Submission by the

Fair Trading Coalition

(A Coalition of Small Business for Trade Practices Act Reform)

to the

Review of the Trade Practices Act

July 2002

Apple & Pear Growers Association of S.A. inc.

AADA
AUSTRALIAN • AUTOMOBILE • DEALERS • ASSOCIATION

AHA

Australian Motor Body Repairers Association
A Division of the Motor Trades Association of Australia

APADA
Australian Petroleum Agents and Distributors Association

Australian Private Hospitals Association Limited

ASSCSA
Australian Service Station
and Convenience Store Association

bec Business Enterprise Centres

CIVIL CONTRACTORS FEDERATION CCF

COSBOA

MTAA

NIA
NATIONAL INSTITUTE OF ACCOUNTANTS

The PHARMACY GUILD of AUSTRALIA

Queensland Fruit & Vegetable Growers

Table of Contents

SUMMARY AND RECOMMENDATIONS

This submission to the Review of the Trade Practices Act has been prepared by the Fair Trading Coalition. The Coalition has been formed by a number of prominent small business representative associations to present the views of their members on the need for reform of the competition provisions of the Trade Practices Act. The members of the Fair Trading Coalition are:

- Apple & Pear Growers Association of SA Inc
- Australian Automotive Aftermarket Association Ltd (AAAA)
- Australian Automobile Dealers Association (AADA)
- Australian Hotels Association (AHA)
- Australian Motor Body Repairers Association (AMBRA)
- Australian Newsagents' Federation (ANF)
- Australian Petroleum Agents and Distributors Association (APADA)
- Australian Private Hospitals Association (APHA)
- Australian Service Station and Convenience Store Association (ASSCSA)
- Business Enterprise Centres (BEC's)
- Chamber of Women in Business (CWB)
- Civil Contractors Federation (CCF)
- Council of Small Business Organisations of Australia Ltd (COSBOA)
- Motor Trades Association of Australia (MTAA)
- National Institute of Accountants (NIA)
- Pharmacy Guild of Australia (PGA)
- Queensland Fruit & Vegetable Growers (QFVG)

This Inquiry and the opportunity it presents for all interested parties to present their views on Part IV of the TPA is welcomed by the Fair Trading Coalition. It is the view of the Coalition that the outcome of this Inquiry will determine to a very large extent the social, economic, and commercial structure of Australian society into the future. Will it be one in which a few large businesses dominate and where maximising shareholder returns (including off-shore shareholders) is the sole or primary concern? Will it be a society where the competitive environment is such that diversity of ownership and operation is maximised and where there is a regulatory regime which encourages fair competition by all participants in the market?

The Coalition believes that without significant changes to the restrictive trade practices provisions of the TPA the former scenario is more likely. That is, in our view, unlikely to be in the long-term interests of Australian society, its consumers, those operating small businesses now and those who may seek to operate such businesses in the future.

The members of the Coalition are united in their view that Australia needs to have an effective competition regime and that it also requires a strong regulator adequately backed with resources and powers to enforce such a regulatory regime. The Coalition believes that

in general the public should be aware of the enforcement and education activities of the regulator. The Australian Competition and Consumer Commission is a publicly funded organisation. Its role is to enforce the Trade Practices Act and to inform Australians of their rights and responsibilities. The public is entitled to be advised of these matters of importance.

If the object of the Act is to enhance the welfare of Australians, by extension then, breaches of the Act will do the opposite. The members of the Coalition believe quite firmly that:

- the Trade Practices Act is about creating a society where consumers have the maximum of choice and access to services;
- there must be strong competition at both wholesale and retail. Such competition should focus on a broad range of matters including price, variety of goods, availability and after sales service;
- weaker and exploitable parties should have legislated rights and protections;
- trade practices regulation is not about ensuring unwarranted business survival or the creation and protection of national champions; and
- the largest, most 'efficient' competitor should not have the power or right to exclude others, except by normal commercial dealings.

The members of the Coalition believe that the Trade Practices Act is about much more than delivering the lowest, but not necessarily enduring, prices to consumers; in the long-term the price for society of solely pursuing such economic outcomes may be too high. Government and its regulatory authorities must ensure that there is a place in our society for small business, for the entrepreneurs who operate those businesses, for the employment opportunities they provide and for the diversity and service that big business is unable or unwilling to provide.

Thus Australia needs to ensure that the Trade Practices Act provides a regulatory framework under which those businesses can compete and the best of them can thrive and grow. That means that we need a Trade Practices Act that is concerned with much more than economic theory but which equally focuses on meeting the needs of our society. We must foster a dynamic and pluralist society with big and small competing fairly.

Small business does not seek a return to a regulated environment. However, it believes that competition policy and globalisation, have failed to address the significant increase in (market) power in key sectors of business that is now held by a relatively small number of large (some of them very large, multi-national) businesses and the actual and possible abuse of that power.

The Coalition contends that the circumstances presently applying to the current Review of the Trade Practices Act are significantly different to any previous inquiry. Importantly, the Trade Practices Act was amended in 1995 to include a new object of the Act to *'enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection'*. The inclusion of that object demonstrates that the fundamental social purpose of the Act is to serve the public interest in its broadest meaning. In this context, it is thus not appropriate to view the Act solely in an economic or legal context. It also needs to be recognised that the fair trading objective contained in section 2 of the Act was given greater weight when in 1998 the Parliament enacted section 51AC to proscribe unconscionable conduct in business transactions. 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 circumstances applying to the present inquiry are also different to those applying previously; in terms of microeconomic reform, the application of National Competition Policy and the more recent increase in the globalisation and deregulation of the Australian economy. Small business has been short-changed as part of all these changes and that must be addressed.

This Coalition submission contains the following recommendations:

1. It was the original intention of National Competition Policy that the public interest must be the sole determining factor in any decision relating to national competition policy. The Coalition believes that a formal restatement of that imperative is absolutely essential.

2. It is recommended that the TPA should be amended to include a provision within the Act to allow small business operators and/or their representatives to collectively negotiate with their suppliers/buyers, including the right of small business to collectively refuse to do so (that is, a permissible boycott arrangement for small business).

3. It is recommended that section 46(1) of the Trade Practices Act be amended to add an effects test. It is also recommended that the Act be amended to allow for authorisation of conduct which might otherwise breach s46.

4. It is recommended that section 46 of the Trade Practices Act be specifically amended to proscribe selling at unreasonably low prices.

5. It is recommended that section 46 of the Trade Practices Act be amended to provide the Australian Competition and Consumer Commission with the power to issue a 'cease and desist' order in circumstances where corporations are thought to have misused their market power.

6. It is recommended that the Trade Practices Act be amended to provide the Australian Competition and Consumer Commission with the power to seek a divestiture order where a corporation has misused its market power.

7. It is recommended that:
   - there be no change to the substantial lessening of competition test in section 50 of the Trade Practices Act;
   - the merger authorisation process and the subsequent appeal process be amended as outlined in section 4.7.1;

- the Trade Practices Act should clearly recognise the voluntary notification system and also provide that where a merger is found to breach the Act and wasn't notified to the Commission additional mandatory penalties should apply in respect of the breach of s50;
- the process for accepting s87B undertakings should be made more transparent, with the Commission being required to consult with all interested parties about the nature of the proposed undertakings before those undertakings are accepted by the Courts;
- the Federal Minister with responsibility for the ACCC be given the power to refer to the ACCC for an authorisation assessment proposed or possible industry-wide structural reform matters; and
- where market concentration has passed a nominated threshold, for example, CR4, the Act should be amended to allow the ACCC to take into consideration previous mergers and acquisitions by an acquirer and to aggregate the effect of previous mergers and assess the resultant state of competition in any relevant market; and
- there should also be an amendment to the Trade Practices Act so as to provide that where a company reaches a certain market share, any further acquisition must be notified to ACCC and assessed under the proposed amended merger authorisation test.

8. It is recommended that the Government ensure, if necessary by legislative amendment, that the Trade Practices Act apply to all Government agencies' commercial dealings.

9. It is recommended that the current penalty regime in the Act be amended as follows:
   - criminal penalties (jail terms) should be available to the Courts to apply to individuals for breaches, by big businesses, of s45 of the Act. The current civil prosecution regime should be maintained, and the ACCC would therefore have the option of commencing legal action under a civil or criminal regime;
   - corporations should not be able to indemnify their employees in relation to any penalties that might be imposed on them by the Courts for breaches of Part IV of the Trade Practices Act and those penalties must be paid by the individuals concerned;
   - corporate and individual parole to be available to the Courts as a specific remedy; and
   - the Act should also be amended to provide for pecuniary penalties in relation to breaches of Parts IVA and IVB. These are currently not able to be sought by the ACCC in its enforcement of the law.

10. It is recommended that section 51AC of the Trade Practices Act 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 *(see earlier comments on repudiation)*;
    - the bringing into existence of documents or policies after the signing of the contract which are then binding 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.

    It is also recommended that misuse of market power should be listed as one of the 'allowable' matters under s51AC.

