# AUSTRALIAN DEMOCRATS

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

## July 2002

# Preamble

This submission by the Australian Democrats is not intended to be a full or comprehensive one.

We intend two things: one, to suggest areas of concern that we would like the Review to consider and deliberate on in much greater depth; and two, to use the eventual Report of the Review to assist us in determining our position on any legislative outcomes or policy directions the Government may subsequently propose.

We are guided in our present approach by two dominant observations, namely that

- The Trade Practices Act 1974 as amended (TPA), and the Australian Competition and Consumer Commission (ACCC), have achieved much greater levels of competition and consumer protection than would have occurred in their absence;
- The TPA can deliver greater and freer competition, and greater consumer benefits, if it is strengthened further.

In our view, there is a real failure to understand that if you want more competition, if you want a freer market, if you want current artificial political constraints on certain industry sectors lifted, if you want greater consumer confidence in the market – then you need a strengthening of the Act, not a weakening of it.

Strengthening the Act has a number of threads. Missing from the Act are a number of elements that are successfully used in foreign jurisdictions- such as USA anti-trust laws, or UK scale or complex monopoly mechanisms. Also missing from the Act is sufficient attention to social and environmental needs, in view of their relevance to modern public policy.

Providing adequate powers to break up corporations is necessary in the public interest. We find it strange that many in business laud the dynamism of competition in the USA, but resist the notion of divestiture (anti-trust) powers. It is as if the contribution of those laws to an effective market can somehow be ignored. Anti-trust laws in the USA have been a vital power providing a restraining corrective effect and contribution.

In passing, we will observe that we have judged the public campaign by some elements of the big business sector (not all, by any means) to weaken the TPA, as predictably self-serving. Well-publicised failings in business practices and ethics do not lead us to view the business environment with complacency. Quite the reverse. More regulation is needed in a number of areas, including in the areas of criminal sanction.

We have attached as an Appendix a more detailed body of work that reflects important views we have on the TPA. That document is the Australian Democrats August 1999 Supplementary Remarks to the Report by the Joint Select Committee on the Retailing Sector.

# Approach

At the outset the Democrats accept the proposition that the TPA would benefit from further reform and additional powers. We do not believe that the structure of the Act needs significant change.

Although it rightly has elements that are industry- specific, or oriented to 'black letter law', we remain of the view that the TPA should largely be principles based, confer a high degree of flexibility and discretion on the ACCC, and have general application across society and the economy.

We do however suggest that the Act's philosophical underpinnings need to reflect the reality that Australian social, economic and environmental values and policies are intertwined. Therefore an Act that promotes fair and effective competition and consumer protection, must adequately address relevant social and environmental considerations as well as economic ones.

As an example, pricing cannot be considered in isolation of the effect of externalities. The long-term costs to the society and the environment of the failure to apply full costing, or to disclose unsafe, unhealthy or unsustainable practices in the provision of goods and services, have to be addressed.

The object of the TPA is to 'enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection.'[1] The Democrats believe that the notion of 'welfare' must take into account not only economic but also social and environmental factors. Australia's competition and consumer protection laws must seek to deliver the maximum economic, social and environmental benefits for this generation and future generations.

The Democrats believe it is important to ensure that the TPA continues to provide an effective mechanism for balancing the needs of large, medium and small firms, and consumers, but that must be done with a long-term perspective in mind, and with a view to benefiting society as a whole.

# Strengthening the ACCC

This section addresses some of the key issues in competition regulation. In particular, it outlines the Democrats' views on the issues of divestiture, the misuse of market power and penalties for collusive behaviour.

Free and fair competition needs a strong regulator empowered by a strong Act. It needs an agreed national Competition Policy, but one that accords with social and environmental values, not just economic values; and one that recognises that industries and regions have a value worth more than the sum of the profits to be made out of them.

[1] Section 2

The Democrats believe that the TPA must be strengthened:

- To accompany good existing powers restraining anti-competitive mergers and acquisitions, the ACCC needs powers to address existing dominant monopolies, including an undue concentration of market power achieved by small 'creeping' acquisitions. The ACCC or the Courts should be given a power to order divestiture where an ownership situation has the effect of materially limiting or substantially lessening competition.

- The prohibition against misusing market power to damage a competitor, already in the Trade Practices Act, needs to be strengthened. A business alleging another business has engaged in anti-competitive conduct must presently show there was an intention to eliminate competition. Proving that intention is notoriously difficult because it is difficult to get behind the 'corporate shield'. Two possible measures could overcome this difficulty and still maintain fairness. The first is to remove the requirement to show intention and to instead show that the actions of the alleged perpetrator have had the effect of damaging competition. The second is to change the onus of proof where the ACCC pursues the matter. The onus would fall on the defendant not the applicant to show that there was no purpose of eliminating competition.

- A system of protecting and rewarding whistleblowers who provide evidence about collusive conduct should be considered. Rewards funded out of fines would provide both a real incentive to encourage disclosure and act as a real disincentive for those considering undertaking illegal activity.

- The law should provide for prison sentences for individuals who are guilty of serious collusive behaviour. The scale of some collusive agreements is enormous, with profits from such behaviour running from millions to billions of dollars. While large fines play an important role in deterrence, it is companies rather than individuals who foot the bill. Prison sentences imposed on senior executives, an approach in use overseas, would provide a much stronger deterrent.

