Dawson Committee

Trade Practices Act Review

From the Queensland Retail Traders & Shopkeepers Association

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DAWSON COMMITTEE
TRADE PRACTICES ACT REVIEW
QRTSA SUBMISSION

About QRTSA

The Association represents just over 2800 members in Queensland, Northern New South Wales and the Northern territory.

QRTSA's membership is 56% non food and 44% food. In the non food sector we represent every type of retail outlet with the exception of the majors and large department stores. Our non food membership even includes retailers for whom there exists their own specialist organizations such as newsagents, a few pharmacies, service stations, hardware stores, hairdressing and florists.

The non food membership also includes organizations such as:
- Pillow Talk
- Retravision
- The Good Guys
- Super A Mart
- A Mart All sports etc.

The association food sector membership includes all of the independent banner groups operating in Queensland such as:
- AUR Stores
- IGA
- Nightowl Convenience Stores
- United Star
- Four Square and
- Seven Eleven

Much of this submission will concentrate on the food sector issues as this sector of retailing is the more vulnerable with respect to the ever increasing dominance of the major retail companies.

Nationally the QRTSA is affiliated to:
- The National Association of Retail Grocers of Australia (NARGA)
- The Council of Small Business Organisation of Australia (COSBOA)
- And the National Independent Retail Association (NIRA)

QRTSA is committed to improving the welfare and viability of its members and, in doing so, does not seek handouts or protection. Rather, QRTSA seeks recognition of and a reduction in the compliance costs faced by small business, and the adoption of trade practices and competition policies that enable small business to compete vigorously in the marketplace.

The QRTSA is concerned to ensure that independents provide a competitive third force within the retail grocery industry to counter the market power of the two major supermarket chains, which already dominate the national grocery market. In order to be such a force, the independent sector must, when buying comparable quantities, be able to acquire its supplies at comparable prices to those obtained by the two major supermarket chains. In addition, independents must not be strategically targeted by below cost pricing or other predatory tactics that may be used by the major supermarket chains. In short, any anti-competitive conduct within the retail grocery industry must be vigorously investigated and stamped out.

Where independents can be a competitive third force, consumers will benefit from more choice, better prices and services than those they may receive when faced with a duopoly comprising the two major supermarket chains. Indeed, a competitive third force within the retail grocery industry will protect consumers from the dangers of a cozy

duopoly, where price competition is only within a limited range as determined by the duopolists; where there is a lack of real choice as a result of the duopolists refraining from competing on price or service; and where there is a lack of genuine innovation.

Key Aspects of QRTSA's pro-competitive philosophy

The QRTSA strongly believes that a competitive third force is critical to the maintenance of vigorous competition within the retail grocery industry. The promotion of competition and the prevention of anti-competitive conduct are an integral part of QRTSA's philosophy. The following are central to our pro-competitive philosophy:

- Ensuring that QRTSA members are not placed at a competitive disadvantage by regulatory compliance costs (Compliance costs tend to fall disproportionately on smaller compared with larger businesses). Given the cost sensitive, low profit nature of the retail grocery industry, any compliance costs incurred by independents place them at a cost disadvantage when competing with the major supermarket chains;

- QRTSA members expect to buy their supplies at the supplier's best price and if a supplier is selling to a competitor at a cost price lower than the cost price offered to QRTSA members, those members we believe are entitled to the same cost price where they make comparable purchases. This is embodied in the principle of 'like terms for like customers' which translates into comparable customers (by reference to volume and services provided) receiving comparable prices;

- Suppliers that discriminate against comparable customers must be identified and any anti-competitive price discrimination appropriately dealt with under the *Trade Practices Act*. Anti-competitive price discrimination arises where independents do not receive comparable prices to those received by the major supermarket chains and, therefore, cannot compete with those chains. Comparable supply prices translate into competitive pricing for consumers. Without comparable prices to those secured by the two major supermarket chains, the independent sector is not as competitive as it could be for the benefit of consumers. Price discrimination between comparable customers can be used strategically to undermine the ability of independents to compete on price. Where price discrimination is demanded by an entity having a substantial degree of market power, suppliers may become party to a tactic employed by the entity to secure for itself an obvious price advantage over rivals;

- Anti-competitive below cost pricing – that is, pricing below cost in selective locations to strategically target an independent competitor - must be identified and appropriately dealt with under the *Trade Practices Act*. Pricing products below cost may give the appearance of being beneficial for consumers, but where below cost pricing is adopted as a strategy by the major retailers to undermine the independent sector, consumers will suffer as prices rise once independents have been eliminated or deterred from engaging in competitive conduct.