11. It is recommended that the Government should make use of the current provisions in the Trade Practices Act relating to codes of conduct to regulate sectors of the economy which have specific problems which cannot, or should not be addressed through generic legislation.

12. It is recommended that a joint standing committee of the Parliament be established to oversight the Australian Competition and Consumer Commission. That committee should assume the current review activities of the House of Representatives Standing Committee on Economics, Finance and Public Administration in relation to the ACCC.

13. It is recommended that the ACCC's role in relation to small business should be strengthened as follows:
    - the Trade Practices Act should be amended to specifically provide that the ACCC handle complaints and take action on systemic issues;
    - to provide for the appointment of a second small business commissioner to the Commission. It would be appropriate that the Deputy Chairman be one of the two small business Commissioners;
    - to establish within the Commission a Small Business as Consumers Division.

14. It is recommended that the Government appoint an adequately resourced Small Business Ombudsman.

1. THE FAIR TRADING COALITION

The Fair Trading Coalition has been formed to rebalance the Trade Practices Act, to take account of a decade of structural changes in Australia, so that it will more realistically reflect its Object: *'to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection'*.

The opponents of rebalancing the Act to better reflect its purpose are, of course, seeking something else. The arguments used are said to be rational economic ones. They rely upon the idea that the Act is about economics and markets and nothing more.

In fact, the Act is about society and the economy and not at all about economic theory or ideology. The Parliament has repeatedly so resolved since the first passage of the Act in 1974 and in all amendments to it since. Indeed, the antecedents to the present Act were built on the same belief and intention.

It has been almost a decade since the last significant review of the Trade Practices Act was completed.

The context of this current Review is ten years of sweeping micro-economic reforms including privatisation, deregulation and trade liberalisation. Australia has also undergone significant social and economic change as a result of external factors such as globalisation, technological change and a greater focus on environmentally sustainable development.

In that light, the Fair Trading Coalition has united to put the case for meaningful modernisation of the Act based on commercial realities.

The formal members of the Coalition are:

- Apple & Pear Growers Association of SA Inc
- Australian Automotive Aftermarket Association Ltd (AAAA)
- Australian Automobile Dealers Association (AADA)
- Australian Hotels Association (AHA)
- Australian Motor Body Repairers Association (AMBRA)
- Australian Newsagents' Federation (ANF)
- Australian Petroleum Agents and Distributors Association (APADA)
- Australian Private Hospitals Association (APHA)
- Australian Service Station and Convenience Store Association (ASSCSA)
- Business Enterprise Centres (BEC's)
- Chamber of Women in Business (CWB)
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- Motor Trades Association of Australia (MTAA)
- National Institute of Accountants (NIA)
- Pharmacy Guild of Australia (PGA)
- Queensland Fruit & Vegetable Growers (QFVG)

- The Apple & Pear Growers Association of SA Inc has over the past 25 years continued *'To Promote, Foster and Protect the Apple and Pear Industry and establish a closer bond of unity and co-operation amongst all persons engaged in the industry'.* Promotion and marketing of apples and pears has been a major focus for the Association over the past 25 years. A regular display at the Adelaide Royal Show has show-cased the industry and assisted in establishing new trends and introducing new varieties such as Pink Lady, Gala and Fuji. Over the past six years the industry has focussed on consumer education through demonstrators conducting tastings in retail shops and supermarkets. Partnerships with other industry groups, state and local government authorities, and other community-based organisations have been important in ensuring the industry is developing and expanding using industry 'best practice'.

- The Australian Automotive Aftermarket Association (AAAA) Ltd represents the interests of manufacturers, re-manufacturers, importers, distributors, wholesalers, resellers and retailers of automotive parts, accessories, tools and equipment in Australia. Headquartered in Melbourne, the AAAA has 700 members, the majority from the small and medium sized business sector. The AAAA promotes The AAAA Trade Show, AAAA Awards to Industry Banquet, the AAAA Conference and publishes the Australian Automotive Aftermarket magazine.

- The Australian Automobile Dealers Association (AADA) is the national peak body for the new vehicle retail sector of the Australian automotive industry and a Member of the Motor Trades Association of Australia (MTAA). There are estimated to be over 1500 franchised motor vehicle dealers holding over 3,000 separate franchises, operating in almost 1,800 locations and employing over 46,000 people. AADA's affairs are directed by a Board on which each of the states and territories (except Tasmania) is represented.

- The Australian Hotels Association (AHA) is one of Australia's oldest and most successful industry associations, with a history dating back to 1839. Today, the AHA represents more than 8,000 members across Australia. The diversity of the hotel industry is reflected in the AHA membership, encompassing small community hotels and taverns, through to large accommodation hotels, resorts and casinos. To provide effective support and assistance for this diverse membership, the AHA directly employs approximately 150 staff at offices in each State and Territory, as well as a National Office in Canberra. With its basis as a registered industrial organisation, the AHA has grown to provide advocacy and representation for the hotel industry on issues such as taxation, tourism, economic policy, health, training and immigration. Over the last Parliamentary term the AHA enjoyed numerous successes, including lowering the level of excise on draught beer, minimising the costs of new food safety standards, improving representation on the Australian Tourist Commission Board and securing funding towards the restoration of historic hotels. With a workforce of more than 250,000 people, the hotel industry is one of Australia's largest employers, providing great opportunities for many hospitality professionals, young people and for those re-entering the workforce. We aim to continue to grow the size of our workforce, as well as our contribution to national economic and social well being.

- The Australian Motor Body Repairers Association (AMBRA) is the national peak body for the specialist motor trade dedicated to the repair and restoration of motor vehicles. There are estimated to be about 8,000 body repair shops in Australia ranging in size from very small concerns employing only one or two people other than the proprietor through to some groups which have multiple shop fronts and employ in total more than a hundred workers. AMBRA's affairs are directed by an Executive Committee on which each of the states and territories is represented. AMBRA meets as an Executive Committee on at least two occasions each year to determine policy and direct the activities undertaken in relation to body repair by the National Secretariat of the Motor Trades Association of Australia. Each state and territory Member of the MTAA Federation has established its own body repair section or division for the purpose of considering issues and activities related to body repair in each jurisdiction as they arise.

- The Australian Newsagents' Federation (ANF) is made up of the various state and territory newsagent Associations and represents some 3,300 retail and territorial distribution newsagent members throughout Australia. The vast majority of these newsagents could be best described as micro to small businesses, with average sales turnover of less than $1 million and employing six, or less, persons (including full time, part time, casual staff and proprietors). While the State Associations work through a system of regions or branches to reach newsagents and deal with day-to-day newsagent business issues, the ANF, as the peak industry body, represents newsagents nationally. The ANF continues to act as a lobby group and represents newsagents in discussions with government, publishers/distributors and other industry suppliers.

- The Australian Petroleum Agents and Distributors Association (APADA) is a national employer organization registered under the Workplace Relations Act 1996, representing the interests of its members with the Oil Companies, Governments, the Unions, various regulatory authorities and the media. It is a not-for-profit organization whose main aim is to maintain the on-going viability of the wholesale and retail distribution of petroleum products for its members. It has membership base of SME's across predominantly regional Australia, employing about 5000 people in total. Petroleum distributors operate inland fuel depots, service stations and tanker fleets throughout Australia. Distributors supply a broad spectrum of businesses, ranging from primary producers, commercial and industrial, aviation, mining, as well as the service station network in regional Australia. The distributor network handles around 16 billion litres of petroleum products, or approximately 35% of the total industry volume and about 85% of all the sales in country areas.

- The Australian Private Hospitals Association (APHA) is a voluntary association of private hospitals in Australia, which aims to promote and protect the interests of private hospitals, their owners and operators and to ensure that the population of Australia have access to an alternative to public hospital care. APHA represents over 200 private hospitals and day surgeries.

- The Australian Service Station and Convenience Store Association (ASSCSA) is the peak association which represents the national interests of approximately 8,000 service station operators. ASSCSA is an Allied Trade Association of MTAA and is governed by an Executive Committee composed of representatives of the Service Station (and Convenience Store) Divisions of the state and territory Member

Associations of the MTAA Federation. The ASSCSA Executive Committee makes recommendations to the MTAA Board of Directors on matters related to the Australian retail petroleum trade. ASSCSA has played a pivotal role in the development of petrol-related policies in all levels of Australian government.

- BEC Australia represents the national network of 137 Business Enterprise Centres (BEC's). The BEC's have over 250,000 client contacts each year in more than 300 communities in all states and the Northern Territory. The primary target group are new and established businesses with less than 5 employees and unlikely to belong to any trade or employer association. The BEC network is the largest network servicing the small and micro business community with over 300,000 businesses on data bases. The principle services of BEC's are:
  - the primary resource for community businesses
  - confidential business counselling
  - business information, eg. local, state and commonwealth government
  - training, seminars and workshops
  - referral to other professionals, eg. accountants, solicitors, marketers
  - networks for local business
  - program delivery and liaison for/with all levels of government
  - private partnerships and sponsorships

  Each BEC is community owned and managed with BEC Australia made up of representatives from each state.