- The ACCC should be given a power to grant 'cease and desist' orders against companies involved in anti-competitive behaviour. Such a power would allow intervention on behalf of small firms who are being harmed by the behaviour of a large competitor. Rather than wait years for a court to determine the legality of a firm's behaviour, a cease and desist power would allow early intervention, before the competitor is driven out of business.

- It needs to be easier for small businesses and individuals to complain and pursue their rights through the provision of more information and better direction on how to pursue a complaint. Too many consumers and small businesses are still unaware of their rights, or unaware of who to approach to pursue their complaints. While creating new consumer centres and ombudsman's offices is a step in the right direction, individuals and businesses are still confused over whom to turn to. The Democrats call for the formation of a 'one stop shop' for all consumer and small business complaints. The 'one

stop shop' would take calls from concerned individuals and transfer them to the appropriate organisation, regardless of the level of government that is responsible for the particular issue.

In August 1999 the Joint Select Committee on the Retailing Sector made numerous recommendations to strengthen the Trade Practices Act. The Democrats' supplementary report provides detailed information about our views on competition regulation, especially as it relates to small business. That supplementary report is attached as an appendix to this submission.

## ESD and the TPA

This section is concerned with the capacity of the TPA to reinforce the Government's elsewhere-stated position of support for integrating into policy and legislation the principles of Environmentally Sustainable Development (ESD). In particular, the issues of protecting emerging industries from unfair competition from incumbents in receipt of subsidies are of significant concern.

The Australian Democrats consider that the TPA should be updated to address anti-competitive market conditions and behaviours that are impeding the emergence of ecologically sustainable industries, businesses and business processes.

Firstly, ecological sustainability issues were not envisaged when the TPA was drafted in 1974. The Act needs to be updated to integrate ESD considerations into the fabric of the Act, such as within the Objects clause and definitions.

Secondly, the Act needs to ensure fair competition between old industries and emerging ecologically sustainable industries, and finally, the Act should help deliver the public benefit of our economy shifting towards ecologically sustainable business practices.

Our concerns centre on anti-competitive conditions that arise from the inadequate (or non existent) pricing of environmental costs. The failure to appropriately price these costs bestows an anti-competitive advantage on environmentally harmful businesses. This anti-competitive behaviour takes two key forms.

- Firstly, business practices that externalise environmental costs are anti-competitive. They give environmentally harmful businesses a competitive advantage over businesses that carry their environmental costs in full, or that develop production processes that minimize environmental harm.

- Secondly, government practices that give businesses subsidised access to environmental resources. These subsidies erode the position of competitors. The situation where some industries get cheap access to non-renewable resources, while their competitors have to pay considerably higher prices for recycled inputs erodes competition and prevents the emergence of industries and productions processes that are in the broader public interest.

A third and emerging issue relates to the release of genetically modified organisms and the potential of genetic contamination to have major commercial impacts on primary producers, particularly those who depend on a GE free product, such as organic producers. It is suggested that the Review consider this issue as part of its review of restrictive trade practices.

The Australian Democrats wish to encourage the Committee to consider a range of trade practices issues, from the classically economic, to the social and environmental. We draw particular attention to a number of issues related to ESD because we believe that greater attention to this area is long overdue.

Despite a generation of commitment, study and review, the principles of ESD are still poorly integrated into Australia's regulatory fabric. In part, the difficulty has been a definitional one. In part, there has been sustained resistance from portions of the business community.

A recent report from the Prime Minister's Science, Engineering and Innovation Council (May 2002), Australian *Industry's Sustainable Competitiveness* highlights how important that integration is:

*"For many Australian companies, access to overseas markets depends not just on price, quality and timely delivery, but increasingly on the reputation of the company in the areas of environment and social responsibility, and on the sustainability attributes of its products".*

This Review of the Trade Practices Act offers a significant opportunity to analyse the need for the integration of ESD concepts into a piece of legislation central to business, industry and the consumer. The Democrats urge the Committee to do so.

## Accountability provisions: Government Activities and the TPA

This section deals with issues of openness and accountability in Government dealings with the private sector and the public. In particular, the Democrats are concerned about the anti-competitive aspects of a range of government behaviours, which have the effect of providing a commercial advantage to individual companies through tailor-made legislation, regulation or other arrangements.

The exclusion of most government activities from the TPA except those that are businesses is of concern to the Australian Democrats. A number of government activities involve business activities outside the core function of government but are not subject to the TPA. Some of those activities serve the public interest and should remain exempt from the TPA. Some, however, are inextricably connected to business activities, both of government and industry.

This concern relates to both Part IV and Part V of the TPA. Exclusive government arrangements, whether by contract, agreement or licensing provisions are potentially anti-competitive in that they may provide specific advantage to a particular company that is not available more generally and is not an agreement with a public interest

purpose. Additionally, accountability and disclosure requirements for these activities are minimal and consumer protections are significantly eroded as a result.

The Australian Democrats recommend that the scope of the TPA's exclusion of government activities should be reviewed in relation to both the underlying government activities and the accountability/disclosure requirements that attach to those activities.

Activities that should be included in that review include:

- Deeds of agreement, particularly those that do not exist under a regulatory process and do not provide for any third party involvement or review[2];
- Company specific legislation, particularly legislation designed to facilitate a company's activities or to exempt a company from other legislative requirements[3];
- Plans, permits or authorities relating to the use or removal of publicly owned resources, particularly where removal occurs with no cost recovery or resource rent[4].