- The elimination or undermining of the independent sector is not in the consumer's best interest as independents provide a competitive third force to counter the dominance of the two major supermarket chains. An independent third force provides choice and convenience, and keeps the retail grocery industry competitive for the benefit of consumers. Any predatory conduct by the major supermarket chains aimed selectively at undermining the viability of the independent sector must be stamped out and any further acquisitions of independents by the majors must be closely scrutinized to prevent further increases in the level of market concentration to the detriment of competition in that market.

- A national competition policy that focuses on injecting competitive pressures into highly concentrated industries and ensuring the viability of independents when competing with dominant market players.

QRTSA views the above as essential ingredients in the promotion of competition primarily within the retail grocery industry (but it is also applicable to other sections of retailing) for the ultimate benefit of consumers. A competitive third force will mean a maintenance of competitive prices, greater choice in shopping and the prevention of a cozy duopoly between the two major chains.

TOWARDS A LEVEL COMPETITIVE PLAYING FIELD - KEY TRADE PRACTICES REFORMS ADVOCATED BY SMALL BUSINESS

Small business is seeking a number of reforms to the *Trade Practices Act* (the Act) in view of the considerable difficulties currently faced in using s 46 (the existing prohibition against misuses of market power) and s 50 (the existing prohibition against mergers that substantially lessen competition) to counter specific forms of anti-competitive conduct that may be engaged in by dominant corporations. For example, the requirement to prove a predatory intent by an entity having a substantial degree of market power is the clearest difficulty faced under the current s 46. In particular, such dominant corporations may engage in conduct that, despite an absence of evidence of a predatory intent, may from an objective point of view have a detrimental impact on the level of competition in the market.

In the circumstances, the Act should allow this conduct to be assessed objectively to determine whether it has an anti-competitive effect on the market. An 'effects' test in s 46 would permit such an objective assessment. In addition, specific forms of anti-competitive conduct not dealt with under the present Act should be prohibited in new provisions of the Act to foster effective competition between dominant corporations and independent small businesses. The Act needs to evolve to meet the more sophisticated types of potentially anti-competitive conduct that may be engaged in by dominant corporations. This involves fine-tuning existing provisions of the Act where appropriate and introducing new prohibitions where existing provisions do not effectively counter specific forms of anti-competitive conduct.

Anti-competitive below cost or unreasonably low pricing

Anti-competitive below cost or unreasonably low pricing is one example of conduct that, where engaged in strategically by an entity having a substantial degree of market power, would undermine competition in a market where independent small businesses could not match or sustain prices set by a dominant corporation. The problem would be magnified in those circumstances where a supplier engages in **anti-competitive price discrimination** whereby a dominant corporation receives better prices or trading terms than the independent small business sector, even though the latter buys comparable quantities of products and provides the supplier with comparable services. Being sold products at prices higher than those offered to dominant corporations places the independent small business sector at a clear price disadvantage and prevents the sector from being competitive with dominant corporations. Being at a competitive disadvantage forces independent small business to go out of business or sell out to the dominant corporations. Simply stated, if the independent small business sector was not at a price disadvantage they would be in a better position to provide effective competition to the dominant corporations to the benefit of consumers.

Prohibiting **anti-competitive below cost or unreasonably low pricing** would ensure that dominant corporations would not price goods below their acquisition cost plus normal selling costs as a way of destroying the independent small business sector. Since a dominant corporation could sustain below cost or unreasonably low prices for longer periods of time, it is critical that no below cost or unreasonably low pricing strategy is implemented (unless, for example, it is implemented to match a competitor's price or there is a genuine commercial reason for sustaining losses on a particular product, i.e. where it is highly perishable or the product is a discontinued line). Similar provisions within the Act to legislation already operating in many European countries (please see attachment 1) would be a very positive move.

Anti-competitive price discrimination

Prohibiting **anti-competitive price discrimination** would prevent suppliers from discriminating between competitors where they buy the same products in like quantities having regarding to the nature of the buyers and the relationship between the buyers and suppliers. Where similar customers are buying at unexplained price differences, the level of competition in the market is distorted by the fact that one customer has a price advantage over another similarly placed

customer. In these circumstances, the price- disadvantaged customer, i.e. the independent small business person, cannot offer the same level of discount to consumers. This acts to the detriment of the independent small businesses, as they cannot match the prices offered by the price advantaged dominant corporation, unless they work on a lower trading margin, which in turn, inhibits the extent to which funds can be reinvested into the business to sustain its viability, growth and continued innovation to meet customer expectations. As independent small businesses go out of business, or cannot compete and are acquired one by one by a dominant corporation, consumers suffer as they are faced with less choice and convenience, and with prices dictated by dominant corporations left with no effective competition from the independent small business sector.