- The Chamber of Women in Business (CWB) is an organisation formed to provide support and development opportunities for business women in the Canberra region. Members:
  - run their own businesses;
  - are part of small firms and partnerships;
  - belong to professional organisations;
  - are employed by larger corporations and the government

  The CWB has been in operation since 1992.

- The Civil Contractors Federation (CCF) is the representative voice of the civil engineering construction contractors in Australia. It represents civil contractors engaged in all aspects of construction and maintenance of the nation's road, rail, water, sewer, gas, telecommunications, power, land development and land improvement infrastructure. CCF is a national organisation with branches in all states and territories.

- The Council of Small Business Organisations of Australia Ltd (COSBOA) is widely recognised as the 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 represents 165 groups and over 200,000 small businesses throughout Australia.

- The Motor Trades Association of Australia (MTAA) is the largest 'stand alone' small business association in the country, representing 83,000 businesses and 250,000 employees in a trade with an $88 billion annual turnover. The Motor Trades Association of Australia is the national representative organisation of the retail, service and repair sectors of the Australian automotive industry. The Association is a federation of the motor trades associations and the automobile chambers of commerce in each state and territory as well as the Service Station Association Ltd (SSA Ltd) and the Australian Automobile Dealers Association (AADA).

- The National Institute of Accountants (NIA) is a professional accounting body of 12,000 members. NIA members work in all sectors of the economy with a very high proportion of our members working in small business, owning their own small business or providing advice and assistance to small business. As such, the NIA is committed to representing the interests of small business. The NIA believes that a strong and independent ACCC is important to small business and consumers and therefore we have affiliated ourselves with this joint submission. The NIA will be preparing its own submission as well.

- The Pharmacy Guild of Australia (PGA) is a national employers' organisation established in 1928 and registered under the Federal Workplace Relations Act with branches in every state and territory. Its members are the pharmacist proprietors of some 4,500 community pharmacies, which are small retail businesses spread throughout Australia. Almost 90 per cent of all pharmacist proprietors are Guild members. Community pharmacy makes a significant contribution to the Australian economy with an annual turnover of $8 billion and $200 million in tax revenue, employing some 15,000 salaried pharmacists and 25,000 pharmacy assistants. Through the Pharmacy Assistant Training Scheme, the Pharmacy Guild provides a significant career path for young Australians, particularly young Australian women.

- Queensland Fruit & Vegetable Growers Ltd is the representative body for horticulture in Queensland, representing a $1.2 billion industry comprising 6,500 growers and 25,000 employees, producing over 120 types of produce for domestic and international markets.The organisation represents and acts for members in the areas of advocacy and policy, industry development, marketing and promotions and research and development.

2. BACKGROUND TO THE INQUIRY

2.1 Introduction

This Inquiry stems directly from a commitment given by the Prime Minister, the Hon John Howard MP, during the course of the 2001 Federal election campaign that a re-elected Coalition Government would *'hold an independent review of both the competition provisions of the Trade Practices Act and their administration'*. The Government's decision to commission the Review was based in part on the concern of small business and its representatives about the impact of National Competition Policy on them and on rural and regional communities. Small business has also, in the last decade or so, become increasingly concerned about growing disparity in market power as between it and big business and the seeming inability of the current regulatory framework to deal with those concerns. Prior to the last election the Motor Trades Association of Australia sought undertakings from political parties on a number of matters aimed at strengthening the restrictive trade practices sections of the Trade Practices Act (TPA) and to allow, in limited circumstances, for collective negotiation on the part of small business. In response, the Federal Director of the Liberal Party responded by noting that the Prime Minister had already announced that a review would be conducted and advised that *'The Coalition will ensure that the small business sector plays a central role in the conduct of this review'*[1].

The importance of the Review to small business was also acknowledged by the Small Business Ministers' Council in a communique issued at the conclusion of its meeting on 3 July 2002. The communique, stated, in part that:

> *'The Council was briefed on the Commonwealth's Review of the Trade Practices Act by a member of the Review Committee. The Council agreed that small business needs the Trade Practices Act to maintain an environment where there is fair and equitable treatment of small firms and new market entrants, to ensure dynamism of the economy, particularly in regional Australia, and to provide consumers with genuine fair competition and diversity of choice. The Council called on the Review Committee to recognise and respond to the interests of small business in its work, given the sector's contribution to employment and community well-being.'*[2]

This Inquiry and the opportunity it presents for all interested parties to present their views on Part IV of the TPA is welcomed by the Fair Trading Coalition. It is the view of the Coalition that the outcome of this Inquiry will determine to a very large extent the social, economic, and commercial structure of Australian society into the future. Will it be one in which a few large businesses dominate and where maximising (probably largely, offshore) shareholder returns is the sole or primary concern? Will it be a society where the competitive environment is such that diversity of ownership and operation is maximised and where there is a regulatory regime which encourages fair competition by all participants in the market?

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1 Letter from the Liberal Party Campaign Director to the Motor Trades Association of Australia, 30 October 2001

2 Small Business Ministers' Communique, 3 July 2002

The Coalition believes that without significant changes to the restrictive trade practices provisions of the TPA the former scenario is more likely. That is, in our view, unlikely to be in the long-term interests of Australian society, its consumers, those operating small businesses now and those who may seek to operate such businesses in the future.

In the last two decades there has been an 'opening up' of the Australian economy. Tariffs have been reduced, financial markets have largely been deregulated, labour markets have been deregulated, shopping hours freed-up and government businesses have been privatised (or corporatised) and forced to compete with the private sector. Many of what were previously government functions have been out-sourced.

Part of the reason that has occurred is as a response/reaction to the increasing globalisation of our economy and perhaps more locally because of the imposition on Australian society of National Competition Policy. The beneficiaries of this were to be consumers. Greater competition, particularly through the ending of (government) monopolies and oligopolies, would, it was said, produce lower prices to consumers and an increase in the standard of living for all Australians.

However while some of those benefits have been delivered to some degree or another, there is a whole sector of the economy for whom the flow-on effects of those deregulatory and privatisation policies have not resulted in an environment which encourages fair competition and thus the maximum benefit for consumers; that is the small business sector.

Small business does not seek a return to a regulated environment. However, it believes that competition policy and globalisation, have failed to address the significant increase in (market) power that is now held by a relatively small number of large (some of them very large, multi-national) businesses and the actual and possible abuse of that power.

The removal of the 'old' regulatory barriers and even the disappearance of some of the government run businesses has allowed big business to get bigger and to increase its market power. In some ways Australian society has swapped government monopolies/oligopolies for much more powerful, in market terms, private oligopolies and oligopsonies; the activities of whom in relation to their dealings with their small business suppliers and resellers are largely unconstrained.

2.2 National Competition Policy

As a result of a growing recognition of the need for universal application of the Trade Practices Act and also of the need for a regulatory regime relating to access to natural monopolies, Australia started, in 1991, to develop a National Competition Policy (NCP). The six key elements of Australia's National Competition Policy are:

1. the limiting of anti-competitive conduct by firms through the Trade Practices Act;
2. the reform of regulations which unjustifiably restrict competition;
3. reforming the structure of public monopolies to facilitate competition;
4. providing third party access to certain facilities that are essential to competition;
5. restraining monopoly-pricing behaviour; and

6. fostering competitive neutrality between government and private businesses when they compete.

Competition policy is thus all encompassing and affects all Australians. Some however are affected more than others and as a nation, Australia needs to look at the development of competition reform as a continuing process. That process is not yet finished. The effect of what has occurred so far, on some sectors, such as small business, has been dramatic. Furthermore, regulation that often protected small business has been removed in the hope that consumers would benefit.

National Competition Policy was supposed to break down the last vestiges of entrenched monopoly power. To some extent however it has allowed that monopoly power to re-assert itself in many industries. In the past, powerful businesses and market power may have been constrained by regulation or the fact that there was competition through public ownership.

This is largely no longer the case. The regulation, and hence protection of the less powerful, that is left is of the generic kind such as that found in the Trade Practices Act and related legislation. That legislation is comprehensive, but it now requires updating to take into account the changes in market structure that to a large degree national competition policy and the law have facilitated.