It is recommended that the Review consider integrating the principles of the Aarhus Convention into the consumer protection provisions of the TPA.

The recently negotiated Aarhus Convention on Access to Information, Public Participation and Access to Justice in Environmental Matters is based on principles both of ESD and of accountability. It is designed to help protect the right of every person of present and future generations to live in an environment adequate to his or her health and well being. Kofi Annan, Secretary-General of the United Nations commented that:

*"It is by far the most impressive elaboration of principle 10 of the Rio Declaration, which stresses the need for citizen's participation in environmental issues and for access to information on the environment held by public authorities."*

## Consumer protection provisions of the TPA

This section outlines what the Democrats see as necessary improvements to the consumer protection provisions of the TPA. In particular, the Democrats believe that the TPA could play a much stronger role in ensuring that consumers are made better aware of the health and environmental risks associated with the use of products, for example by stronger disclosure provisions.

[2] See, eg. Port Hinchinbrook Deed of Agreement. In excess of 50 breaches of the Deed were recorded and reported with no action taken by the Government, as signatory to the Deed, including no response provided to the reporting party; see also the ACT *Public Access to Government Contracts Act* 2000 (PAGC Act).

[3] See, eg. The *Townsville Zinc Refinery Act*, which exempts certain ancillary industries on the refinery land from impact assessment requirements

[4] See, eg. The commercial trawling industry pays a licence fee but no resource rent at all, either in Commonwealth or State waters.

The consumer protections in the TPA are sound in principle but in practice are somewhat limited in scope. In keeping with both the principles of the Aarhus Convention and the need to integrate ESD principles into the TPA, the Democrats recommend that the consumer protection provisions of the TPA be broadened in some important ways.

## *Environmental Claims*

For products making environmental claims the 1992 proposed amendment to the Fair Trading Act in Victoria should be followed. The provision provided a definition of 'environmental claim' and required the person making a claim to prove that it could be satisfied and quantified.

An 'environmental claim' was defined as 'a representation that goods, their use or their disposal:

- are beneficial to the environment;
- do not affect the environment; or
- have no or only limited affect on the environment in itself or if used in a particular manner'.

The bill was strongly opposed by industry because it reversed the onus of proof, but this would appear to be a reasonable proposal if a company makes environmental claims. Indeed, the proposal was supported by the 1994 Australian Law Reform Commission review of the TPA.

## *Duty to disclose*

*"Requiring the disclosure of ingredients as has been required in food labelling regulation, does not provide meaningful information about the environmental impacts of products"*.

A. Cornwall, *Regulating Environmental Claims in Marketing,* Competition and Consumer Law Journal, v 3, no 3 April 1996

Currently, most of the disclosure requirements within the TPA relate to accurate labelling of information on products. There is generally no duty to disclose in the TPA. Labelling requirements are regulated elsewhere; it is only the accuracy of the claims made in product information that is subject to the TPA.

Additionally, most of the consumer protections in the TPA are either procedural (eg accurate labelling *per se* even in the absence of a showing of harm) or predicated on a general principle of protecting the health of consumers. Broader environmental and long-term health protections are not currently part of the consumer protection provisions.

The Democrats believe that such protections are an appropriate part of the TPA and effectively integrate some ESD principles into the TPA. For instance, products that claim to be organic may be subject to the TPA. However, foods produced using toxic and potentially dangerous chemicals are not subject to disclosure requirements. The nature of the chemicals used, the risks they pose, the environmental concerns associated with them, should all be disclosed to consumers.

Similarly, product placement and inducement should be subject to a disclosure requirement. This is particularly true of products such as tobacco.

## Higher Education and Part V of the TPA

This section details some possible enhancements for the TPA in relation to the need to protect what are now commonly referred to as the 'customers' of the higher education system.

The Democrats note with concern the anomaly whereby a fee-paying student may seek remedy against a university if it is allegedly engaged in misleading and deceptive conduct (s.52). However, this remedy is not available to a HECS student. The ACCC have the view that in providing educational services to HECS students, institutions do not have a direct fee relationship with the student and thus are not engaged in trade and commerce for the purposes of s.52 of the Trade Practices Act.

The Democrats believe this view does not sit well with significant changes in the university sector in the past decade. For instance;

a) Government policy has emphasized competition, 'user pays' and 'choice', including increasing deregulation of fees;
b) Universities have increasingly labelled students as 'customers' (and students are increasingly accepting this description), and openly compete through scholarships and aggressive marketing. This marketing may make representations as to outcomes, employment prospects, accreditation status, resources, availability of facilities and services and so forth. Some of these claims may be deceptive or misleading.
c) In 2002, the Postgraduate Education Loans Scheme (PELS) was introduced. This is like HECS in that it is an income contingent loan paid through the tax system, although unlike HECS, universities set their own course fees and students pay 100%. PELS is specifically targeted at the postgraduate coursework sector, which is constituted as a market particularly in lucrative MBA and IT courses. (We expect the status of PELS has not been considered in relation to s.52, but suspect it would be viewed the same as HECS in that the Government mediates the fee relationship between student and university.)
d) Since 1998, up to 25% of domestic undergraduate students pay up-front fees in some courses and more than 60% of domestic postgraduate coursework students pay full fees (through PELS or upfront fees).

The Democrats believe it is anomalous that in any given course, some domestic students may appeal to the ACCC but others may not. Yet, fee-paying and HECS students are subject to the same marketing claims by universities.