Anti-competitive creeping acquisitions – Nature of the problem

A new specific prohibition against **anti-competitive creeping acquisitions** is called for in view of the difficulties faced by the ACCC under the current s 50 in assessing a proposed acquisition by a dominant corporation by reference to previous small acquisitions by that corporation in the particular market. While a large acquisition by a dominant corporation can, as in the case of the Franklins break-up, be subject to close scrutiny by the ACCC, a series of minor acquisitions that together would substantially lessen competition are less likely to be subject to the same scrutiny. Where in fact scrutinized, the ACCC faces considerable limitations on its ability to assess the cumulative effect of the creeping acquisitions on the level of competition.

Prohibiting **anti-competitive creeping acquisitions** would prevent further anti-competitive concentration in already highly concentrated industries. With dominant corporations already controlling key industry sectors and s 50's inability to deal with small, yet cumulatively anti-competitive acquisitions, all further acquisitions by such dominant corporations should be placed under the competitive microscope to assess their impact on competition in the relevant market. Where a proposed new acquisition would, when taken together with previous acquisitions in the market, substantially lessen competition in the market, that acquisition should not be allowed. Given the importance of preventing anti-competitive creeping acquisitions, it is imperative that the ACCC be notified of such proposed acquisitions by dominant corporations.

Additional reforms for dealing with anti-competitive creeping acquisitions

Where markets are highly concentrated, consumers do not get the benefits that ordinarily flow from vigorous competition. In those circumstances, there is a danger that what little competition is present in the market may be removed through the acquisition of independent small business rivals by entities having a substantial degree of market power. The removal of independent rivals merely acts to further concentrate the market to the detriment of consumers. Backed by their considerable market power, entities having a substantial degree of market power can simply undermine an independent small business rival or acquire it. Indeed, a process of undermining an independent small business rival in a highly concentrated market can be part of an obvious strategy of lowering the value of the independent's business with a view of acquiring it subsequently at a reduced price. Over time, an entity having a substantial degree of market power can simply cherry pick independent small businesses at leisure to the detriment of consumers. Often these independents feel they have little choice other than to sell out as they are unable to remain competitive as a result of the unleveled playing field favoring dominant corporations.

The QRTSA is concerned that the continuing concentration of industry sectors not only undermines the independent small business sector, but more importantly is highly detrimental to consumers. There must be a point at which a market is too highly concentrated and any further acquisitions need to be carefully reviewed. Without a divestiture power for intentional breaches of s46, more attention needs to be focused on ensuring that no further concentration occurs, through acquisition, in those markets already viewed as too highly concentrated.

One proposal for identifying highly concentrated markets and ensuring that no further concentration occurs without appropriate scrutiny involves giving the ACCC the power to issue what Small Business describes as a 'concentrated market notice'.

Anti-competitive creeping acquisitions – The role of a Concentrated Market Notice

A concentrated market notice would be issued after the ACCC has formed the view that an identified market is highly concentrated by reference to pre-determined criteria. QRTSA would submit that a highly concentrated market is one in which four or less market participants control 75% or more of the market. Given that four or less market participants control 75% or more of the market, it is quite likely that a majority of those participants already have a substantial degree of market power. In such circumstances, acquisitions by such participants can only increase their level of market power and more than likely to the detriment of consumers.

With the danger of further concentration continuing to impact negatively on the level of competition, it is important that further acquisitions in concentrated markets are placed under the spotlight. Thus, while a concentrated market notice is in place, no acquisitions in the market identified by the notice can take place unless authorized under the Act or allowed by the ACCC subject to an appropriate s 87B undertaking.

Such a concentrated market notice would not prevent further acquisitions, but rather would ensure that if any such acquisitions were to take place their impact on competition is carefully assessed. The clear advantage of a concentrated market notice is its transparency. That is, once a notice is issued, market participants are well aware that any further acquisitions need to be justified on public benefit grounds or a trade off needs to be made by which the acquirer undertakes to divest existing assets or operations to offset the increase in market concentration arising from the proposed acquisition.

An alternative to a concentrated market notice would be to give the ACCC the power to issue, on a case by case basis, what Small Business describes as an 'anti-competitive acquisition notice'.

Anti-competitive creeping acquisitions - An Anti-Competitive Acquisition Notice as an alternative

Rather than identify concentrated markets beforehand and deal with further acquisitions in a pre-emptive, yet transparent manner, the ACCC could be put into a position to respond to particular acquisitions that, when taken together with previous acquisitions, substantially lessen competition in a market. By taking each acquisition on its merits, the ACCC could carefully weigh up whether or not a particular acquisition, when taken together with previous acquisitions, substantially lessens competition. If the ACCC forms the view that it does, then it could issue an anti-competitive acquisition notice. Once such a notice is issued the acquirer must divest itself of the acquisition or not proceed with it unless it has been authorized or subject to a s 87B undertaking accepted by the ACCC. In these circumstances, an anti-competitive acquisition notice has the advantage of allowing the ACCC to consider each acquisition on a case by case basis and to act only where it forms the view that the acquisition is detrimental to competition and consumers.

