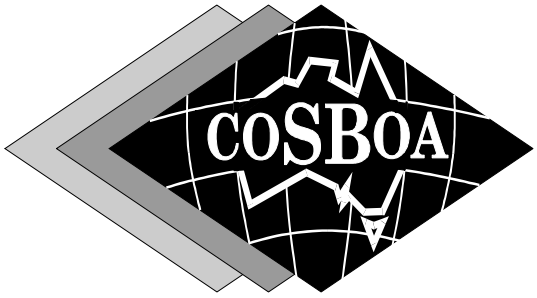

Council of Small Business Organisations of Australia Ltd

Submission to the
Trade Practices ACT Review

Dawson Committee

July 2002

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1. INTRODUCTION

The Council of Small Business Organisations of Australia Ltd (COSBOA) is widely recognised as a peak body of small business organisations, industry groups and individual members. It was founded in 1979, incorporated in 1985 and operates through a permanent secretariat in Watson, Canberra.

COSBOA represents a wide variety of small businesses through our member organisations in a wide variety of industry from retail; civil contractors; business professional women; entertainment; hotel and motel; travel agents; restaurant and caterers; timber merchants; furnishing industry; equipment lessors; including NARGA (National Association of Retail Grocers of Australia) and NIRA (National Independent Retailers Association); Small Business Combined Association of NSW including many small business association and individual members.

COSBOA supports the review of the competition provisions of the Trade Practices Act 1974 because small business needs a stronger Trade Practices Act and an effective regulator (in ACCC) to insure the ongoing viability of our members and the ability to compete fairly in the market place when faced with globalisation and extensive market power by large business. In particular a strengthening of Section 46 by the introduction of an 'effects' test and strengthening of the 'purpose' test and the introduction of 'cease and desist' orders.

COSBOA recognises the real debate is between large business (and their desire to meet global competition and compete locally and internationally in a way that their actions, because of either efficiencies or public interest, should by-pass Trade Practices Act when it suits them to meet their corporate goals) versus small businesses desire to utilise competition policy to ensure a level playing field where dominant players do not swamp small business by their desire to compete on a global scale.

COSBOA supports a strong ACCC and dismisses the arguments regarding media attention and thus new types of regulation and control over the workings of the ACCC as a smoke screen to allow big business to appear to get away with anti-competitive practices. If law was based on what was best for small business it would always be good for big business, however what often is good for big business is not always good for small business. I trust that this enquiry will bear this in mind in their deliberations for recommendations for reform of the Trade Practices Act 1974.

2. CRIMINAL SANCTIONS

COSBOA supports the ACCC proposals to amend the Act to introduce criminal sanctions for the most serious contraventions of the competitive provisions of Part IV: 'hard-core' cartels. COSBOA supports the commissions' view that it be a criminal offence for a large company to collude with a competitor to fix prices, rig bids, limit out-put or share markets. Individual executives found to have been personally involved in contravention would be liable to be imprisoned.

The evidence from changes made in the US would indicate this is a positive move to eliminate collusive behaviour in both an international and domestic market place. COSBOA would support the proposed civil penalties and guidelines outlined in Section 2 Criminal Sanctions and Increased Pecuniary Penalties in the ACCC Submission dated June 2002.

3. MISUSE OF MARKET POWER

COSBOA's first guideline would be that no company should abuse market power. If this was the case then provisions under Section 46 would not be necessary. COSBOA supports Section 46 (1) as it currently reads with the following changes.

3.1 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.

What may be meant by 'below cost' of 'unreasonably low' prices should be a matter for the ACCC to interpret taking into account all the circumstances of a case.

Recommendation –
That Section 46 of the Trade Practices Act be specifically amended to proscribe selling at below cost or unreasonably low prices.

3.2 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.

Recommendation –
Prohibit under Section 46 anti competitive price discrimination.

3.3 EFFECTS TEST

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.

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."

