

SECTION 48 – RESALE PRICE MAINTENANCE – RELATED CORPORATION EXCEPTION

Resale Price Maintenance is a "per se" offence under the Act and applies in circumstances where there are dealings between related corporations. This appears to be an anomaly as all other price fixing offences under the Act allow dealings between related corporations as an exception. There are obvious sensible reasons to exempt related corporations from exposure to prosecution for horizontal price fixing behaviour. Those same sensible reasons exist for exempting vertical resale price maintenance behaviour between related corporations and Shell submits that the Act should be appropriately amended to do so.

SECTIONS 50/88 – AUTHORISATION OF MERGERS AND ACQUISITIONS

Mergers and acquisitions usually result from market driven pressures for industry reconstruction. Almost invariably they are negotiated in highly pressured environments and result in deals which are very time sensitive, in that the deal struck at the time is a result of the circumstances of the moment: but as circumstances change in business, as they inevitably and rapidly do, then the shape of the deal changes. It is therefore imperative that the process for authorising mergers and acquisitions is as efficient as it can be and that any inefficiency in the process itself does not either cause deals to fail or deter mergers and acquisitions from being undertaken at all. The fact that the authorisation process has rarely been used in recent years to assess mergers suggests that significant reform to the process is required.

Shell believes that the current authorisation process does contain some aspects which can result in a longer and more inefficient process than is necessary. Specifically, the

low threshold required for a party to establish itself as a sufficiently interested party to appeal a Commission decision to grant an authorisation, and thereby significantly prolong the process, is unnecessary and should be reformed. In Shell's submission, the only parties who should be permitted to appeal against a decision of the Commission are the parties directly involved in the merger itself. Other interested parties have a full opportunity to put their points to the Commission during its hearing of the authorisation application, but should thereafter be constrained from "spoiling" the merger proposal by appealing the Commission decision.

An alternative to limiting access to appeal would be to give parties the option of seeking authorisation directly from the Australian Competition Tribunal in the first instance. This would involve ensuring that the Tribunal is appropriately resourced and would have the same effect of restraining the ability of third parties to "spoil" a merger by using the appeal mechanism simply as a delay tactic.

The effect of either of these proposals to limit the opportunity to appeal against the Commission decisions, together with more stringent timing obligations for the processing of authorisations by the Commission would help to contain the length of the authorisation process and facilitate its greater use in merger proposals.

INFORMAL CLEARANCE PROCESS

Currently, informal clearances are sought from the Commission for mergers and acquisitions where the parties do not believe that there will be a resulting substantial lessening of competition. Clearly, in those circumstances, the parties always have the option of simply proceeding to implement the proposal, although, with complex competition issues, this can be dangerous and would normally not be the preferred route of most organisations.

The attraction of the informal clearance process over the authorisation process is that it does not involve the same public submission procedures or the assessment of the public benefit issues associated with the proposal. It would therefore normally be expected to be a significantly quicker process which, as stated above, is of great importance in most mergers and acquisitions.

The problem with the current informal clearance process is that it does not give the parties to the proposal a sufficient degree of certainty, in that not only is the Commission not required to give reasons for or be bound by its decision, but also the proposal remains exposed to attack from third parties. Shell submits that there is justification for the informal clearance process to be given legislative formality so as to enable parties utilising that process to obtain the comfort of certainty in respect of Commission decisions emanating from the process. The basis of the decisions themselves should remain unchanged; that is, that the Commission's granting of informal clearance should remain based on the assessment that there is no substantial adverse effect on competition emanating from the proposal. Appeal to the Australian Competition Tribunal (or, possibly, some other review panel) should be allowed on the same basis as has been proposed above to apply to authorisations.

In the informal clearance process, the Commission is able to utilise the mechanism of enforceable undertakings to help overcome its concerns with anti-competitive impacts

of a proposal. This can be a useful and sensible device and Shell supports its retention, but in Shell's experience the Commission has used this device as a means to reconstruct an industry or business to conform with its vision. In so doing, the Commission strays beyond the purpose of the undertakings, namely,to redress the perceived anti-competitive impact of the proposal. This intervention can have dangerous and distorting commercial implications. The Commission's vision of how an industry or a business should be structured is not derived from the commercial vantage point and, therefore, will not always be an appropriate vision.