Express recognition of small business and rural/regional factors in the ACCC's assessment of whether or not a merger breaches the existing s 50

At present, s 50 prohibits acquisitions (mergers) that substantially lessen competition:

> "(1) A corporation must not directly or indirectly:
> (a) acquire shares in the capital of a body corporate; or
> (b) acquire any assets of a person;
>
> if the acquisition would have the effect, or be likely to have the effect, of substantially lessening competition in a market.

(2) A person must not directly or indirectly:
(a) acquire shares in the capital of a corporation; or
(b) acquire any assets of a corporation;

if the acquisition would have the effect, or be likely to have the effect, of substantially lessening competition in a market."

In assessing whether the acquisition substantially lessens competition a number of factors (listed in s 50(3)) must be taken into account by the ACCC and the Courts. These factors at present do not include reference to the impact of the acquisition (merger) on small business or rural and regional Australia:

"(3) Without limiting the matters that may be taken into account for the purposes of subsections (1) and (2) in determining whether the acquisition would have the effect, or be likely to have the effect, of substantially lessening competition in a market, the following matters must be taken into account:

(a) the actual and potential level of import competition in the market;
(b) the height of barriers to entry to the market;
(c) the level of concentration in the market;
(d) the degree of countervailing power in the market;
(e) the likelihood that the acquisition would result in the acquirer being able to significantly and sustainable increase prices or profit margins;
(f) the extent to which substitutes are available in the market or are likely to be available in the market;
(g) the dynamic characteristics of the market, including growth, innovation and product differentiation;
(h) the likelihood that the acquisition would result in the removal from the market of a vigorous and effective competitor;
(i) the nature and extent of vertical integration in the market."

QRTSA strongly advocates the insertion of a new paragraph (j) in s 50(3) in terms requiring that the ACCC and the Courts must also take into account the impact of the acquisition (merger) on the viability and competitive position of small business.

Also, in view:
- of the key role played by small business in being both a competitive force and providing consumer choice in rural and regional Australia, and
- the typically disproportionate negative impact of acquisition (mergers) on rural and regional Australia,

Small business also strongly advocates the insertion of a new paragraph (k) in s 50(3) requiring that the ACCC and the Courts must also take into account the impact of the acquisition (merger) on the level of competition and consumer choice and services in rural and regional Australia.

Maintain current ACCC role in merger assessment, but fast track process in merger cases

The ACCC is currently responsible at first instance for assessing whether or not an acquisition (merger) substantially lessens competition. That role is vital for enabling an independent assessment to be made of the competitive impact of the acquisition (merger). In a vast majority of merger cases there is either no breach of the present s 50 or the ACCC accepts an undertaking under s 87B of the Act allowing an acquisition (merger) to proceed. Given that the vast majority of acquisitions (mergers) are not prevented by the present s 50, any suggestion that s 50 stands in the way of acquisitions (mergers) must be dismissed. Apart from the suggestion by Small Business that s 50 should be amended to deal with anti-competitive creeping acquisitions and to acknowledge the importance of small business and rural and regional issues, The QRTSA strongly supports the present role of the ACCC in merger cases.

In those very small number of cases in which s 50 prevents the acquisition (merger) because it substantially lessens competition, The QRTSA advocates the creation or the availability of an ACCC unit dedicated solely to assessing authorization requests in merger cases. The ACCC Merger Authorization Unit would be available as a fast tracking mechanism in the very small number of merger cases that would otherwise breach s 50 because they substantially lessen competition. This fast tracking mechanism would provide a timely and transparent process in which any possible benefits to Australian consumers from an otherwise anti-competitive merger can be quickly identified and assessed.

An `effects' test under s 46 of the Trade Practices Act

Small business concerns with the present s 46 – misuse of market power provision - stem from the difficulties faced by the ACCC or others relying on the provision in pursuing abuses of market power by dominant corporations. In particular, the s 46 prohibition against the misuse of market power has had limited impact in view of the need to demonstrate a particular purpose (as outlined in the existing s 46) for the conduct. While `purpose' can (and often, can only) be demonstrated by inference, the current prohibition does not enable an objective assessment of the conduct's impact on competition in the relevant market to be undertaken. By amending the current prohibition in s 46 to incorporate an `effects' test an objective assessment of the conduct on the level of competition can be made to reveal whether or not the conduct of dominant corporations operates as a deterrent or hindrance to competitive conduct in the relevant industry sector.