Markets in Australia which are highly concentrated include banking, petroleum, retailing particularly; food, liquor and hardware, most manufacturing, airlines, most food processing and publishing and wholesale distribution of newspapers and magazines. The following lists just some, with a particular relevance to rural and regional Australia:

Abattoirs
Agricultural machinery
Agricultural supplies
Air conditioning suppliers
Airlines
Architectural hardware
Asphalt products
Automotive tyres
Banking
Bread
Bricks
Carton manufacturing
Cement
Ceramic-ware manufacturers and wholesalers
Concrete
Fencing materials
Fertilisers
Freight forwarders
Frozen vegetable processors
Glass merchants
Industrial waste
Insulation materials
Milk processing
Oil companies.
Paper merchants
Petrol
Pharmaceutical wholesalers
Poultry processors
Private health insurance
Publishing and wholesale distribution of newspapers and magazines
Retailing - food
Retailing – hardware
Retailing – liquor
Roof tiles
Scrap metal merchants
Soft-drink manufacturers
Steel distribution
Stevedoring companies
Stock and station agents
Timber products
Transport companies
Veterinary supplies
Windscreen suppliers

In many sectors rural and regional Australia has been severely disadvantaged; not just the consumer, but business as well. Many businesses in rural and regional areas and in some metropolitan areas have either been eliminated or have to compete against aggressive monoliths that are often their suppliers as well as competitors. For example, some national purchasers of private health services are exerting extreme pressure on small rural hospitals to accept unsustainable payment levels, threatening the viability of not only the hospital but also that of the local community.

Much of this is well documented in Parliamentary reports particularly on retailing, banking and dairying. The Productivity Commission Report on the Impact of Competition Policy Reforms on Rural and Regional Australia and the Senate Report on the Socio–Economic Consequences of National Competition Policy in Regional Australia clearly indicated that there were winners and losers from NCP; the metropolitan over the regional and big business over small business.

The Senate report (and to a lesser extent the Productivity Commission report) has a lot to say about compensation for the losers; in some industries such as dairying there have been significant structural adjustment packages available to those affected by the changes. The position of actual and potential "losers" from national competition policy must be a key element of the focus of the Trade Practices Act review.

The Competition Principles Agreement which was an integral part of the NCP package included a list of public interest considerations to be taken into account when considering reform. These were not only economic matters but social ones as well. However the latter seem to have largely been overlooked and the issue of distributional equity largely ignored with the result that there is now some scepticism in Australia about the so called benefits of NCP:

> *'….Deregulation does not improve competition. In the long term, it actually reduces it by allowing big companies to use their power games, through market dominance to take small business market share. It is all about transferring market share from the small operator to the big chain stores. …'*[3]

In short, the effect of the structural changes in the Australian economy, which had the stated aim of fostering efficiency and lowering consumer prices, have in reality seen a transfer of income from small to big business. Businesses have been allowed and even encouraged to grow large through mergers, deregulation, globalisation and so called successful commercial strategies.

In a 1979 OECD report on the significance of market concentration it is noted that:

> *'Until the 1930s, it was the general presumption of economic thought that serious market imperfections occurred almost solely in conditions of monopoly. Examination of markets however, tended to show that domination by the few was a situation more likely to exist than conditions of pure monopoly.*

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[3] Soula George, Micro Business Consultative Group; Transcript of Evidence to the House of Representatives Standing Committee on Industry, Science and Technology's Inquiry into Fair Trading, pp 300-301, 4 November 1996

> *Moreover, it was shown that domination by a few sellers in less than perfectly competitive markets could lead to market imperfections such as tacit collusion or parallel pricing or could facilitate actual collusion in the form of price-fixing, market sharing or other restrictive practices. It was also recognised that practices such as vertical restrictions, mergers and price discrimination could have more serious anti-competitive effects when engaged in by leading firms in a concentrated market.*
>
> …
>
> *Market concentration, …..., refers to the share possessed by a relatively small number of the largest firms in an individual market or industry. It is [that] which is of primary importance in competition theory and for the enforcement of competition legislation. In addition concentration has both static and dynamic aspects. The static aspect refers, for example, to the market share of a small number of the largest firms at a specific point in time, while the dynamic aspect relates to the manner in which this market share has increased or decreased over time.*
>
> …
>
> *While the existence of a high degree of concentration in an industry does not necessarily ensure anti-competitive practices, it does indicate that the possibilities exist for certain types of conduct and performance which are not usually considered desirable. In theory, high concentration facilitates consciously inter-dependent behaviour, including parallel pricing and the restriction of output. Monopolistic and oligopolistic practices are more likely and competitive behaviour less likely, where a few large firms account for the major share of an industry's output, compared to a situation where even the largest firms are relatively unimportant.'*[4]

There is little that small business can do if it is subject to use and, we could contend, the misuse of market power by the large in competitive situations. Small players confronting dominant or powerful upstream or downstream players that dictate terms cannot take collective action to combat this. Unions, and hence labour, have long been able to do that, but others cannot.

Small business concerns about the current Trade Practices Act and expectations for its reform were expressed quite accurately by the Deputy Prime Minister and Leader of the National Party, the Hon John Anderson MP, during the 2001 Federal election campaign when he said that:

> *"Their* [small business'] *concerns centre on the disparity between small and large businesses when they negotiate terms, conditions and prices. The disparity is reinforced by the Trade Practices Act. When a large corporation or chain negotiates with its suppliers, it does so with the bargaining strength conferred on it by its large number of retail outlets. In effect, it is collectively bargaining on behalf of many retailers. However, when local small businesses negotiate with their suppliers, they bargain for themselves alone. The Trade Practices Act prevents them from bargaining collectively with their suppliers – unless they obtain a special authorisation, which is complex, expensive and*

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[4] 'Concentration and Competition Policy', OECD Committee of Experts on Restrictive Business Practices, 1979

time-consuming. Consequently, in the main streets of our towns there is a competitive imbalance between stores that are located next door to each other. The first task of the review into the Trade Practices Act must be to produce practical and workable recommendations to redress the imbalance."[5]

2.3 Trade Practices Law

Early competition law such as the US *Sherman Act 1890*, the Canadian *Combines Act 1889* and the Australian *Industries Preservation Act 1906* were all aimed at trusts or combines; that is, basically those entities with a great deal of market power. Those Acts were not about economic efficiency as such, but about a fear that these entities would take over others or otherwise eliminate them, especially small business. While those Acts were introduced in an era of much less import competition the underlying concerns which facilitated their introduction then are no less significant today for some parts of the Australian community.

The *Trade Practices Act 1965* (the predecessor statute of the current *Trade Practices Act 1974*) had an offence of 'Monopolisation'. A business engaged in such conduct if it took advantage of its position to:

- induce or attempt to induce someone not to deal with someone else or only deal on disadvantageous terms;
- engage in price-cutting with the object of damaging competitors;
- impose prices or conditions that it would be unable to impose but for its market position.

'Monopolisation' was deemed to apply to any business with a market share of one third or more. 'Monopolisation' could also be by combination. That provision was not adopted in the current Trade Practices Act in that form, instead the more general section 46 covering misuse of market power was inserted.

Australian competition law is aimed amongst other things at curbing further market concentrations if such further concentration through acquisitions or mergers leads or is likely to lead to a substantial lessening of competition in the relevant market or markets. The law also prohibits the misuse of market power. What the law does not do is seek to curb overall national market concentration per se or to seek to curb creeping acquisitions[6].

The law does prohibit misuse of market power by those having a substantial degree of market power but there are no special rules for those in highly concentrated markets; the only exception being telecommunications.

The law also prohibits small business collectively using its power to meet the challenges of the concentrated and deregulated markets. Ironically a large business with a number of branches can aggregate its market power but small individual businesses which may either

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5 'Leadership and Certainty for Regional Australia', The Hon John Anderson MP, Leader of the National Party and Deputy Prime Minister, National Party Campaign Launch, Tweed Heads, 22 October 2001

6 The term 'creeping acquisitions' is used in this submission to mean, small acquisitions which in isolation and by themselves are unlikely to result in substantial lessening of competition. However over time, there is a possibility that major firms could acquire many small firms which overall and over time results in a substantial lessening of competition.

compete with these branches or seek to supply to or purchase goods or services from them cannot.

The law does assist small business in its one to one dealings with big business in relation to unconscionable conduct. However these provisions are relatively recent and remain still to be judicially tested to any effective extent. Whilst the 1998 'fair trading' amendments were a significant step forward, further improvement is needed. The current law still promotes an environment where small business is on its own, yet big business can use its market power to behave in ways which are immoral, unethical and anti-competitive and which should be illegal.

In the latter part of the twentieth century, there has developed a philosophy that there is nothing wrong with being big, that the market place should not be fettered and that the law should only intervene when market power is misused and that it should only to apply to the very big and only in the most limited circumstances.

However, we are now in an era which has seen the introduction of laws proscribing unconscionable conduct between businesses, for pro-competitive reasons, but where, at the same time, there has been increasing market power gathered into the hands of a few; both domestically and globally. This is most apparent in the following sectors:

- airlines;
- banks;
- insurance;
- petroleum refining and marketing;
- pharmaceutical companies;
- publishing and wholesale distribution of print media;
- supermarkets; and
- telecommunications.

Fortunately, parliaments, state, territory and Federal, should not be and are not averse to regulatory intervention if intervention is found to be in the public interest. In the context of the efficacy of intervention on society's behalf, it has been suggested that the strong prohibition in the law against collective conduct by small business needs to be re-examined by parliaments. It is possible under current arrangements to authorise collective conduct by small business but that is a cumbersome and uncertain process and starts from the point of view that the conduct is <u>bad</u>, especially if it deals with price.