An example of the Commission attempting to use undertakings in this way occurred when Shell and Mobil unsuccessfully sought informal clearance to merge their respective refining businesses in 1999. The Commission concluded that the proposal was likely to substantially lessen competition in the market for refined products, its major concern being that continuing structural import competition could not be relied upon as a sustainable constraint on the domestic refiners. Shell and Mobil proposed focussed undertakings that would have given continuing structural access to imports. However, the Commission's proposed undertakings were not at all focussed on the import issue – they were broad ranging in scope with some emphasis on downstream marketing issues on which the Commission had long held views; e.g., a proposed undertaking that the companies would release their retail service station franchisees from 100% fuel purchase ties.

Shell submits that the Commission should be bound to follow the strict guideline that, when seeking enforceable undertakings, those undertakings should only extend to matters which directly relate to redressing the anti-competitive effect of a proposal.

SECTION 45A – JOINT BUYING

Section 45A provides an exemption to the "per se" price fixing prohibition where there is a collective acquisition by two or more competitors. It is unclear whether, to gain the protection of the exemption, it is sufficient for negotiations to be conducted jointly or whether it is also necessary that both competitors must commit to buy from the supplier. In the latter case (and it is often that the commercial circumstances would require a purchase commitment to be given by the buyers), it is unclear whether the competitors (buyers) would fall foul of the exclusionary provisions of section 4D, in that their commitment to purchase some or all of their requirements from the supplier would amount to a boycott under those provisions.

It is also unclear as to when two companies will be considered to be competitors in relation to the acquisition of goods or services for the purposes of the above provisions. For example, does the fact that both companies simply want to buy from the same supplier automatically make them competitors in respect of that acquisition?

Where businesses and industries are striving for efficiencies and ways to lower their cost bases, the use of collective acquisition strategies will become more common and Shell would propose that the provisions in the Act should be clarified to give certainty to what legally is permissible.

LEGAL PROFESSIONAL PRIVILEGE

Pending the outcome of the appeal in "Daniel's case", Shell believes that the Act should be amended to make certain the availability of Legal Professional Privilege in respect of the Commission's regulatory functions under the Act (including section 155 processes). Companies and individuals should not feel constrained in seeking legal advice and if Legal Professional Privilege was not available in certain circumstances, then they inevitably would feel constrained. Legal Professional Privilege is a very important common law right which should not be taken away lightly. If the High Court upholds the Federal Court decision in Daniel's case, Shell believes that it would be desirable from both a policy and practice point of view to amend the Act to ensure that Legal Professional Privilege remains available.

SECTION 155 NOTICES

Under section 155, the Commission may issue notices requiring the production of documents, the attendance at oral examinations or the access to search premises if the Commission (or Chairperson or Deputy Chairperson) believes that the person has evidence that relates to a matter that may constitute a contravention of the Act. The receipt of a section 155 notice is a very serious matter and can result (and, in Shell's direct and recent experience, has resulted) in the incurring of many hundreds of thousands of dollars expenditure in complying with the notice.

Given the serious consequences, Shell believes that there is justification for the issue of section 155 notices (while continuing to be instigated by the Commission) to be required to be authorised by a body independent from the Commission (in much the same way as a warrant is instigated by the Police, but issued by the Court). Such a process would add a level of protection against section 155 notices being used as "fishing exercises" by the Commission.

The Commission has argued that if persons do not believe section 155 notices are justified, they can challenge them. However, this is an expensive and time consuming exercise and runs against the practical pre-disposition of most people, which is to avoid litigation if possible. There should be a heavy onus on the Commission to exercise its extensive powers under the Act with discretion and restraint, and not in the capricious and provocative manner in which the Commission presently appears to act. People should not be forced to take court action to defend themselves against the arbitrary abuse of power, as the present Commission appears to contend. It is also a somewhat sad reflection on the public perception of the Commission that many parties would refrain from challenging the Commission for fear of retribution.

GAOL PENALTIES

The principle of appropriate deterrence is an important principle in regard to any legislation and the Act is no exception. Shell supports the principle that there should be a penalty regime in the Act to deter behaviour that breaches the Act. However, the proposal that the Act should be amended to provide for gaol sentences for individuals in respect of breaches of the "hardcore", horizontal cartel provisions of Part IV is not, in Shell's view, justified.