The QRTSA advocates that the existing s 46(1) be amended to read (changes in bold italics):

> "46(1)A corporation that has a substantial degree of power in a market shall not take advantage of that power for the purpose ***or in a way that has the effect or would have the likely effect*** of:
>
> (a) eliminating or substantially damaging a competitor of the corporation or of a body corporate that is related to the corporation in that or any other market;
> (b) preventing the entry of a person into that or any other market; or
> (c) deterring or preventing a person from engaging in competitive conduct in that or any other market."

This change would leave the existing purpose (or essentially subjective) element, and add, as an alternative, an objective element allowing an assessment of the impact of the conduct on competition. The new objective element would allow the Court to determine whether or not there was a causal link between the conduct and at least one of the paragraphs under s 46(1).

Also, this objective element would bring s 46 into line with the other provisions of Part IV of the Act.

Strengthening the existing purpose element of s 46 – the inclusion of a list of factors to assist in the identification of purpose

While QRTSA strongly supports the retention of the purpose element under s 46, we are mindful of ensuring that the present difficulties in proving the `purpose' element are dealt with by the inclusion of a list of factors that guides the Court in determining what has motivated the conduct in question. Such factors could focus attention on whether the conduct was truly intended to be pro-competitive – that is, in the best interests of consumers, or whether the conduct was intended to punish, eliminate or send a signal (for example, to a rival not to compete vigorously or for a supplier not to offer comparable or better deals to competitors). The factors are intended to provide some objective benchmark or framework for assessing the conduct in question. The existence or otherwise of the listed factors is not, of itself, conclusive evidence of a breach, but rather a mechanism for better understanding what has motivated the conduct in question.

Similarly, a supplier may be coerced or intimidated by a dominant corporation into treating the dominant corporation more favorably than other customers of the supplier. By being coerced or intimidated into discriminating against other customers, suppliers are being forced to tilt the competitive playing field in favor of the dominant corporation. The disadvantaged customers are not able to be as competitive as they could have been in the absence of discrimination and, therefore, consumers are deprived of the benefits of having an independent small business sector that can compete vigorously with a dominant corporation.

Accordingly, The QRTSA advocates that a new prohibition against coercive or intimidating conduct by entities having a substantial degree of market power be inserted into the Trade Practices Act. A provision of this kind should then result in easier persecution of this type of activity under the Act. Activity such as that reportedly engaged in recently by Colgate Palmolive, and Westerns, at the apparent instigation of Woolworths.

The QRTSA would also submit that Cole's Myer's plans to introduce reverse logics (please see attachment 2) would also fall into the category of unfair use of market power if as indicated in the attached article Coles Myer went ahead with this proposal, Woolworth's would as indicated follow suit. Where then would manufactures recoup the estimated (by Woolworth's) cost of $130 million. We suggest it would be from the independent sector.

In addition to the aforementioned examples there is a further recent occurrence which amply demonstrates the need for changes to the Act in order to curb the often coercive and or intimidating conduct by entities (in the case of Coles Myer) having a substantial degree of market power.

Following the Victorian Governments decision to gradually eliminate the cap on packaged liquor sales in that state, Coles Myer CEO John Fletcher was quoted as stating the following "Coles Myer was going to start using its size to become more aggressive". He singled out retailers in the liquor sector and was further quoted as saying that small independent retailers would feel Coles Myers market power. He said "the consequences of that is I am sure that there will be more independent liquor store operators that, with the shackles off (Coles Myer) it may be time to think about selling".

Divestiture for repeated intentional breaches of s 46

Given that the present s 46 focuses on intentional anti-competitive conduct by an entity having a substantial degree of market power, it is readily apparent that the present s 46 deals with unilateral abuses of market power. That is, the entity has such market power that it can use that power to eliminate competitors, deter entry into a market or deter competitive conduct. By aiming to achieve such purposes, the entity is clearly trying to lock in or cement its market dominance. If that entity will do anything to prevent threats to its market dominance, then there is no guarantee that it will behave in a pro-competitive manner towards customers. Consumers face the risk of higher prices and less service as the entity destroys competitors, prevents entry of new competitors or deters competitive conduct by competitors.

In short, if an entity with a substantial degree of market power cannot be constrained by competitive pressure from rivals or the possibility of new entrants, then it would be in the public interest for some other mechanism to be available to undo the anti-competitive effect of a highly concentrated market. There will be a point at which a market is so concentrated that the only way to deal with repeat perpetrators of anti-competitive conduct is to consider their break up. While clearly a dramatic remedy, it is for the court to determine where that point lies. At present, the courts do not have that opportunity and, accordingly, entities having a substantial degree of market power are only constrained by industry specific regulation or monetary penalties - penalties that, while appearing to be significant, pale into insignificance if the entity faces no competitive constraints.