The inquiry might like to consider the definition of trade and commerce; alternatively, it may want to suggest to the ACCC that it reviews its understanding of the relationship between universities and students. The Democrats believe the small amount of case law on this issue should not preclude the ACCC being able to re-assess its approach.

# Appendix
# Supplementary Remarks to the Report by the Joint Select Committee on the Retailing Sector

**Senator Andrew Murray : Australian Democrats : August 1999**

This postscript to the Report is written because the Committee as a whole has gone as far as it could, and I thought it appropriate to indicate some additional conclusions that I have come to. This should not however be taken as an expression of dissent.

I support the Main Report, which is unanimous and has my endorsement as a member of that Committee.

I wish to thank the Chair, Deputy Chair, and Secretariat for the professional and thorough way in which this inquiry has been conducted.

## A. SUMMARY AND ADDITIONAL RECOMMENDATIONS FOR CONSIDERATION

### 1. The market

This inquiry has been dominated by a war of words between the supermarket superpowers of retailing, and the opposing coalition of independent supermarket and independent wholesaler interests. However, the terms of reference refer to all retail sectors, and it is important that the Main Report's recommendations, and these recommendations, are seen in that light.

To a single supermarket owner in a country town, the market **is** that town, and its catchment area. To one of the major chains, the market ranges from that very town to the whole country. Along with these geographical distinctions go sectoral distinctions. The various specialist categories of retail compete with each other in each retail sector, be they butchers or florists. They also compete with multi-sectoral retail conglomerates covering all retail categories.

The evidence before the Committee was persuasive – that in certain markets and retail sectors, the independent retail sector is under threat. Without detracting at all from the strengths, professionalism and consumer benefits offered by the major retailing chains, we have to face the fact that if a viable independent sector is to be retained in each of the retailing sectors, then competition policy must be tightened up.

I accept the evidence that in a few regional markets within the supermarket sector, the expansion of major retailers has probably reached saturation point. In one or two regions it might even have exceeded it. In other regional markets

it is also evident that there are still opportunities for the major retailers to expand. On the evidence before the Committee, it is difficult to argue that the national market is saturated by the majors, with the logical corollary therefore that *national* country-wide divestiture of the major supermarket chains is required, or that there should be no opportunity for their further growth in *any* regional market.

However, to deal with any retail market concentration problem the regulator needs to have an ability to appropriately define the retail market. The Australian Competition and Consumer Commission (ACCC), has made it clear that the Trade Practices Act (TPA) makes the definition of a market somewhat difficult. Section 50 of the TPA does for instance clearly state that the market can be determined for Australia as a whole, or by State or Territory. Under that definition, a few hundred thousand people in the Northern Territory or Tasmania can be easily categorised as a market. A defined retailing market in smaller geographical areas such as Darwin or Hobart or any sizeable country town, or even areas with very large populations such as defined areas of Melbourne and Sydney do not, strictly speaking, fall within Section 50's definition. This does not make sense for retail markets. Retail markets always relate to particular catchment areas or regions, and market definitions should attend to that fact.

The Main Report provides a very helpful recommendation to address this problem.

It is essential the retail industry markets are identified both geographically and sectorally as those where substantial impacts of competition can be readily identified.

## 2. A Viable Independent Retail Sector

In designing competition policy we have to determine a set of values and principles which should guide our laws and behaviour. First amongst these should be the recognition that monopolies or oligopolies inherently contain within them a capacity for the abuse of market power, and should usually be resisted where they emerge, or monitored where they already exist. Therefore a situation such as we have in the Australian supermarket industry, where an oligopoly is present, has to be acted upon.

Secondly, we must acknowledge that a viable and thriving independent sector in the retail industry is desirable of itself and that it has an economic and social value that should not be lost.

In retailing, this independent sector is most at threat in Australia in the supermarket sector, where the critical mass essential to its survival is under

threat. However the trend is also emerging in non-supermarket retail sectors, and that problem needs to be addressed to prevent such crises emerging there too.

The Main Report addresses these points, but does not include a formal recommendation. It is desirable that the Government find a device - legislative, regulatory, or a direction of some sort - to formally require the ACCC to address the need for a viable independent retail sector, when considering issues relevant to that need.

**Recommendation One**

**That the Australian Competition and Consumer Commission be required to include in its considerations: to ensure the preservation of a viable independent sector in retailing.**

### 3. Market Power - (horizontal integration or market concentration).

Market concentration entails the dominance of the market by the few. In other words fewer competitors result. At the heart of this trend lies the danger that the destruction of competitors will result in the destruction of competition.

Members of the independent supermarket and independent wholesale sector have argued that a cap should be put on the majors acquiring any further market share in the supermarket sector. This is a difficult concept to accept because no-one is able to determine the precise percentage of market share, after which the critical mass essential for the survival of the independent sector is lost. It is also the case that in some markets the majors are under represented and in others possibly over represented. It is only through attention to the Main Report's recommendation for a proper retail market assessment by appropriate geographic and population markets, that excessive concentration could be identified.

Competition in any retail sector is best served by a diversity of competitors and a lowering of real barriers to entry. Barriers to entry include the difficulty independents have in securing prime sites, particularly in regional shopping centres.

Creeping acquisitions have allowed the majors to achieve a market size which might have been prohibited by the ACCC if those acquisitions had been aggregated into one purchase, which could therefore have fallen foul of existing merger provisions in the TPA.

