# DAWSON COMMITTEE

# TRADE PRACTICES ACT REVIEW

# MASTER GROCERS ASSCOIATION OF VICTORIA LIMITED

## INTRODUCTION

The MGAV is a trade association representing the interests of the independent supermarket owners of Victoria. This encompasses some 600 family owned and operated businesses across the State. The trading names of Foodworks, IGA and Foodway(AUR) make up the MGAV membership base, with all banner names actively encouraged to have representation and involvement with the MGAV Board. All independent supermarkets across Victoria are members of the MGAV.

The MGAV is a shareholder member of NARGA and fully supports the recommendations put to the Trade Practices Review by NARGA on behalf of the Australian independent retail sector. To that end the key trade practices advocated by NARGA are included in this submission.

However the MGAV seeks to reinforce and highlight the following specific issues.

The MGAV members are based throughout the suburbs of Melbourne, and rural and regional Victoria, including many towns where the major supermarket chains are not represented. In these towns the local grocery store is the heart of the community providing vital services and employment opportunities. The educative role our businesses play in the development of teenagers should not be underestimated. Particularly in regional areas the independent supermarket owner will have many more teenage employees on the books than is actually required, as being the largest and the primary employer in a township brings this pressure. The workplace, community, business skills and experience young people gain from part time employment cannot be gained at school.

It is widely accepted that the local supermarket is the first to assist local bodies with manhours, monetary or stock donations, and assistance with cost price goods when local functions or events are held.

Profits and the many (sometime less tangible) benefits from locally owned supermarkets remain in the township, are spent and utilised within the township, and help the development of other local businesses. A thriving local supermarket will assist and support the development and growth of all smaller businesses within the township as more people will remain in town for shopping and services.

It is therefore vital that these stores are competitive so as to maintain a vibrant local economy where the money and benefits generated remain in and support the community. A viable and thriving small business network within a township ensures the diversity of that township, provides employment, development of youth, supports other businesses and industry within the town, and provides a sound economic basis for local government infrastructure.

However the two major grocery chains now dominate the supermarket sector, *and* control the future horizon.

The MGAV recognises that this review of the Trade Practices Act is a watershed for Australian business, large and small. If the outcome is that we continue along the current path, small to medium sized businesses will be marginalized to the point where the consumer will suffer adverse competitive conditions.

It is folly for either of our two major food retailers to suggest that they could provide a competitive environment. One only has to observe duopolies such as that which existed with QANTAS and Ansett to understand that it is invariably the smaller operators in all industries that drive price points in addition to being the basis for most customer service initiatives that are later adopted and claimed by the majors as theirs.

The MGAV does not seek special concessions or allowances. We simply seek transparent accountability and fair and reasonable business practice. We seek to empower the ACCC, or similar body, with sufficient legislative strength in order that they may carry out their roles without having to return time and time again to the civil courts in order to pursue investigations. Large enterprises should not be able to prevent 'due process' simply because they can afford the expensive and extensive legal procedure.

The MGAV accepts that large enterprises will enjoy better buying prices from time to time due to volumetric considerations on the part of suppliers. However we do not accept that when the volume is similar, that the more favourable trading terms should always remain in favour of the major retailers.

Additionally, the MGAV cannot accept the practice of small independent businesses being denied immediate access to new line releases or new technologies, both practices being common place and a disadvantage to small business and consumers alike.

The MGAV seeks a strong and flexible regulator such as the ACCC due to a faith in that body's ability and willingness to be fair and even handed.

The recommendations that this review makes to the Federal Government, along with the Government's response will shape the business landscape in Australia well into this new century. It will either be a diverse and vibrant mix of small and large competitors freely and fairly providing the Australian consumer with choice, convenience and service, or it will be a duopoly with consumers restricted in range, and dictated to on price within a culture where suppliers are forced to work within minimum staffing and service levels to control their own costs in order to supply a product to a retail body at a price prescribed by that body itself.

## MGAV Issues

A competitive independent sector as a third force is critical to the maintenance of genuine competition within the retail grocery industry. Measures to uncover, investigate, address, and where necessary punish anti-competitive conduct are an integral part of maintaining that third force:

- The MGAV enforces the NARGA claim that compliance costs tend to fall disproportionately on smaller compared with larger businesses. The low profit nature of the retail grocery industry creates a significant disadvantage to independents as compliance costs result in a cost disadvantage when competing with the major supermarket chains;

- MGAV members need to be able to rely on a market place driven by like terms for like customers. Where MGAV members make comparable purchases from suppliers, MGAV

members reasonably expect to buy their supplies at the supplier's best price. If a supplier is selling to a competitor at a cost price lower than the cost price MGAV, members expect to be entitled to purchases at the same cost price where they make comparable purchases. In order to be a competitive third force the independent sector needs to be able to acquire its supplies at comparable prices (when purchasing in comparable amounts) to those obtained by the two major supermarket chains.