While a divestiture power for breaches of s 46 may never be used, that in itself is no reason for not adding it as a remedy under the Trade Practices Act. Indeed, its mere addition as a remedy would send a clear signal to entities having a substantial degree of market power that it might come unstuck if it goes too far. Ideally, that should inject a degree of self-restraint that is presently missing in relation to possible breaches of s 46.

The factors, which could be included in a new s 46(8), include:

- Whether the conduct was part of a policy adopted by the entity or whether it was an isolated occurrence;
- If the conduct was part of a policy adopted by the entity:
  - how was the policy developed and who was involved in its development;
  - were there clear lines of authority in the implementation of the policy;
  - was the policy publicly known;
  - what was the stated intention of the policy;
  - were there discrepancies between the stated intention of the policy and the behavior of those giving effect to the policy;
  - did the policy only target those markets in which the entity faced vigorous competition from a competitor;
  - did the entity adhere to the terms of the policy;
  - was the policy uniformly applied or only applied on an ad hoc basis;
  - did the policy involve the entity selling goods or services at unreasonably low prices or below the cost of acquisition or production, plus normal selling costs;
  - did the policy involve the entity requiring or encouraging another party to discriminate between comparable customers;
  - was the policy used in an intimidating or coercive manner;
  - was the policy in place since the entity's inception or was it formulated or implemented after the entity attained a substantial degree of market power;
  - does the policy place the entity at a competitive advantage with respect to its rivals;
  - what was the impact (or would be the likely impact) of the policy on the level of competition in any market in which the entity is a participant; and
  - was the entity aware or in a position to be aware of this impact.

- If the conduct involved an isolated occurrence:
  - did the conduct occur only in those markets in which the entity faced vigorous competition from a competitor;
  - did the entity sell goods or services at unreasonably low prices or below the cost of acquisition or production, plus normal selling costs;
  - did the conduct involve requiring or encouraging another party to discriminate between comparable customers;
  - was the conduct part of a pattern of conduct;
  - how did the entity behave in similar circumstances in the past;
  - was the conduct intimidating or coercive in nature;
  - was the conduct engaged in since the entity's inception or was it engaged in after the entity attained a substantial degree of market power;
  - did the conduct place the entity at a competitive advantage with respect to its rival;
  - what was the impact (or would be the likely impact) of the conduct on the level of competition in any market in which the entity is a participant; and
  - was the entity aware, or in a position to be aware, of this impact.

In short, the inclusion of a list of factors would be an attempt to introduce a level of objectivity in what has been a difficult issue.

Prohibiting coercive or intimating conduct by entities having a substantial degree of market power

The QRTSA is concerned that as corporations become even more dominant and industries become more concentrated, they are more likely to behave in a coercive or intimating manner towards those with which they deal. This is a particular issue where the dominant corporation is a substantial customer of a smaller, or even large, supplier. Suppliers may be coerced or intimidated into doing things that they would not have otherwise done. For example, suppliers may be coerced or intimidated into withdrawing discounts offered to customers other than the dominant corporation. Withdrawal of such discounts following approaches by a dominant corporation is anti-competitive as it deprives consumers of those discounts.

Collective bargaining by small businesses

Given that the independent small business sector is fragmented and, unable, because of the operation of the Act, to collectively bargain with dominant corporations who acquire their goods or services, or from whom they acquire goods or services, Small Business is a strong supporter of an authorization process that is user friendly and offers timely immunity from the Act for collective bargaining arrangements.

The QRTSA is a strong advocate of an authorization process that allows entities without a substantial degree of market power (namely small businesses) to have, in relation to collective bargaining arrangements and subject to ACCC disallowance within 21 days, the immediate benefit of the immunity offered by an authorization. Under this model, small businesses (entities not having a substantial degree of market power) applying for an authorization of a collective bargaining arrangement would upon application have immediate protection, subject only to the ACCC's ability to withdraw the protection within 21 days on the basis that the arrangement is of such an anti-competitive nature that a more thorough assessment is required as to whether or not the arrangement is sufficiently in the public interest. This more thorough assessment would take place as part of the ordinary course of an authorization application.

The model advocated by Small Business in relation to collective bargaining authorizations does not remove the ACCC's ability to protect the public interest, but rather to streamline the process and ensure timely immunity under the Act. Once the collective arrangement is protected by the authorization, The QRTSA strongly advocates that the protection remain in place until such time as it may be overturned on appeal by the Australian Competition Tribunal.

The QRTSA would further recommend (in addition to the streamlining of the authorisation process) a dramatic reduction in the authorization application fee. Few small businesses, even collectively can afford the current fee structure.