The proponents of the proposal contend that the current financial penalty regime is not adequate to deter conduct in breach of those provisions. The current maximum financial penalties, per offence, are $10 million for corporations and $500,000 for individuals. In Shell's submission, there would be very few corporations or individuals where the prospect of a penalty of that size would not act as an adequate deterrent. Also, typically, the conduct at which the proposal is directed results in the occurrence of multiple offences, which means that the potential aggregate financial penalties can hurt the biggest of corporations and wealthiest of individuals.

The proponents contend that the proposal is directed at "big business". However, in Shell's experience the compliance policies and practices of big business are far superior to those of small business. Further, Shell would expect that an analysis of the occasions when big business has been found to offend these provisions of the Act would show that the offensive conduct in most cases has occurred at levels below senior management and without any knowledge or involvement of senior management. The deterrent effect of the current penalty regime on those individuals should, logically, be just as significant as it is with individuals in small business.

There is no evidence to suggest that the Commission is not obtaining appropriate penalties under the existing regime. Further, the penalties handed down by the courts leave considerable "headroom" for even greater penalties up to the maximums permitted under the Act. Gaol sentences should be reserved for individuals who commit crimes. The legislators have seen fit, appropriately, not to classify breaches of Part IV of the Act as a crime and therefore Shell does not support the introduction of gaol sentences for such breaches.

ADMINISTRATION OF THE ACT

The Commission must, in Shell's respectful opinion, improve its fair administration of the Act. The particular areas which Shell believes could be improved are as follows:-

Commission's Constituency

The Act has as its objective *"to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection."* In its regulation of the Act, consumers and small business are clearly legitimate constituencies of the Commission, and the Commission is seen very publicly to acknowledge and support those constituencies. However, just as publicly, the Commission's stance towards "big business" (also disparagingly referred to as "the big end of town") is one of confrontation and aggression. Shell's perception is that "big business" is generally cast by the Commission as being hostile to the objectives of the Act and, in any event, being well capable of looking after itself. It is not, it would seem, considered to be a legitimate constituency of the Commission.

It is also Shell's perception that the Commission has, over an extended period, consistently undermined public confidence in "big business" by its conduct, most particularly by evocative and provocative press statements and by inflammatory

conduct such as the recent "raids" on oil company premises. Shell believes that this approach by the Commission is unjustified, unfair and not intended by the legislature. "Big business" is a legitimate constituency of the Commission. Indeed, major corporations have been, and are, supportive of the objectives of the Act and of sensible competition policy. They should be the natural allies of the Commission in its compliance objectives. Instead, they feel alienated and are demonised by the Commission.

It is noted that the Chairman of the Commission has recently contended that "big business" is colluding and "ganging-up" on the Commission in the lead-up to this present enquiry. Shell is not aware of this alleged "conspiracy", but Shell is aware of a rising sense of genuine concern at the Commissioner's behaviour and a questioning of whether some of it is truly in the interests of "consumers" and, indeed, in the longer term future of Australia.

There are particular provisions which are clearly designed for the protection of small business from the actions of big business, so if an individual big business offends against those provisions, then it should suffer the consequences. However, there is no justification for big business generally not to be accorded the same respect and treatment as is given to the other constituencies of the Commission - small business and consumers.

In this regard, Shell's concern is that the Commission either does not understand or chooses to disregard the interests of "big business" and is indifferent to the consequential harm suffered by business so described. Further, it follows that the Commission either fails to understand or chooses to disregard the fact that the various stakeholders of a company can suffer indirect harm as a result of it's the Commission's behaviour in respect of the company concerned. Such stakeholders include employees, shareholders, customers, suppliers and special interest groups.

Shell does not understand why this "constituency" problem has arisen, but postulates that it may be as a result of the composition of the Commission itself. If that is the case, then a broadening of the basis of selection may be required to ensure that all constituencies are properly represented on the Commission. The activities of the Commission need to be administered with objectivity and detachment: this is not presently the case. If the Commission itself cannot be constituted to deliver this objectivity, then it should be supervised by a body which can.