It is rather suggested that Australia needs to redress the original legislative concern about the effect of market concentration and the effect of it on others in the market including consumers and small business while not blinded or deflected by economic theory.

In 2002 and beyond Australia is, and will continue to be, faced with a very different environment to that of the preceding 30 years. A reconsideration of some aspects of the Trade Practices Act is therefore now appropriate. In particular, there is a need to concentrate on how the Act's aims are to be secured to enhance effectiveness and to reduce the imbalance of power that deregulated markets have fostered.

Australia's economic future depends upon its capacity to let small business grow. Yet currently in many industries that is not possible. Those with market power have the power of

life or death over small business that exist in the sector as well as the capacity to prevent entry. Any entry into or expansion of competitive small businesses into key sectors is currently hampered and that results in an even greater concentration of market power in the hands of a few large businesses.

As noted by the Chairman of the Australian Competition and Consumer Commission in his introductory remarks to the Commission's 2000-2001 Annual Report, *'[T]hree major forces are driving change in the modern economy: globalisation, the emergence of new technology and progressive liberalisation of markets, both local and international. …. These forces, while generally beneficial for consumers and businesses, may require some scrutiny by competition and consumer protection regulators. …. If we are to have an internationally competitive economy we must apply a vigorous competition law to respond to these new market imperatives. To tackle such a dynamic environment, the Commission believes the Trade Practices Act should be changed. While its basic structure is sound, the Commission believes that scope exists for several amendments.'*[7] The Chairman went on to state that the three key changes required were:

- that criminal sanctions should apply to price fixing, bid rigging, market sharing, and possibly, collective exclusionary boycotts by big business;
- that changes be made to s46 to incorporate an 'effects' test and to give the Commission the power to issue 'cease and desist' orders where it considers section 46 (and perhaps others sections of the Act) might have been breached; and
- civil penalties should apply for breaches of the consumer protection provisions in Part V of the Act.

2.4 Abuse of Market Power - A Key Issue for the Review's Consideration

A key issue for consideration by the Review is the question of the abuse of market power as prescribed by section 46 of the Act. At present the Act provides in s46(1) that:

> *'A corporation that has a substantial degree of power in a market shall not take advantage of that power for the purpose 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.'*

One of the key questions for this Review is whether the Act should be amended to include, in that section, an 'effects test'. A number of previous inquiries have rejected such a change. Professor Warren Pengilley argues[8] that six previous inquiries have rejected such a proposal. This is not in fact the case.[9]

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7 ACCC 2000-2001 Annual Report, August 2001 pp 6-9

8 See the submission to the Senate Legal and Constitution References Committee Inquiry into the *Trade Practices Act 1974* by Professor Warren Pengilley, 27 March 2002

9 The inquiries nominated by Professor Pengilley include Griffiths (MP), Senator Cooney, Hilmer, Reid (MP), Baird (MP)and Hawker (MP). In relation to these six inquiries, it is noted that the Reid inquiry

2.5 Collective Negotiation

Trade practices theory and law has always cautioned against, and in fact prohibited (as per se offences where such action involves prices) collective action; the only exception being for labour arrangements. The reality is that many of the difficulties faced by an individual employee negotiating with an employer are also faced by small business: the potential for exploitation by a large employer, the economic tie to the large employer and the desire of the employee to maximise its return from its labour, versus the desire of the large employer to secure the services of the employee for the least cost possible. It has therefore long been realised that labour required some form of countervailing power to balance against the market power of the large employer. While it has been recognised for many years that collective bargaining in labour markets has provided benefits to workers and transferred some of the market power from employers to employees the same recognition has not been given to small business.

The result of these NCP driven changes has been a wealth transfer to the powerful buyer or seller or competitor at the expense of small business. This has lead to an inequitable distribution of wealth, not to mention a feeling in small business that it is being cheated by the law.

The process of restructuring our marketplace through enhancement of competition which had been under way for some time and which has now stalled has been both good and bad. In relation to small business it must be said that the regulatory reform process has overlooked some important issues and needs now to be regenerated.

It should be remembered as stated in the Hilmer Report that:

> *"Competition policy is not about the pursuit of competition per se. Rather, it seeks to facilitate effective competition to promote efficiency and economic growth while accommodating situations where competition does not achieve efficiency or conflicts with other social objectives. These accommodations are reflected in the content and breadth of application of pro-competitive policies, as well as the sanctioning of anti-competitive arrangements on public benefit grounds."*[10]

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did not extensively consider and was not focussed on section 46 as that inquiry dealt more with fair trading and retailing issues. In addition, the Coalition considers that the Hilmer inquiry was a report in relation to national competition policy in a broad sense and was not a detailed report about the adequacy of various provisions of the TPA. Further, the Hawker Committee which is a Committee of the House of Representatives, has in this context as its principal role the reviewing the Annual Report of the Australian Competition and Consumer Commission and does not have a role of making detailed recommendations as to the adequacy of provisions contained in the Trade Practices Act. In these circumstances, it is misleading to assert that an "effects test" has been rejected on more than two or if you include the Blunt Committee Report (not mentioned by Professor Pengilley) on no more than three occasions. In any event the question of an 'effects' test was not a priority issue for any of the Committees other than the Cooney Committee. In fact in 1983 the Government's Green Paper recommended the introduction of an 'effects' test.

[10] Report by the Independent Committee of Inquiry, *National Competition Policy*, 1993 (the Hilmer Report)

It is not suggested that small business be permitted to deal collectively where they deal with customers generally, but only where they face a few purchasers or suppliers, who in many cases will also be competitors. In those circumstances it is contended that the law should not prohibit what will be a temporary use of collective market power to counter the relational market power of the large businesses.

2.6 What is Different This Time?

The Coalition contends that the circumstances presently applying to the current Review of the Trade Practices Act are significantly different to any previous inquiry. Importantly, the Trade Practices Act was amended in 1995 to include a new object of the Act to *'enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection'*. The inclusion of that object demonstrates that the fundamental social purpose of the Act is to serve the public interest in its broadest meaning. In this context, it is thus not appropriate to view the Act solely in an economic or legal context. It also needs to be recognised that the fair trading objective contained in section 2 of the Act was given greater weight when in 1998 the Parliament enacted section 51AC to proscribe unconscionable conduct in business transactions. 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 circumstances applying to the present inquiry are also different to those applying previously; in terms of microeconomic reform, the application of National Competition Policy and the more recent increase in the globalisation and deregulation of the Australian economy. Small business has been short-changed as part of all these changes and that must be addressed.

3. ISSUES FOR SMALL BUSINESS

3.1 The Inquiry Terms of Reference

The Terms of Reference for this Inquiry require the Committee to review the operation of the competition provisions of the Act, specifically Parts IV (and associated penalty provisions) and VII and having done that 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'*[11].

The matters which the Review must confront are wide-ranging and in some cases reflect entirely different agendas and priorities. The following matters are relevant to those agendas and priorities and must be taken into consideration by the Committee:

- there is a need to ensure that the high reputation that trade practices regulation has acquired for being in the community interest is maintained;
- the institutions that administer and enforce trade practices legislation are now mature and responsible;
- the administration of the law is now undertaken more in an economic construct;
- many Australian markets are more concentrated than ever;
- at the same time, markets have become more global. However there are still real domestic concerns for small business, that to some degree are parallel and symmetrical to the fears larger businesses experience in relation to the global competition environment;
- consumers and small business need protection from anti-competitive practices in order to ensure there is maximum fair competition;
- speed of consideration by the competition regulatory authorities is all the more important than ever;
- transparency is vital; and
- in the light of frequently revealed abuses, the sanctions for serious breaches of the trade practices legislation by large corporations need strengthening.

For those reason this Inquiry is not only timely, but its outcome will be critical for the future of small business.

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[11] 'Review of the Competition Provisions of the Trade Practices Act 1974' Media statement by the Hon Peter Costello MP, Federal Treasurer, 9 May 2002

3.2 The Environment in which Small Business Operates

In a recent address,[12] the Minister for Small Business and Tourism, the Hon Joe Hockey MP, noted that there are *'almost 1.2 million small businesses in this country'* and that *'they are mostly family-run concerns. Two thirds of small businesses are owned by members of the same family. About the same proportion of small businesses are operated from the family home. These are the people who have the courage to risk their house to finance their business, to secure a better future for themselves and their family. And these are the people who put in the long hours to sustain and grow that business.'*

However, the reality is that hard work and long hours may not be enough to sustain, let alone grow, a business if the regulatory arrangements under which it operates do not foster an environment which encourages competition and fair trading and hence provides incentives for hard work, diligence and customer focus. The role of the Trade Practices Act is definitely not to promote an economy in which a few large firms dominate and decide which products and services shall be available to the consumer. The members of the Coalition believe quite firmly that:

- the Trade Practices Act is about creating a society where consumers have the maximum of choice and access to services;
- there must be strong competition at both wholesale and retail. Such competition should focus on a broad range of matters including price, variety of goods, availability and after sales service;
- weaker and exploitable parties should have legislated rights and protections;
- trade practices regulation is not about ensuring unwarranted business survival; and
- the largest, most 'efficient' competitor should not have the power or right to exclude others, except by normal commercial dealings.