Increased penalties for anti-competitive conduct provisions

Given that there continue to be breaches of the prohibitions against anti-competitive conduct, it is readily apparent that existing monetary penalties under the Act do not provide sufficient deterrence against possible breaches of the Act. In these circumstances, The QRTSA is a strong advocate of setting monetary penalties by reference to a percentage of a corporation's group turnover. This percentage may be set at 10%, in line with the EU, and provides considerable deterrence to any corporation contemplating breaches of the Act or not taking adequate steps towards implementing an appropriate trade practices compliance program. It is particularly noteworthy that the setting of a penalty on a turnover basis is consistent with international practice. Clearly, Australia is currently out of step with international efforts to stamp out anti-competitive conduct.

Jail sentences for intentional collusive conduct by entities having a substantial degree of market power

The provision of adequate deterrence against anti-competitive conduct is a key issue in the enforcement of the Act, particularly in relation to entities having a substantial degree of market power. Without sufficient deterrence the task of enforcing the Act is made unnecessarily difficult. Given that the promotion of compliance is integral to effectiveness of the Act, Small Business is a strong supporter of any initiative aimed at providing clear deterrence against anti-competitive conduct, especially anti-competitive conduct that is highly organized in its intention of ripping off consumers. The QRTSA views criminal penalties in cases involving intentional price fixing, market sharing and bid rigging by entities having a substantial degree of market power as essential to the promotion of compliance with the Act.

No need for a supervisory Board to oversee the ACCC

Small Business would strongly oppose proposals by big business for the establishment of a supervisory board for the simple reason that such a board would amount to placing the poachers in charge of the gamekeeper. The gamekeeper (the ACCC) has been given a specific role by Federal Parliament to enforce, in the public interest, prohibitions against anti-competitive conduct (poaching). In these circumstances, any suggestion of putting the poachers (those who engage in anti-competitive conduct) in a supervisory position defeats the purpose of having an independent regulatory body (already accountable to the Courts and Federal Parliament) enforcing the Trade Practices Act without fear or favor.

Given that the ACCC is already accountable to the Courts in every legal proceeding that it launches and Federal Parliament (especially the House of Representatives Standing Committee on Economics, Finance and Public Administration), Small Business would be strongly opposed to any form of supervisory board.

Where there are any concerns with the use of the Media by the ACCC, The QRTSA is confident that the existing accountability to Federal Parliament provides an appropriate mechanism for dealing with such concerns. QRTSA is also confident that future concerns can be minimized by the ACCC making publicly available in one document the ground rules by which it adheres to in dealings with the media. This document could encapsulate a Code for Media Dealings, setting out how the ACCC deals with the media. Any concerns with ACCC adherence to the Code for Media Dealings could be raised with the House of Representatives Standing Committee on Economics, Finance and Public Administration.

Employment

When considering the issue of potential changes to the Trade Practices Act in the areas of "misuse of market power", banning of "predatory pricing", "like terms for like customers" plus the other issues dealt with in this submission consideration needs to also be given to the impact on employment.

The QRTSA would suggest that the current provisions of the Act do nothing to prevent the substantial lessening of competition in the relevant market.

Activity by the major retailers is designed to increase their market share at the expense of the independent sector.

In grocery the subsequent effect on employment is dramatic.

A few years back a study undertaken by Doctor Ken Houghton (an economist) of COSBOA produced quite startling figures which to our knowledge have never been refuted.

They were that for every one percent shift in market share nationally from small to large firms there is a loss of 1800 jobs.

The committee in its deliberation regarding the total issue of possible changes to the Act also needs to have regard to consumer interests (paragraph 2, terms of reference).

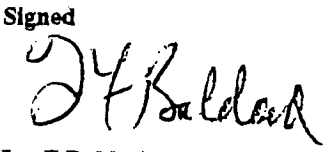
The QRTSA would submit that employment considerations are directly inter-related with consumer interests and therefore deserve the full consideration of the committee.

Summary of Recommendations

- Introduce an "effects" test to s46.
- Prohibit specific forms of anti competitive conduct.
- Prohibit anti competitive below cost or unreasonable low pricing.
- Prohibit anti competitive price discrimination.
- Introduce reforms to deal with the issue of anti competitive creeping acquisitions.
- Introduce a new section paragraph J in s50(3) to take into account the impact of an acquisition on the viability and competitive position of small business.
- Fast track process in merger cases.
- Introduce a list of factors to be considered by the ACCC when assessing issues relating to the "conduct" provisions of s46.
- Prohibit coercive or intimidating conduct by entities having a substantial degree of market power.
- Introduce "divestiture" for repeated intentional breaches of s46.
- Revamp the authorization process and fee structure for collective bargaining by small business.
- Increase penalties for anti competitive conduct provisions.
- Consider jail sentences for intentional collusive conduct by entities having a substantial degree of market power.

We would thank the committee for the opportunity to make this submission.