The corollary of the ACCC power to prevent mergers, has to be a power to order divestiture. Divestiture is already accepted as a trade practices principle

(for instance, in Section 50 of the TPA). However, the ability for the ACCC or the Courts to order a major to divest in just one over concentrated retail market region, as opposed to within an entire state, is missing. Of course any such action would not prevent the Majors continuing to have the opportunity for further expansion in under represented market areas.

**Recommendation Two**

**That the TPA be amended to specifically empower the ACCC to order divestiture in regional markets which are overconcentrated. (In this regard the Main Report's recommendation on market definition will need to be accepted.)**

Retailing industry sectors need a 'trigger' market share percentage at which the ACCC takes formal and public note of potential danger, similar to that used in Europe. Such thresholds do not constitute an automatic declaration of market dominance. Nor are they an automatic signal as to the existence of anti-competitive prices, or of an abuse of power. They act instead as a trigger to the regulator to maintain a watching brief on the company concerned.

I consider the figure of 25% used under the United Kingdom Fair Trading Act, as constituting a fair market power measure. If such a measure were adopted in Australia, the ACCC would thereafter notify a company so identified that it needed to keep the ACCC advised on all market acquisitions activity, with a specific requirement to report to the ACCC annually, on the concentration of market power in the markets it operates in. The ACCC could then, on its own volition, review the company or the industry concerned. (ie the UK model).

**Recommendation Three**

**That the ACCC be given a power similar to that in the United Kingdom Fair Trading Act, to keep a specified 'watching brief' on companies that reach 25% market share in substantial retail markets.**

**4. Secrecy of pricing of retail space**

Running right through the evidence by retail witnesses was a theme of leasing arrangements with landlords, and how that affected market behaviour.

I am concerned at the existence of secret markets in Australia, namely secrecy of the pricing of retail space made available by landlords, particularly in shopping centres. Landlords, who may also be described as 'retailers of space', often have absolute market knowledge as sellers, in contrast to the buyers of their products, who are generally in the dark.

A prospective consumer of almost any product can take himself or herself to the market place for the goods they are considering purchasing, and easily obtain the different prices of the various different products that are on offer. A customer in a shoe shop is made aware of every price of all the shoes in the shop. In contrast, a retailer customer wanting to rent a shop almost always has no idea at all of the prices at which space has been sold to other retailers in the centre.

Open access to pricing information does not exist in the market place for retail space. That market is the very antithesis of an open and transparent market place, and the consequences are typical of closed and controlled markets – high returns to the sellers, and inequitable pricing practices.

Rental pricing has two parts; rent and outgoings. Rent is nearly always secret, a matter between that particular tenant and landlord, while outgoings are often on a common formula basis and are therefore also known to all tenants of that landlord. Concern with pricing and with secrecy has to deal separately with these two areas.

A problem arises where landlords distinguish between the pricing of their premises to tenants on an arbitrary basis. Discrimination in prices of retail premises are profitable to the landlord discriminator where he or she possesses market power, can distinguish classes of possible customers/tenants who can be obliged to pay more than others or where that customer/tenant may find it difficult or impossible to relocate elsewhere. The net result is inevitably an increase in rents, which are in turn inevitably passed on to consumers.

When looking at land pricing and rental practices, it is helpful to regard landlords not as a special commercial category, but as another type of retailer. Landlords are in fact simply retailers of space. Their goods are square metres and the services that go with them. Landlords are just one more supplier to tenants, but a supplier with unusual power.

As a principle, secret pricing is generally a stratagem which allows the vendor (in this instance the landlord), and those with unusual or exaggerated market power, to maximise their returns and to unjustifiably discriminate between similar buyers with similar needs, but differing abilities to negotiate or pay. If those same pricing stratagems were used against customers buying houses, cars, financial services, white goods, consumables and so on – there would be political, social and regulatory uproar. The prices of such goods and services is rightly non-discriminatory and public. The market badly needs the methodology of rent pricing to also become open and widely understood. It needs an end to secret pricing.

The morality of land or space pricing must catch up with established moral pricing standards of other goods and services. The very essence, the very

nature of a market, is that the range of goods and prices on display are publicly available and known. When rent reviews are under way it is nonsense to talk of a rental market or market values, when the market's prices are secret. Tenants are not even aware of other rents in the same shopping centre, never mind elsewhere.

I endorse the comments and recommendation in the Main Report concerning tenancy. However, that recommendation needs to be taken further.

**Recommendation Four**

**That open and transparent market principles be applied to the retail property sector, just as they do for Australian markets in general. Through the Council of Australian Governments, the States should consider measures to implement provisions for prospective tenants to have access to relevant tenancy schedules of shopping centres. These should show the total occupancy costs for each tenant in the centre and the value of any concessions or rebates given, for the purpose of informing prospective retailer customers, for valuing retail property, or providing advice on market rent reviews.**

## 5. Predatory Pricing and reversing the onus of proof under section 46 of the TPA

The Committee received significant evidence as to the difficulty in bringing a successful action under section 46 (which deals with misusing market power) for predatory pricing. Witnesses consistently complained of the difficulty in proving predatory pricing. I refer to paragraphs 6.28 to 6.35 of the Main Report for a summary of some of the evidence received on this issue. I would like to reiterate the comments of Professor Allan Fels, Chairman of the ACCC, on the merits of the reversed onus of proof test. Professor Fels said:

> There may be scope for some further strengthening of section 46 in terms of that kind of thing; that, if the effect can be shown, then there is a reverse onus of proof on purpose. That would essentially keep it to purpose. There is a problem at the moment with the test, in that the Commission or private litigants have to embark on a cops and robbers type search for purpose in particular cases. They are just not going to succeed in that, even though one has a fair idea that the purpose is anti-competitive. So there is a case for reversing the onus without departing from the underlying notion that, in the end, it would be a purpose test.[5]

Despite the fact that reversing the onus of proof is not uncommon in Australian law, under both this Government and its predecessors, I understand that it may

[5] *Hansard*, Canberra, 13 July 1999, p 1163.

still be seen as a big step to reverse the onus of proof in cases brought under section 46. However, the nature of the claims of predatory pricing are invariably going to take the form of a small retailer alleging misconduct on the part of a major retailer. Proving that the purpose of a corporation is to damage a competitor or prevent entry into a market requires a person to prove a state of mind on the part of the directors or employees of a corporation. That is exceptionally difficult, and results in people of such persuasion being able to ignore the present law as of no effect.

I would like to emphasise that a reversal of the onus of proof would only occur after a plaintiff/applicant had established that the defendant has a substantial degree of market power.

In recognition of the fact that there may be apprehension as to potential for abuse of this measure, I would see it as appropriate that the reversal of the onus of proof would only occur in cases brought by the ACCC. That should abate concerns that the provision could be used by vexatious or frivolous litigants to merely put the defendant to the expense of defending the claim without substantive wrong having been committed.

The Committee has decided to reconsider this issue at the time of a possible review in three years. The question is, what is expected to occur during the next three years to either confirm or deny the need for strengthening section 46, or that will alter the evidence the committee already has? There is nothing to suggest that the predatory pricing practices will change or that the number of claims of predatory pricing will decrease, or that it will somehow become easier to prosecute a claim.

Legislating for reversal of the onus of proof in cases brought by the ACCC will provide a substantial disincentive for retailers to engage in that conduct whilst at the same time ensuring that retailers are not the subject of frivolous claims.

**Recommendation Five**

**Section 46 of the *Trade Practices Act 1974* should be supplemented to provide for a reverse onus of proof test where, once the Australian Competition and Consumer Commission has established that the firm with a substantial degree of market power has used that power, on the motion of the ACCC the onus of proof shifts to that firm to prove it did not use that power for a prohibited purpose (as prescribed).**

## 6. Divestiture

I have not adopted the suggestion by NARGA that there should be a cap on the market share of the major retailers.

However, I do believe that there is value in giving the ACCC a power to break up retail monopolies which substantially inhibit competition, or (as is more likely in the Australian market situation), to reduce their market power in particular regional markets by requiring limited and selective divestiture. I take the view that this power is a natural corollary to and extension of the ACCC's power under Section 50 of the TPA to prevent acquisitions which would result in a substantial lessening of competition.

The power should however be regarded as largely a reserve power, and as international precedents indicate, would be seldom used. Its great virtue is as a cautionary power, making oligopolies careful of abusing their market power.

The Committee remarks that:

> The Committee is therefore of the view that the break up of economies of scale and scope, such as an order for Woolworths, Coles or Franklins to divest stores, would lead to an unpredictable result, and may undermine the benefits and efficiencies brought about by vertically integrated chain stores.

This statement is presented as a concluding statement and as some sort of reason as to why a power of divestiture is not appropriate. In my view, there is no possibility whatsoever that a power of divestiture, such as is proposed here, would result in the break up of the economies of scale and scope of Woolworths or Coles.

**Recommendation Six**

**That the ACCC be given the power to order divestiture where an ownership situation exists which has the effect of substantially inhibiting competition.**

## 7. Trading hours

The Committee received a substantial amount of evidence in relation to the deregulation of trading hours. This issue has played a major role in making the independent sector vulnerable and less viable. The theme was that small independent retailers are being pushed out of the grocery retailing market as the majors extend their trading hours and the public gravitate towards the majors away from the small independents.

What is more, the Majors have been leaders in the lobbying campaign for deregulated trading hours, expressed at its most extreme by the push for twenty-four hour seven day trading.

There is also a considerable social impact to the extent that owner/operators of independent grocers are forced to maintain longer hours just to keep up with the major retailers.

It should not pass unnoticed that the State with the largest independent sector, Western Australia, has managed the issue of trading hours better than the rest of Australia. In my view, there is a clear link between the dominance of the majors, and the extent of trading hours deregulation.

State governments need to take much greater account of the social and economic impacts of deregulated trading hours than has previously occurred.

## B. SOME SUPPLEMENTARY REMARKS TO THE MAIN REPORT, ON COMPETITION

The Main Report itself has very useful analysis of many components of competition theory and practice. Consequently these supplementary remarks are confined to a number of discrete areas, and of course, remain supportive of the Main Report.

The role of competition in the market place is not just the improvement of prices, products and choice, but the preservation of a diversity of competitors, even where some are identifiably less efficient than others. Economists, such as those of the University of Chicago[6], tell us that "societies that promote vigorous competition among private companies have lower prices, better products, and greater consumer choice"[7]. These characteristics are not altruistic, but arise from enlightened self interest. Those same economists also accept that not every successful competitor needs to be at the same standard of economic efficiency.