Section two of the Trade Practices Act states that the object of the Act *'is to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection'*.

Small business believes that despite the Act being specifically amended to recognise and state that objective in 1995, the structure of the economy has, as a result of the introduction of NCP, changed quite dramatically. As indicated earlier in this submission economic and commercial power has continued to become much more concentrated. The reality is that a few large businesses in our economy have now acquired or are seeking to acquire significant additional market power. Their actions have the power of life or death over many small businesses.

While the structure of our economy has changed, small business believes that the Trade Practices Act and in particular the anti-competitive (or restrictive trade practices) sections of the Act have not kept pace with those changes. The Act therefore needs to be updated to address the severe imbalances in commerce and the economy which have arisen because of those structural changes.

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[12] Address to Baker & McKenzie Competition Forum, Sydney, The Hon Joe Hockey, MP, Minister for Small Business and Tourism, 18 April 2002

Much evidence was provided to both the House of Representatives Standing Committee on Industry, Science and Technology's Inquiry into Fair Trading and the Joint Select Committee on the Retailing Sector about the market dominance of the major retailers (largely Coles Myer and Woolworths), particularly in the grocery sector. Recent media reports suggest that both Coles and Woolworths are each now actively seeking an increased share of the liquor market; at the reported expense of small licensees.[13] The regular ACCC reports to the Senate on Anti-competitive and Other Practices by Health Funds and Providers in Relation to Private Health Insurance have detailed a number of instances of large health funds using market power against private hospitals.

Yet while the large firms are on the one hand content to increase their own market share at the expense of smaller market players, they, on the other hand react very vigorously when they find other parties competing strongly for their market share. For example, when small supermarkets and petrol outlets combined to provide shoppers with two cent a litre 'shop-a-dockets' for petrol purchases in response to Woolworths own discount arrangements at its Plus Petrol outlets, the ACCC was forced to act on complaints by Woolworths and advise the small supermarkets and retailers that they were in danger of breaching the third line forcing provisions of the Trade Practices Act and that they should submit formal notifications to the Commission of the arrangements. Such notifications involve a significant cost in fees and charges.

In a recent *Business Sunday* program,[14] reporter Michael Pascoe noted that the ACCC's recent successful prosecution of Colgate Palmolive Pty Ltd for resale price maintenance was initiated after a complaint by Woolworths to Colgate about Colgate's wholesale pricing arrangements with a, by comparison, relatively small discount retailer.

In another sector, motor vehicle body repair, the dominance of a few large insurance companies is a cause of concern for small business. The relationship between repairers and insurance companies has, in recent times, been severely tested as the major insurance companies reposition themselves in the market place. Demutualisation of major insurance companies, particularly of NRMA Insurance (now IAG), has been a major influence in this changing relationship. The companies have embarked on a series of acquisitions and mergers which has resulted in the emergence of a few very large insurance companies; again IAG could be cited as an example of that, and its over-riding concern now appears to be increasing shareholder value; whatever the cost to both repairers and insureds. IAG advertising currently focuses on reduced costs. It has abandoned its previous campaigns that focussed on the customer and quality of service.

In fact the split and demutualisation of the then NRMA Insurance has had other impacts as well as those referred to above. The directors of NRMA (the motorists association) were recently forced to vote for substantially increased fees for membership/roadside assistance services because NRMA had recently incurred substantial losses; presumably at least in part because the cross subsidisation previously provided by the 'NRMA insurance business' is no longer available. The profits flowing from the insurance business are now passed to shareholders and not the NRMA members.

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13 See for example, *'ACCC To Oppose Woolworth's High Court Application To Stop Production of Liquor Investigation Documents'*, ACCC Media Statement, 12 October 2001

14 *Business Sunday*, Channel 9, 19 May 2002

In the Australian petroleum industry, the refining, distribution, marketing and retailing of fuel is now dominated by only four companies, three of which are multi-nationals who do not report to Australian shareholders or the market. Those vertically integrated companies have enormous (and largely unfettered) market power. This extends to the power to effectively dictate the wholesale price to every distributor and the retail price at virtually every petrol outlet in Australia and extends to their dealings over all the business decisions of individual retailers. In addition their wholesale pricing policies, which involve complex rebates and price support arrangements calculated on a site by site basis, determine whether independents can survive in the market. These are not practices and arrangements which are in the long term interests of consumers. Yet the present provisions of the Trade Practices Act mean that it is very difficult to prove that the companies are acting in an uncompetitive manner. In fact the prevailing wisdom of both the regulators and the government has been that if the outcome is lower prices for consumers then that is a good thing and no other factors need to be considered.

The ACCC has addressed this matter in its recent report on fuel price variability,[15] in which it concluded there should be a consumer awareness initiative to increase consumers understanding of fuel price cycles and to educate consumers so that they can time their purchases to buy fuel when prices are relatively low. The Commission recommended against government intervention to limit price cycles and failed to recommend the introduction of national terminal gate pricing arrangements preferring instead to recommend further monitoring of regulatory arrangements in Victoria and Western Australia.

This represents a policy of accepting second best in the absence of the regulatory armoury to deal with the primary problem.

In relation to the distribution of print media, the Australian Newsagents' Federation has previously noted that:

> *'There are few major cities in Australia that are serviced by more than one local, daily newspaper. Within regional Australia a similar situation exists. The ownership of these daily newspapers (particularly in major cities and in many regional areas) is not diverse.*
>
> *The vast majority (more than 90%) of readily available magazines (both national and international), are distributed by three companies across all states of Australia. Two of the three companies have the majority of that distribution (regardless of whether that measure is based on numbers of copies circulated, or their dollar value). Within the last twelve months there have been attempts to merge / acquire two of the three distribution companies.*
>
> *In a city such as Adelaide a newsagent who acts as a 'distribution only' newsagent (that is the newsagent does not have a retail shop and generates income from the daily delivery of publications to homes, businesses and to other small mixed business retailers), 80% of their sales are likely to be coming from one daily publisher. Those sales will account for 85% of their overall gross profit'*[16]

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15 *Reducing fuel price variability*, Australian Competition and Consumer Commission, December 2001

16 Australian Newsagents' Federation Submission to the Senate Legal and Constitutional References Committee Inquiry into the *Trade Practices Act 1974*, January 2002, p9

The members of the Coalition believe that the Trade Practices Act is about much more than delivering the lowest, but not necessarily enduring prices to consumers; in the long-term the price for society of solely pursuing such economic outcomes may be too high. Government and its regulatory authorities must ensure that there is a place in our society for small business, for the entrepreneurs who operate those businesses, for the employment opportunities they provide and for the diversity and service that big business is unable or unwilling to provide.

Thus Australia needs to ensure that the Trade Practices Act provides a regulatory framework under which those businesses can compete and the best of them can thrive and grow. That means that we need a Trade Practices Act that is concerned with much more than economic theory yet which equally focuses on meeting the needs of our society. We must foster a dynamic and pluralist society with big and small living side by side.

3.3 Administrative Issues

The members of the Coalition firmly believe that if Australia is to have an effective competition regulatory regime, we need, indeed require, a strong regulator adequately backed with resources and powers. The Coalition believes that in general the public should be aware of the enforcement and education activities of the regulator. The Australian Competition and Consumer Commission is a publicly funded organisation. Its role is to enforce the Trade Practices Act and the public is entitled to be advised that that is happening. If the object of the Act is to enhance the welfare of Australians, by extension then, breaches of the Act will do the opposite.

The publicising by the Commission of the legal actions that it has commenced and, when a conclusion is reached, the outcome, where there are alleged breaches of the Act is in our view an important element of the Commission's role. There should be a clear understanding by businesses of all sizes of the fact that alleged breaches of the law will be drawn to public attention and proven breaches will be severely punished by the Courts. Business must also be cognisant of the likelihood that there is a relatively high chance that alleged breaches of the Act will be thoroughly investigated by the Commission and legal action commenced where necessary. That will, and should, act as a deterrent to anti-competitive behaviour. This view is supported by the Chief Executive of the Australian Consumers Association who stated in the Australian Financial Review (5 June 2002) that:

> *'Without the high public presence of the ACCC and its ubiquitous chairman we would be far less aware of the TPA and, further, consumers would be less confident that somebody was watching out for them. Publicity is an extremely cost effective compliance tool – saving taxpayers a fortune over other equivalent devices.'*[17]

However, the Coalition believes that it is also appropriate that the Commission's activities be transparent and that it be subject to regular and intense parliamentary oversight; as is currently the case with other Commonwealth regulators such as the ASIO and the NCA. The Chairman and Commissioners should continue to be required to regularly attend for

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[17] Sylvan, Louise; Chief Executive of the Australian Consumers Association, *Australian Financial Review*, 5 June 2002

Parliamentary scrutiny in the same way as the Governor of the Reserve Bank. This matter is further discussed in section four of this submission.