Signed



Ian F Baldock
Executive Director

ADDENDUM 1

from its 52-week high.
"The FBI is looking ... to determine if there are any criminal violations for potential prosecution," says FBI spokeswoman Dawn Kenney. "There are a lot of documents to review."
Neither the FBI nor Kmart would comment on specifics. But Kmart briefly mentioned the probe in its an annual statement filed late Wednesday, in which the company also said it posted a record loss of $2.4 billion in 2001. Kmart spokesman Jack Ferry says the retailer is co-operating with the US Attorney's Office for the Eastern District of Michigan and the Securities and Exchange Commission. Kmart is conducting an internal investigation, too, Ferry says.
The federal investigation is believed to centre on potential accounting fraud and other financial matters. It was spurred by a series of anonymous letters alleging wrongdoing by former CEO Charles Conaway and other executives. Conaway could not be reached for comment.

Carrots - but not as we know them

CNN reports that carrot growers in England have grown purple carrots, which are said to be their true colour, and will be selling those in Europe for the first time in five centuries. Also on the horizon are black carrots, white carrots and a whole array of colours, which should be available by next year. Purple carrots, which will retain their orange-coloured centre, will appear on the shelves of Sainsbury's supermarkets in England at a slightly higher price than the more familiar version. A bag of purple carrots will cost around £1 ($3) compared to 65p ($2.40) for orange ones.

UK: Report calls for ban on supermarket loss leaders

NEW laws are needed to stop supermarkets selling essential items such as bread and butter at a loss, the author of a report in *The Independent* states. According to campaigners the supermarkets' practice of selling own-label products at a loss to attract customers into their stores has added to the pressure on corner shops who rely on customers buying their essential items.
According to NAMNews' Professor Paul Dobson, of Loughborough University, who gave his findings to the Federation of Bakers' annual conference in London, said he would like to see Britain following European countries such as France, Germany, Spain, and Portugal in banning the practice, the newspaper reports.

UK: Asda outlines plans for new stores

ASDA has announced plans to open eight new stores in the UK during the remainder of 2002, and create some seven giant supercentre stores, NAMNews' reports.

20/05/02

ADDENDUM 2

Australian Financial Review (National Metro – Circ 90,974)
29 May 2002
Page: 48 ID: 928 QRTSA

Woolworths at odds with Coles on supply

Sue Mitchell

A row is brewing between Woolworths, Coles Myer, their suppliers and the grocery industry's peak body over controversial changes in supply chain practices that Woolworths estimates could cost manufacturers an extra $130 million a year.

One of Woolworths' most senior executives, chief general manager of supermarket buying and marketing, Barnie Brookes, yesterday lashed out at plans by Coles Myer to introduce reverse logistics and outsourcing of planograms, saying they would "lower the bar" and reverse some supply chain gains of recent years.

Mr Brookes warned the industry that if Coles Myer introduced these changes, Woolworths would be forced to take action of its own to ensure a level playing field.

Mr Brookes did not specify what action Woolworths would take. But people in the industry said they believed Woolworths was considering charging its suppliers extra if Coles Myer managed to push costs back onto suppliers.

Coles Myer will soon start a pilot study in Victoria with the industry's peak body, the Australian Food and Grocery Council, aiming to assess the impact of reverse logistics. It is expected to be completed early next year.

KEY POINTS

- Woolworths says plans by Coles will reverse supply chain gains.
- It says it will have to take action to ensure a level playing field.

Under reverse logistics, damaged, slow-selling and deleted products would be removed from stores and sent to a central point. From there, suppliers would be responsible for collecting and disposing of the goods.

Under planogram outsourcing, the design and layout of stock in stores, now handled by suppliers in collaboration with the retailer, would be handed over to planogram specialists, who would bill suppliers for their work.

The executive director of the AFGC, Harris Bolton, said the council neither supported nor opposed the proposed changes at this stage. It would participate in the study to evaluate properly whether the changes were viable.

The study would not make recommendations but give its members information and allow them to make their own decisions.

Mr Brookes told the annual Foodweek industry convention that reverse logistics was a "primitive" way for stock to be managed and would cost suppliers about $100 million a year, while outsourcing planograms would remove responsibility for layout and merchandising from suppliers, retailers and their merchandisers, costing suppliers $30 million annually.

"The astonishing part from Woolworths objective, and I put to you from an industry perspective, is that deleted lines become your responsibility after you've sold them and been paid for them when previously it was a retailers' responsibility," Mr Brookes said.

"To me, this is a marvellous example of moving the costs from the retailer back to the supplier and takes this reverse logistics back to the late 1980s and '90s," he said.

"From Woolworths' point of view, we can't give a free kick to our competitors. If reverse logistics ... is successful, then we will endeavour a similar program but one with less supply chain imposts."

Outsourcing planograms was not on its agenda and in the past 10 years it had been cutting costs of store layouts and merchandising, Mr Brookes said.