It would be appropriate to add an 'effect' test to s46. Thus if certain conduct had the 'purpose or effect' of one or more of the paragraphs in the existing provision, then that conduct would be in breach of the misuse of market power provision of the TPA

An effects test would encompass behaviour that, regardless of the subjective purpose of the behaviour would contravene one of the paragraphs in s46(1).

Recommendation –
That Section 46 – 1 of the Trade Practices Act be amended to add an 'effects' test.

3.4 STRENGTHENING THE EXISTING PURPOSE ELEMENT OF SECTION 46

COSBOA strongly supports the retention of the purpose element under s46 however, it needs to be strengthened by providing a list of factors that can guide the court in determining what has motivated the conduct in such questions. 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.

Recommendation –
That Section 46 includes a list of factors to assist in the identification of purpose. (Note: NARGA a member of COSBOA will be providing a detailed list of factors for your consideration in their Submission)

3.5 DIVESTITURE

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.

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

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

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 comes 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 s46.

Recommendation –
That a divestiture power be added to Section 46 of the Trade Practices Act.

3.6 CEASE AND DESIST ORDERS

Strengthening the current misuse of market power provision is necessary but there needs to be mechanisms in the Act to enable fast access to the law, by the Commission, to get commercially speedy results. To facilitate that the ACCC should be able to issue a ‘cease and desist’ order. Failure to abide by that order should be a breach of

the law, with the ACCC thereafter having to go to Court to enforce such an order.

The current enforcement arrangements in the TPA suggest that once an investigation has been done can take many years to resolve. As the potential damage to competitors and markets can be significant, it is argued that the ACCC, where a company has substantial market power, and is thought to be engaging in conduct which breaches Part IV of the Act, should be able to issue a 'cease and desist' order. This would mean that the conduct of concern would have to cease whilst it is investigated by the Commission (and if appropriate, its legality or otherwise determined by the Courts). If necessary the ACCC could have the 'cease and desist' order enforced by the Federal Court. In the event of the 'cease and desist' orders taking place and no court action follows then a limit of the 'cease and desist' order should cease after six (6) months.

Recommendation –
That Section 46 of the Trade Practices Act to be amended to provide ACCC with the power to issue a 'cease and desist' order in circumstances where corporation are thought to have misused their market power.

4. COLLECTIVE BARGAINING AND SMALL BUSINESS

4.1 COLLECTIVE BARGAINING

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, COSBOA is a strong supporter of an authorization process that is user friendly and offers timely immunity from the Act for collective bargaining arrangements.

The ability of small business operators to collectively negotiate with suppliers or purchasers is severely constrained by the Trade Practices Act. Presently, any type of collective bargaining arrangement is likely to be in serious contravention of section 45 of the Trade Practices Act, as having the effect of substantially lessening competition.

The difficulty is of course that one individual small business operator has little or no bargaining power against the greater market power of supermarket chains, oil companies, insurance companies, telecommunications providers or motor vehicle manufacturers and importers. In relation to collective bargaining for the provision of labour, no such constraints exist.

The need, for small business, is to be able to collectively negotiate and then get on with business.

Recommendation –

That Section 45 be amended to include a provision that would authorise small business to have collective bargaining powers dealing with their suppliers/buyers in a timely notification process.

5. MERGERS – EFFICIENCIES, GLOBALISATION AND PROCESSES

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. COSBOA recommends s 50 to be amended to deal with anti-competitive creeping acquisitions and to acknowledge the importance of small business and rural and regional issues, COSBOA strongly supports the present role of the ACCC in merger cases.

5.1 ANTI COMPETITIVE CREEPING ACQUISITIONS

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, be subject to close scrutiny by the ACCC, a series of minor acquisitions that together would substantially lessen competition are less likely to se subject to the same scrutiny. Where in fact scrutinised 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.

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.

Recommendation –

That the ACCC be given the power to issue 'concentrated market notice' and/or an 'anti-competitive acquisition notice'.

5.2 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.

Recommendation –

That 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 and 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.

COSBOA would support reforms that would improve the speed and processes to decision making in the current merger laws, but not compromising the effect or likely effect of substantially lessening competition in a substantial market for goods and services irrespective of the efficiencies and globalization demands.