There is also concern that the Commission itself may choose to overlook what is perceived by small business as anti-competitive behaviour because it delivers lower prices to consumers. The Coalition believes that there should therefore be more focus within the Commission, from an administrative and enforcement view, on those concerns of small business. This matter is also discussed further in section four of this submission.

Small business is very aware that society, through regulators such as APRA and ASIC, places quite some emphasis on good corporate governance. The Corporations Law imposes obligations on Directors and Officers of companies about their duties to shareholders in terms of disclosure, financial and other reporting, dealing with conflicts of interest and so on. This regulatory regime was imposed following reviews of the then legislation and corporate governance, respectively, by Wallis[18] and Bosch[19] following several high profile corporate collapses in the 1980s. In fact in the foreword to the Working Group's paper, *Corporate Practices and Conduct*, Bosch notes that *'The Working Group is firmly of the view that the corporate sector should establish its own framework for acceptable standards of behaviour irrespective of existing or prospective regulatory and legislative rules.'*

However, small business is concerned that the same expected high standards of conduct have not applied to business in commercial dealings. In other words there is a belief that in terms of ensuring high standards of conduct, the Trade Practices Act has fallen behind the corporations law. While trade practices compliance requirements benefit corporations it can also educate corporations to the extent to which legislation can be avoided (for example, through either not creating or by destroying documents). Thus while consumer and shareholder concern about corporate collapses in the 1980s led to a greater focus in both legislation and governance policy terms on the behaviour of corporate Directors and Officers there has not yet been the same public pressure in relation to trade practices compliance matters. There has not yet been significant public pressure to focus big business attention on trade practices corporate governance issues. Such governance issues should be factored into any penalty system and into the transparency of the operations of corporations. Corporate ethics should reward compliance activities by company boards and penalise the opposite.

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[18] Financial System Inquiry, 1997, chaired by Mr Stan Wallis

[19] Corporate Practices and Conduct, 1991, Business Council of Australia Convened Working Group chaired by Mr Henry Bosch AO

4. REMEDIES AND PROPOSED AMENDMENTS TO THE TRADE PRACTICES ACT

4.1 A Return to the First Principles of National Competition Policy

There is a perception within the wider community, particularly in rural and regional Australia, that the imposition of national competition principles has led to the 'hollowing out' of the bush. The Coalition believes that government policies are inexorably leading to the demise of rural and regional communities because of the withdrawal of government and other services, the gathering up of services formerly provided by small business by retail chains and a decline in employment opportunities. In particular tendering processes often result in contracts awarded to 'out of town' entities and a net loss of population, opportunity and income. In its Report, *Riding the Waves of Change,* the Senate Select Committee on the Socio-Economic Consequences of National Competition Policy reports on evidence provided by the Latrobe Shire Council. The Council advised the Committee that:

> *'The really big effect has been the rationalisation and privatisation of the electricity generation industry. Over 6,000 direct jobs were lost in the power industry in around a decade, which equates to roughly 10 per cent of our total population and a loss of something like 18,000 jobs overall. In a community of around 70,000 people that is an extraordinary level of job loss.*
> …..
> *This resulted in a great loss of local skills and engineering resources. One finds former Latrobe Valley engineering people, for example, working all over the world. … The skill base that had been built up over half a century has been dispersed to a certain extent. We still have some of it, but a lot of it had to move.'*[20]

National Competition Policy has provided benefits to consumers and the economy. However the Coalition also believes that the benefits have not been distributed evenly across the regions of Australia and that there is a need to strengthen the public interest test in any application of the national competition principles.

The Coalition believes that the public interest is not necessarily served by rigid adherence to contestability or 'competitive tendering' or the removal of government services from rural and regional areas. Issues such as the impact on employment in local areas, the viability of small business, access of members of communities to government services, as well as the net economic benefits to communities should all be taken into account in applying national competition principles to particular sectors or regions of the economy. In fact, competitive tendering was never part of NCP

In that context the members of the Coalition are encouraged by the following Liberal Party resolution which was passed at its Federal Council meeting in April 2002:

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[20] *Riding the Waves of Change*, Report of the Senate Select Committee on the Socio-Economic Consequences of National Competition Policy, 16 February, 2000; pp 78-79

'That Federal Council supports the Howard Government on its commitment to ensure a greater focus on the public interest test when applying national competition policy with a particular reference to rural and regional communities and urges the early implementation of such a commitment.'[21]

Recommendation 1:
It was the original intention of National Competition Policy that the public interest must be the sole determining factor in any decision relating to national competition policy. The Coalition believes that a formal restatement of that imperative is absolutely essential.

4.2 Collective Negotiation by Small Business

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.

At present in Australia any agreement or understanding relating to price is deemed to be anti-competitive. The law is thus uncompromising. Further, boycotts involving competitors are also per se anti-competitive.

However, given that many sectors of the economy are much more concentrated today than in the past there is increasing support for the view that small business should be able to collectively negotiate in certain circumstances. There is also a view that those negotiations, in order to be fair, now need to involve the possibility of a business or group of businesses refusing to deal or supply as part of a protected conduct measure. Normally this would only be a short term measure in the way that workers withdrawing their labour would usually only do so today for a very short term.

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.

While there is a provision within the Trade Practices Act for authorisation of conduct that might otherwise be in breach of the anti-competitive provisions of the Act, that process is expensive and very uncertain. It is possible now to have collective conduct and boycotts authorised by the Australian Competition and Consumer Commission, but this is slow and difficult. The ACCC does not easily authorise collective conduct and rarely authorises boycotts. The need, for small business, is to be able to collectively negotiate and then get on with business.

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[21] Text of a Liberal Party resolution passed at the Federal Council meeting held in April 2002

The members of the Coalition do have some serious concerns about the current authorisation process. Those concerns relate to the time and expense (leaving aside the actual application fee) involved in preparing an application for authorisation and the complete uncertainty as to the eventual outcome. Even if the Commission grants an authorisation, that can be appealed by any interested party. Once an appeal has been 'lodged' the authorisation is suspended and the matter referred to the Australian Competition Tribunal for a hearing[22]. The President of the Tribunal is a Judge of the Federal Court. However, the Tribunal cannot award costs and thus the appeal process is very expensive. In the end the Tribunal may not uphold the Commission's original decision and the party seeking authorisation is, after considerable time and expense, left with nothing. Also timing is often critical in negotiations and any long delay will make any authorisation useless.

The present process of application to the ACCC for authorisation is both cumbersome and costly. The Australian Newsagents' Federation (ANF), in preparing and lodging its current application for collective bargaining and collective withdrawal of services, expended considerable time in briefing sessions with its Lawyers. The application was lodged in April and a determination is still being awaited at 9 July.

The process is also costly; the $7,500.00 application fee plus several thousands of dollars in legal advice. On receipt of the application, the ACCC sought clarification of some issues and then distributed the application to key industry parties inviting submissions. Extensions of time were granted to some of these parties for their submissions.

The Coalition thus supports the introduction into the Trade Practices Act of a provision that would permit small business operators and or their representatives to collectively negotiate with their suppliers. This collective negotiation could cover issues such as terms and conditions of franchise agreements, supply agreements, sales targets and the like. It would also include a right for small business to agree not to do something (effectively to allow for boycotts by small business). The members of the Coalition believe that amending the Trade Practices Act to specifically include a provision on collective negotiation by small business would provide a much more certain regulatory arrangement than the current authorisation process (or even a notification process).

One proposal for such a legislative provision could be that in relation to collective negotiation by small business, certain 'safe harbours' should be provided in the Trade Practices Act. Basically, what is proposed is that a limited collective bargaining arrangement be allowed for small players (as has been proposed by a US commentator, Warren S Grimes[23], in relation to small business collective negotiation and the Sherman (antitrust) Act).