Lower prices are an effort on the part of a company to gain new customers or retain existing customers through offering goods or services at cheaper prices than their competitors. Better quality products, or new products are an effort on the part of the company to maintain their present customer base or obtain new customers through a reputation for quality service or product. Greater choice is the product of competition in any given market, with a number of companies offering a range of products or services in an attempt to attract and satisfy the customer.

While the most important measure of effective competition is whether the market satisfies the needs of the consumer, that can in some circumstances be provided by a benevolent monopoly. However, society as a whole would be

[6] "The Economics of Antitrust", article from *The Economist*, May 2nd 1998, pp 66-68.
[7] Federal Trade Commission (US), "Promoting Competition, Protecting Consumers: A plain English Guide to Antitrust Laws", web-site, http://www.ftc.gov/bc/compguide/index.htm

very much the poorer if it did not have the diversity and opportunity that many competitors bring to the market place.

When one company begins to dominate any given market, or when a small group of companies work themselves into a position of dominance, this is not necessarily an example of market failure in the formal sense of that phrase, but it can still be an undesirable social and economic outcome. Dominance of a market occurs when a company, or a group of companies, are able to exercise excessive market power.

The ACCC, in their submission, defined market power as:

> "The ability of a firm to behave persistently in a manner different from the behaviour that a competitive market would enforce on a corporation facing otherwise similar cost and demand conditions. That is, market power is the ability of a firm or firms profitably to divert prices, quality, variety, service or innovation from their competitive levels for a significant period of time[8].

This type of market power, in a situation of dominance, is beyond the reach of other competitors in the market, leaving them at a serious disadvantage.

There are three areas in which market dominance and the exercise of market power can be exercised, one relating to the competitors in the market, one to the suppliers, and the other relating to the consumers.

With regard to competitors, the dominant group or company in a marketplace can wipe-out or buy-out its smaller competitors, and effectively eliminate their competition, creating a situation of market monopolisation, or in the case of a group, market oligopoly. In other words, they don't just eliminate competitors, but in the end they can eliminate competition itself.

With regard to suppliers, in a market where market power exists, suppliers face problems when the company possessing market power uses this power to demand selective discriminatory discounts on purchases. Small or vulnerable suppliers may fall victim to changes in contract or trading terms with little to no negotiation in the process.

With regard to consumers, with the elimination of competition and the establishment of monopoly or oligopoly, the benefits of competition of lower prices, better products, and greater choice that flow on to the consumer are eliminated or reduced. This is because the monopolist "can restrict output and raise prices so as to increase their own profitability at the expense of

[8] The Australian Competition and Consumer Commission (ACCC), Submission to the Joint Select Committee on the Retail Sector, Submission no. 191, p 26.

consumers"[9], who are left with little choice but to purchase from the monopolist.

Looking at this scenario, dry economic theorists might claim that this is the market at work, with inefficient players being eliminated and the more efficient companies expanding their share of the market as they defeat their competition. In their eyes, any dominance or monopoly that one player is able to exert in the market is purely temporary because the high profits that they are able to extract from an anti-competitive market will attract new competitors[10].

They would also claim that market forces serve to eliminate "firms that are inefficient or fail to respond to the changing wants and needs of consumers (which) will be replaced through the entry of more efficient and responsive firms"[11].

Under this theory, free markets will themselves erode monopolies, and serve to keep the market efficient through the elimination of those companies that cannot capitalise on efficiency gains and adapt to the changing needs of the market.

The Chicago theorists make the further claim that a company may not actually seek to raise prices once they have established a dominant position, because this would attract other competitors to the market. (Over the long run that may indeed occur, but in the real world barriers to entry act to stop or delay this happening.) They may instead seek to forestall competition by setting prices, which while still high, might still be as though they were engaged in a competitive market[12], thus not obviously disadvantaging the consumer.

Perfect competition, as expressed in economic theory, does not exist in markets such as those subject to this inquiry.

The abuse of market power can result from predatory or intimidatory pricing, to fix pricing levels in a particular market. Then there is the practice of demanding prices and terms from suppliers which results in a forced differentiation between their retail customers, a differentiation the supplier would otherwise not have contemplated. Suppliers themselves may charge retail customers of similar standing different prices for goods of like grade or quality[13]. The questions that are posed by Ann Everton, law lecturer at Leeds University, become especially relevant in instances of dominance and excessive market power in the marketplace:

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[9] "The Economics of Antitrust", p 67.
[10] ibid, p 67.
[11] ACCC Submission 191, p 22.
[12] ibid.
[13] Everton, Ann R. **"***Price Discrimination – A Comparative Study in Legal Control,* Leeds University, 1976, p 1.

> "Should or should not free competition be encouraged to the point that it leads to the further increase of an already sizeable monopoly, and hence to the very destruction of competition? Secondly, should or should not some limit be set to the promotion of free competition in order to ensure that the competition also be fair?"[14]

Governments in various countries have found it necessary to adopt one of three possible broad policy approaches when dealing with the problems of market power and dominance within the marketplace. In contrast to other industries in Australia, it could be argued that retailing has mostly been subject to the laissez-faire approach – to mostly leave the market well alone. This can result in situations of dominance and subsequent oligopoly or monopoly, as well as disparities in wealth and income distribution. It leaves markets free, but it opens the door to them quickly becoming unfair.

The public supervision approach has lost favour in Australia, where strict regulation of key or sensitive markets, possibly through government ownership of key industries, has declined. Industries such as electricity, water, or telecommunications, are in this category, and restricted licensing systems such as for pharmacies and liquor.