Media Publicity

The Commission's use of the media is, an aspect of its administration of the Act which requires review and reform. In particular, in Shell's experience, the Commission is cavalier in its use of the media at the beginning of investigations, before any charges have been brought (let alone breaches found), while becoming quite "camera shy" when investigations lead nowhere or charges are not sustained. The Commission's behaviour demonstrates a lack of understanding, disinterest or, at worst, disregard for the serious business and reputational damage to particular companies or industries that can be caused by such use of the media.

Shell also submits that, whilst this may be well received in the tabloid press, it is poor public administration and not appropriate conduct for a regulatory agency. (As the Federal Court's Mr Justice Finn, said in the recent ESSA case, *"I do not wish to question the use of the media made by the ACCC in publicising its views. I would merely suggest that, as the agency responsible for policing section 52 of the TP Act, it properly can be expected to set the example of care in its own representations to the public ... The stances so taken may constitute good public theatre. Whether they represent good public administration is another matter"*).

There can be little doubt that the public perception of the performance of the oil industry in complying with competition laws is poor. In Shell's case, we hold strongly to the view that this perception is totally unjustified given Shell's compliance record. Shell believes that the perception has been fostered by the Commission's use of the media – for instance, Professor Fels' recent use of the pejorative term "big oil".

An extreme example of the Commission's inappropriate behaviour was the publicity which the Commission orchestrated over its "raids" on Shell and other oil companies in April this year, as earlier referred to. The dimension of those raids, and the way that the Commission clearly orchestrated the media coverage, was enormously damaging to the reputation of Shell and the industry generally. And yet, in the time since those raids, the Commission has failed to articulate the specific offences which it believes the oil companies may have committed

The enormous and expensive search task imposed upon Shell (and, in all likelihood, on the other companies involved), which continues to the date of this submission, has failed to reveal any document remotely suggesting that an offence has been committed. While Shell remains confident that it has not committed any offence in respect of matters the subject of those raids, the fact is that, from the reputational point of view, our public image has been further eroded by the Commissioner's pernicious conduct. Further, if the Commission's investigations are discontinued, or no offence is subsequently found to have occurred, the Commission's past conduct suggests it will make no attempt to redress the harm of its original actions. The Commission's disregard of the fact that its actions might cause reputational damage to companies was reinforced as recently as 13 June 2002, when it stated in a media release responding to a complaint by Caltex that its reputation had been damaged by ACCC remarks regarding the oil company raids - *"the ACCC is not responsible for the reputation of an oil company"*.

It is accepted that publicity of breaches of the Act is a necessary and desirable tool for the Commission to use in deterring offenders in appropriate circumstances. However, in Shell's view, it is not legitimate for the Commission to use publicity to the detriment of a company before that company has been found to have breached the Act. The Commission seems to ignore the fact that the reputation of a company is a significant factor in the mix of components determining a company's effectiveness as a competitor. By wrongly damaging the reputation of a company, the Commission is damaging competition itself. Further, as previously noted, the consistent demonising of business has a corrosive effect on community perceptions of the business community in general and is not, ultimately, a desirable social objective.

Unless a company has been found to have committed an offence, the Commission's use of the media needs to be governed by a code of conduct under which the Commission must not utilise the media in a way which damages the company's reputation. Further, in the event that the Commission does make media statements on the commencement of an investigation, the code should provide for the Commission to give equivalent prominence in its media statements when the investigation does not proceed, or when a subsequent action fails to prove an offence.

Further, the code should address the issue of timeliness of the conduct and completion of investigations by the Commission. This is particularly the case where the knowledge of the investigation is in the public arena, for in those circumstances the continuation of the investigation is often, of itself, a significant factor causing reputational damage to the party being investigated.

An example of this problem was the investigation by the Commission into the Fuels Sales Grant Scheme introduced by the Commonwealth Government at the time of GST introduction. After allegations by the Federal Member for Hunter (Mr Joel Fitzgibbon) that up to $500 million of taxpayers' money was being diverted into the pockets of the oil majors and, specifically, that Shell was clawing back the moneys allocated under the Fuel Grant, the Commission issued a media release on 22 August 2000 referring to Mr Fitzgibbon's allegations and indicating that it was investigating the matter. The matter was covered on national television. Shell co-operated fully with the Commission's investigation, including attendance before a Commissioner and several other Commission officers in Canberra on 13 September 2000. Shell unequivocally demonstrated to the Commission that Mr Fitzgibbon's allegations had no substance. Notwithstanding this, and despite periodic requests by Shell for the Commission to report on the findings of its investigation, it was not until 1 June 2001 that the Commission announced that it had finalised its investigation and found no breach of the law by Shell.