- Suppliers that discriminate against comparable customers must be identified and any anti-competitive price discrimination appropriately dealt with under the *Trade Practices Act*. The ACCC should have the power to confidentially investigate claims and complaints made against this practice. Where independents do not receive comparable prices to those received by the major supermarket chains the independent operator cannot compete with the chains. Comparable supply prices translate into competitive pricing for consumers. This price discrimination between comparable customers can be a demand made on manufacturers and suppliers in order to regulate the market. A competitive third force always sees consumers benefit from more choice, better prices and services and protects consumers and manufacturers from price competition limited to an agenda set by the major chains. The MGAV seeks a regime of absolute transparency in manufacturer-supplier-retailer pricing, deal, and support services costing. MGAV members seek to be fully aware of those manufacturers and suppliers not dealing fairly and equitably in terms of like terms for like customers.

- Pricing that is below cost in selective locations to strategically target an independent competitor must be dealt with under the *Trade Practices Act*. This practice is depicted as being 'competitive' and to the 'benefit of consumers' when in fact it has the specific intent of eliminating a competitor in the short term, thus creating a long term objective of allowing the remaining supermarket to price in an extremely uncompetitive manner. The MGAV requires a mechanism that prevents location specific predatory pricing. The independent sector (and specific individual sites of the independent sector) should not be the victim of ongoing below cost pricing or any other predatory tactics.

- The measures for determining any misuse of market power need to be based on an **effects test** to more accurately demonstrate the impact on a business.

- Undermining the independent sector, with the log term objective of elimination, is not in the consumer's best interest. The independents sector provides choice, convenience and diversity in the market place. The MGAV agrees that acquisitions of independents by the majors should be overseen by the ACCC to ensure no detrimental effect to the sector as a whole.

# 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, ie where it is highly perishable or the product is a discontinued line).

**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, ie 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 scritinised, 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 unlevel playing field favouring dominant corporations.

Small Business 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. Small Business 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 authorised 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 authorised 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 sustainably 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."

Small business 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, Small Business 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, Small Business 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.

Small business 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 Small Business strongly supports the retention of the purpose element under s 46, Small Business is 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.

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 behaviour 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**

Small Business is concerned that as corporations become 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.

Similarly, a supplier may be coerced or intimidated by a dominant corporation into treating the dominant corporation more favourably 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 favour 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, Small Business 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.

**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.

**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.

Small Business 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, Small Business strongly advocates that the protection remain in place until such time as it may be overturned on appeal by the Australian Competition Tribunal.

**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, Small Business 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. Small Business 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 favour.

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, Small Business is confident that the existing accountability to Federal Parliament provides an appropriate mechanism for dealing with such concerns. Small Business 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.

## TERMS OF REFERENCE

## REVIEW OF THE COMPETITION PROVISIONS OF THE TRADE PRACTICES ACT 1974

Effective competition laws contribute to the productivity, efficiency and growth of an open, integrated Australian economy.

The Government considers it is timely to review some key provisions of the Trade Practices Act 1974 (`the Act') in view of the significant structural and regulatory changes that are occurring in Australia that impact on the competitiveness of Australian businesses, economic development and affect consumer interests.

In establishing a review, the Government is aware of concerns, among other things:

- that Australian businesses increasingly face global competition and need to compete locally and internationally;
- that excessive market concentration and power can be used by businesses to damage competitors; and
- the need for businesses to have reasonable certainty about the requirements for compliance with, or authorisation under, the Act.

1. The Committee is to review the operation of the competition and authorisation provisions of the Act, specifically Parts IV (and associated penalty provisions) and VII, to determine whether they:
(a) inappropriately impede the ability of Australian industry to compete locally and internationally;
(b) provide an appropriate balance of power between competing businesses, and in particular businesses competing with or dealing with businesses that have larger market concentration or power;
(c) promote competitive trading which benefits consumers in terms of services and price;
(d) provide adequate protection for the commercial affairs and reputation of individuals and corporations (in this regard, the Committee may examine the processes followed by the ACCC and the laws under which the ACCC operates, but is not to reconsider the merits of past individual cases);
(e) allow businesses to readily exercise their rights and obligations under the Act, consistent with certainty, transparency and accountability, and use compliance or authorisation processes applicable to their circumstances; and
(f) are flexible and responsive to the transitional needs of industries undergoing, or communities affected by, structural and/or regulatory change and to the requirements of rural and regional areas.

2. The Committee is to identify, where justified, improvements to the Act, its administration and/or additional measures to achieve a more efficient, fair, timely and accessible framework for competition law.

3. The Committee may consider other aspects of the Act and the recommendations of reviews currently underway or previously completed where relevant; but is not to include in this review a direct consideration of Ss 45D-45EB, ss. 51(2) and (3) of Part IV, or Parts IIIA, X, XIB or XIC.

4. In performing its functions, the Committee is to advertise nationally, consult with key interest groups and affected parties, receive public submissions, and take into account overseas experience. As the States and Territories each apply the competition provisions of the Act as their own laws, the Committee should seek the views of the State and Territory Governments.

5. The Committee is to protect the confidentiality of the affairs of individuals and companies during the course of its deliberations.