Much of the work of the ACCC and Australian Governments covers the regulatory approach, where the government recognises the imperfections of real markets, and takes responsibility for ensuring that competition among the private firms within the market is sustained. Yet the government does not interfere with the decisions of price and output.[15]

The stated purpose of the *Trade Practices Act 1974* is to promote competition and fair trading within the marketplace, as well as providing some form of protection for consumers.

The approach adopted in Australia is very similar to that of other OECD economies, in that many countries may possess laws that have 'monopolisation', 'abuse of dominance' or 'misuse of market power' provisions which do not directly prohibit monopolies or the possession of market power, but the abuse of this privileged position[16].

At the OECD Competition Policy Roundtables in 1996, the preamble to the United States paper stated that:

> "Size or power alone is not illegal, the firm must have engaged in certain monopolistic or anti-competitive conduct; and some monopolies will escape

[14] ibid, p 2.
[15] "Antitrust Overview", by Charles E. Mueller, Editor Antitrust Law and Economics Review, web-site, http://webpages.metrolink.net/~cmueller/I-overvw.html
[16] ACCC Submission, ibid, p.44; Australian Retailers Association (ARA), Submission to the Joint Select Committee on the Retailing Sector, Submission 57, Volume 2, p 43.

condemnation under the statute because they were a consequence of success in the market, untainted by impermissible conduct"[17].

However, there is an important underpinning to this statement. While size or power alone are not only not illegal, but are highly desirable because of economies of scale, nevertheless size alone *is* a signal to be alert to the potential for an abuse of market power.

Section 46 of the TPA specifically states that any corporation with a substantial degree of power in a market shall not take advantage of that power for any of three enumerated purposes:

(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.*[18]

Section 50 of the TPA prohibits acquisitions that have the effect or likely effect of substantially lessening competition[19]. By this means, the Act is attempting to curb the elimination of competition in the marketplace through the acquisition of competitors. In determining the extent to which the acquisition lessens competition in a market, a number of matters must be taken into account, such as:

- Entry barriers to the market;
- Market concentration levels;
- The power of competitors in the market;
- The likelihood the acquisition would result in the acquirer attaining market power;
- Market dynamics, such as growth, innovation and differentiation of product;
- Whether the acquisition would remove a substantial market competitor; and
- The nature and extent of vertical integration in the market[20].

When the level of concentration is taken into account, ACCC guidelines state that where the post merger market share of a merged firm is 15% or more, and the share of the four or fewer largest firms is 75% or more, the Commission will want to investigate the merger further before being satisfied it does not result in a substantial lessening of competition[21].

[17] ARA Submission, ibid, p 44.
[18] *Trade Practices Act 1974*, Section 46(1), Subsections a, b & c.
[19] *Trade Practices Act 1974*, Section 50(1).
[20] *Trade Practices Act 1974*, Section 50(3), Subsections b - i.
[21] ACCC Submission 191, p 27, footnote 44.

Mergers are therefore readily dealt with under this law, and under ACCC guidelines. Small accumulative incremental or 'creeping' acquisitions, which have the same effect as mergers in reality, are not.

The United Kingdom Office of Fair Trading (OFT), in their *Competition in Retailing* report suggest that when trying to analyse questions of competition in retailing, a certain framework should be taken[22].

The United Kingdom, under its *Fair Trading Act 1973*, empowers the Office of Fair Trading (OFT) to investigate monopoly situations in one of two possible monopoly situations, these being:

- Scale Monopoly – one person or firm controls 25% of the supply or acquisition of goods or services of a particular kind; and

- Complex Monopoly – where a number of firms together make up 25%.

These 25% thresholds do not indicate market dominance in themselves. Instead they act as a trigger for the OFT to refer the matter for investigation by the Monopolies and Mergers Commission into the ramifications of the market share that a company holds, and whether it results in negative effects on competition or the consumers[23].

The use of national market share data is less commonplace in the United States, where competition authorities take a more local and regional focus when considering market concentration levels following the merging of companies[24].

This is markedly different from the approach of the ACCC, which has indicated in its submission that, in the retailing sector at least, the major chains are national competitors, and ACCC decisions are made at a national level. The result of the ACCC stance with regard to the major chains is that the market is defined nationally, as opposed to any statewide, regional or local definition[25]. That is a failing.

NARGA has called for a market cap. NARGA has said that in their view a market cap would be modelled on "United States anti-trust-style sanctions"[26]. However, United States anti-trust laws do not create artificial barriers to market expansion using market share as the only or main measure of competition levels. The point of the US anti-trust laws, as interpreted by the US courts, is

[22] London Economics, Competition in Retailing, research paper prepared for the Office of fair Trading (UK) by London Economics, September 1997, p 8.
[23] ibid, p 49.
[24] ACCC Submission, ibid, p 49.
[25] ACCC Submission, ibid, p 32.
[26] NARGA Submission, ibid, p 159.

to prevent unreasonable and unfair methods being employed by companies establishing a position of market power. A practice is deemed illegitimate if it restricts competition in some significant way and has no overriding business justification, as activities which are likely to harm consumers through increased prices, reduced availability of goods or services, lowered quality or service, or stifled innovation[27].

**Senator Andrew Murray**

[27] Federal Trade Commission (US), "Promoting Competition, Protecting Consumers: A plain English Guide to Antitrust Laws", web-site, http://www.ftc.gov/bc/compguide/index.htm