Such a delay in concluding the investigation, where in the period from October 2000 to June 2001 no further information in respect of the investigation was sought from Shell by the Commission is, Shell submits , completely unreasonable. Shell should not have been subjected to the reputational damage which these sort of allegations cause by virtue of the investigation not being concluded in a timely manner.

CONCLUDING OFFER

Shell would be happy to provide any further information which the Review feels may be necessary in support of this submission.

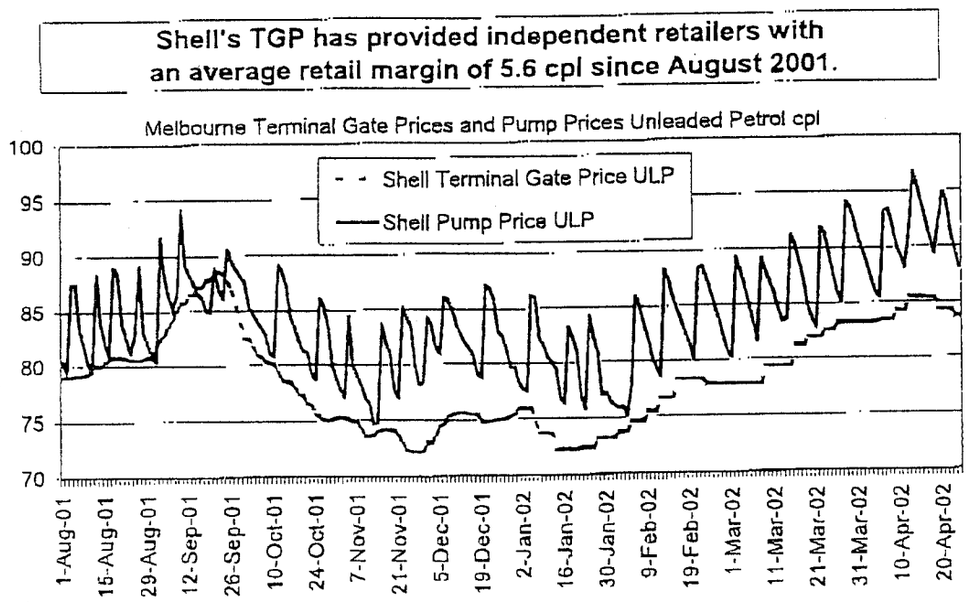
ANNEXURE A

Misuse of Market Power – Example of the Facts not supporting the Rhetoric

To take a specific example with which Shell is familiar in the petroleum retailing sector, the smaller independent retailers have often accused the major oil companies (refiner marketers) such as Shell of engaging in predatory pricing. The specific allegation is that through their franchised retail networks, the major oil companies routinely set pump prices below the wholesale prices at which they supply the smaller independent retailers.

A simple analysis of publicly available information demonstrates that this allegation is simply not true.

The chart below compares Shell's wholesale or terminal gate price with the average pump price in Melbourne. This data demonstrates that retail prices rarely fall below the wholesale price at which Shell supplies independent retailers and that, on average, the gross fuel margin available to independent retailers is around five cents per litre.



The other relevant factor is that in markets such as petroleum retailing, which have very low barriers to entry, there is very little prospect of a firm which engages in predatory pricing benefitting from this behaviour. A firm engaging in predatory pricing incurs significant direct costs by selling at below cost. Even if a competitor is forced out of the market through predatory pricing, where barriers to entry are low, there is nothing to stop a new competitor entering the market. Consequently, the attempt to diminish competitiveness in the market inevitably fails.

Despite these obvious facts, the ACCC has conducted a number of prolonged investigations into allegations of predatory pricing in the petroleum industry. None of these investigations have demonstrated any evidence of abuse of market power.

Allegations of predatory pricing and misuse of market power are probably more common in petroleum retailing than any other sector. However, the facts demonstrate that this is a highly competitive market which, excluding Government taxes and subsidies, delivers Australian consumers amongst the cheapest petrol in the world.