6. ROLE OF THE COMMISSION

COSBOA considers the existing legal framework and the ACCC's processes provide an appropriate balance between adequate protection of commercial affairs and reputation, and maintain certainty, effectiveness, transparency and accountability in the administration of the law as it relates to Trade Practices Act. COSBOA would like to comment on some issues that have been raised in the press.

6.1 SUPERVISORY BOARD

COSBOA 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.

6.2 MAINTAIN PRESENT PARLIAMENTARY OVERSIGHT OF ACCC

COSBOA considers the regular Parliamentary scrutiny of the ACCC through the Senate Estimates Committee process and in relation to its Annual Report, by the House of Representatives Standing Committee on Economics, Finance and Public Administration is sufficient overseeing of the ACCC.

COSBOA does not feel that any new legislative guidance on administration, Charter and Board of Competition Regulation or Inspector General of Competition Regulation is necessary. The resources to fund these bodies should be provided to the ACCC so that they can be more effective in their role as regulator for anti-competitive behaviour.

6.3 THE ACCC AND THE MEDIA

COSBOA supports the belief that there is public interest in the ACCC disseminating information about cases involving breaches of the Act and that publicity also plays an important role in achieving compliance with the TPA. The media's role is critical in ensuring transparency and accountability of the courts and Commission. Media coverage results in a high level of scrutiny of the Commissions own processes. At times this media coverage can highlight individual members of the Commission, this in itself is not a problem where the coverage reinforces the ACCC's role in enforcing the Act. If at times certain

companies and individuals are uncomfortable with the profile of the ACCC then they must look at their own behaviour to see why they feel uncomfortable. Both the consumer and small business recognise the importance of a strong ACCC in maintain a competitive and fair market place. However, it may be advantageous for the ACCC to prepare a code for media dealings that would set the ground rules for dealing with media. This would be publicly available and clarify any concerns that the public may have on how the ACCC deals with the media.

6.4 MAINTAIN CURRENT MERGER ASSESSMENT BUT FAST-TRACK THE PROCESS

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 COSBOA 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, COSBOA 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, COSBOA 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.

7. OVERVIEW OF COMPETITION LAW IN AUSTRALIA

COSBOA supports the overview outlined in the ACCC Submission to the Trade Practices Act dated June 2002 but would like to make the following comments.

7.1 UNCONSCIONABLE CONDUCT

Often there is a strong relationship between those who engage in unconscionable conduct and the market power that such companies hold. In these circumstances, any strategy to address unconscionable conduct should not merely rely on prohibiting the conduct per se but it should also focus on the root causes of such conduct.

The unconscionable conduct provisions in Section 51AC of the Trade Practices Act have been of some assistance to small business. However, experience has shown that further measures are much needed to curb unacceptable behaviour.

Recommendation –
That Section 51ac should be amended to proscribe as per se offences the following conduct –
- Unilateral variation of contract or associated documents;
- The termination of contracts by one party without just cause or due process;
- The bringing into existence of documents or policies after the signing of the contract which are then dinging and which can also be used to vary the original agreement or contract; and

The presentation of 'take it or leave it' contracts or agreements.

8. CONCLUSION

The Council of Small Business Organisations of Australia Ltd expects a stronger Trade Practices Act as a result of the Dawson Committee Review. In addition we would expect the Australian Competition and Consumer Commission to have greater powers in searching out anti-competitive and unfair market practices providing effective consumer protection and allowing for prompt mergers of companies who have passed anti-competitive analysis.

The future of Australia will depend on a very strong and vibrant small business community. This will come about as the confidence and opportunity exists for small business to trade and be successful in a anti-competitive and fair market place where dominance by few players is reduced. This will depend on governments and regulatory authorities recognising the community good of small business who uses labour for competitive advantage as distinct from big business who uses capital for competitive advantage. The damage when big business fails due to abuses of their capital advantage creates a high cost to small business and the consumer by increases in costs. This has been most evident by insurance premium increases in recent times.