Grimes proposes that:

> *'Small players are uniquely vulnerable to the relational market power that arises when substantial financial and other commitments are made in reliance on a commercial relationship. A right to act collectively in response to a power-wielding commercial player has long been recognised in the labor antitrust exemption that permits collective bargaining by employees. But there*

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22 As recently occurred in relation to an authorisation granted to the Australian Dairy Farmers Federation which has been appealed to the Australian Competition Tribunal by National Foods

23 Grimes, Warren S; *The Sherman Act's Unintended Bias Against Lilliputians: Small Players' Collective Action as a Counter to Relational Market Power*, Antitrust Law Journal, vol 69 2001 pp 195-248

> *is no general collective action defense in antitrust law, even for small players confronting a dominant upstream or downstream player that dictates the terms of sale for goods or services.*
>
> *So who fall into this class of Lilliputians that are victimized by this Sherman Act bias? Among the disfavoured are professionals (such as doctors or lawyers) who practice individually or in small groups and must do business with power buyers of their services; small businesses (such as independent pharmacies or bookstore owners) that confront power buyers or sellers; small franchisees or ranchers that sell their output to power buyers; and any independent contractor that sells services to a power buyer (such as a taxicab or truck owner that sells his services to a large taxicab or trucking firm).'*[24]

Grimes notes that one option for small operators to balance market power imbalances is to merge or enter into joint ventures. However he points out though that that may not be the preference of many professionals or small business operators. *'For these small players, attaining countervailing power through consolidation or merger may be an unattractive or unattainable option. The only tenable option for attaining countervailing power may be through collective action. The failure of antitrust to recognize a countervailing power defense for small market players is the basis of the legitimate perception that the antitrust laws are skewed against the little guy.'*[25]

Grimes also states that '*recognizing a countervailing power defense for small market players always has a significant benefit within the scope of antitrust analysis: the countervailing power will diminish the wealth transfer to the power buyer or seller at the expense of the small player. Even if the countervailing power exercised by a collective of small buyers or sellers produces no competitive gain for downstream consumers, a more equitable distribution of wealth occurs at upstream levels. Antitrust cannot hope to achieve equitable wealth distribution among market players, but prevention of market power based wealth transfers is a benefit of competition law that Congress sought to achieve'*.[26]

4.2.1 Safe Harbours

In Australia a provision to provide for limited collective action could be based on the model adopted for liner shipping in Part X of the Act which provides a specific exemption, in certain circumstances, for collective dealings with overseas shipping companies. By reference to this policy position and reliance upon it, the changes proposed would allow for collective bargaining in certain circumstances as set out below.

To qualify for this arrangement (and protection from prosecution for breaches of the Trade Practices Act) the small business operators proposing to engage in the collective negotiation would have to fall into one of the following three categories (similar to that proposed by Grimes):

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[24] Ibid pp 195-196
[25] Ibid p 206
[26] Ibid p 212

i) *a safe harbour for small players with a collective market share of 20 per cent or less in any relevant market* – this would have to be met for both relative (market share) and absolute (amount of assets and annual sales) size;

ii) *the exclusive relationship safe harbour* – this would allow collective bargaining by all small businesses involved in exclusive buying or selling relationships with the same big business buyer or seller. However this safe harbour would not provide protection for an industry or market wide association confronting all sellers or buyers. Thus it would provide for collective action by franchisees of a single franchisor, but not for collective action by say all petroleum franchisees against all petroleum franchisors; or

iii) *a rule of reason analysis for near-miss collective action of small players* – that is where collective action by small players does not fall cleanly within either of the safe harbours. This near miss safe harbour would apply if the following three elements could be established:

   a) preconditions – each is a small player in relative and absolute terms and faces the sort of market power that cannot easily or reasonably be addressed other than by collective action; and
   b) nature of the collective action – it must be public and narrowly tailored to address the market power problem faced by the small business operators; and
   c) effects – the collective action must be unlikely to lead to a substantial lessening of competition in the market.

   The burden to establish these elements would fall on the small business operators. However representative associations would be permitted to assist small business in establishing those elements.

The provision would:

i) only relate to small businesses when negotiating with large customers or suppliers;
ii) be limited to collective negotiations or bargaining and it would not cover dealings with other customers or other suppliers;
iii) would provide protection from section 45 (contracts, arrangements or undertakings that restrict dealings or affect competition);
iv) would cover collective arrangements including refusing to do something; that is, boycotts, (guidelines as to permissible boycotts would need to be issued by the ACCC before the amendments became law).

Protected conduct, to collectively negotiate or bargain, could include:

i) agreements on sale prices of product and to whom they would be sold, quality, transport arrangements, standard growing agreements, appointments of representatives from groups to enter negotiations on agreements and resulting contracts;
ii) the ability to freely exchange price sensitive information;

iii) the withholding of products from sale to particular buyers by agreement amongst sellers;
iii) agreements on cooperative advertising and advertising rates paid to advertising agencies and the media; and
iv) refusals to accept standard rates of remuneration offered in advance and irrespective of the nature and quality of the work to be performed.

Recommendation 2:
It is recommended that the TPA should be amended to include a provision within the Act to allow small business operators and/or their representatives to collectively negotiate with their suppliers/buyers, including the right of small business to collectively refuse to do so (that is, a permissible boycott arrangement for small business).

4.3 Add an Effects Test to s46 of the Trade Practices Act

The Coalition believes that there should be a change to the provision of the Trade Practices Act dealing with the misuse of market power (s46). As it is currently worded, in order to prove misuse of market power, an aggrieved party or the ACCC must prove (among other things) that the purpose of the behaviour was to substantially lessen competition.

It would be appropriate to add an 'effect' test to s46. Thus if certain conduct had the 'purpose or effect' of substantially lessening competition in a market, then that conduct would be in breach of the misuse of market power provision of the TPA. It would not be necessary to prove that it was intended that the conduct be anti-competitive; a definite and established anti-competitive outcome would be sufficient (provided that the other tests of s46 were made out). This amendment could be made in conjunction with the changes proposed later in this section to s51AC. Together they would substantially strengthen the position of small business in the economy and enhance the state of competition.

In order to protect businesses from any unintended consequences of the proposed change to s46, it would also be appropriate to allow, where substantial benefit could be shown, for authorisation of conduct that might otherwise be in breach of the amended s46.

In support of a change to the current wording of s46, in its submission to the Senate Legal and Constitutional References Committee inquiry into possible amendments, including to s46, of the Trade Practices Act, the Australian Competition and Consumer Commission stated that it:

> *'… has initiated few actions under section 46, with one reason being the difficulties in proving a proscribed purpose. The forensic task of proving purpose is becoming increasingly difficult as companies become aware of the possible implications of creating "smoking gun" documents.*

> *The ACCC takes the view that the reversal of onus of proof proposal would be preferable to the way in which section 46 actions taken by the ACCC are currently proved before the courts. However, in the ACCC's view, a better approach would be to amend section 46 so as to incorporate an "effect" test.'*[27]

The ACCC has also stated that '*the introduction of the effects test would bring the section into line with similar law in [sic] overseas, including the US and Europe'*.[28]

It will no doubt be proposed by opponents of change to section 46 that no decision should be made on amending the section until the outcome of the current case (Boral Masonry Ltd v ACCC) before the High Court is known. As discussed in section five of this submission, the High Court, or any Court, can only interpret the law as written. The Coalition does not believe that the law, as currently written, provides sufficient protection to small business against the misuse of market power. Awaiting the outcome of the case currently being considered by the High Court, or any other case, will not address the fundamental concerns that small business has about the wording and effectiveness of the misuse of market power provision of the Trade Practices Act.

The Coalition notes that a recent survey[29], conducted by Australian Business Ltd, of 350 manufacturing businesses, ranging from one employee to over 500, revealed that there was support for increased powers for the ACCC. The survey results showed that **47 per cent** of businesses surveyed supported an 'effects' test being added to the 'purpose test' in section 46. The same survey reported that 52 per cent of businesses surveyed supported increased powers to issue temporary "cease and desist" orders which would allow the ACCC to stop alleged anti-competitive conduct while the ACCC investigates it (see section 4.5).

The New South Wales State Chamber of Commerce in conjunction with NRMA Insurance also surveyed[30] its members on a range of issues. Sixty one per cent of respondents said that they thought large firms misused their market power and 67 per cent said that they believed that the ACCC should have more power to halt anti-competitive conduct.

It should be noted that in recommending the addition of an 'effects' test to section 46 the Coalition would observe that in order to prove a misuse of market power had occurred it would still be necessary to show that a firm had a 'substantial degree of power in a market' and that it had taken advantage of that power to eliminate or damage a competitor, to prevent market entry or to deter or prevent competition in that or any other market. The legal precedents already established by the Courts in relation to market definition, market power and taking advantage of that power would continue to apply to an amended s46.

Some organisations have expressed concern that an amended s46 would have an adverse impact on small business; that is, the amended provision could be used against small business. As the law currently stands there is no 'threshold' to exempt small business from the scope of s46; nor should there be. In the unusual situation of a small business having a

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27 Australian Competition and Consumer Commission submission to the Senate Legal and Constitutional References Committee Inquiry into the Trade Practices Act 1974, February 2002, p 2

28 ACCC Media Statement 'ACCC Submission to the Review of the *Trade Practices Act 1974*', 2 July 2002

29 *More Power for ACCC Supported by SME's says New Survey*, Australian Business Ltd media statement, 21 June 2002

30 NSW State Chamber of Commerce website, February 2002

substantial degree of power in a market, that business should not be able to take advantage of that power to damage a competitor or potential competitor.

Two private actions in respect of s46, Mark Lyons Pty Ltd and Bursill Sportsgear Pty Ltd (1987) and John Neal Williams and Anor and Papersave Pty Ltd (1987) have been proposed as being reason for small business exercising caution in relation to changes to s46. However it needs to be recorded that in the Papersave case it failed both at first instance and on appeal and it failed essentially on the issue of the taking advantage of market power. In relation to the Bursill Sportsgear case, Bursill was not a small business. If one looks at its market position and the description of that position in the judgment itself, Bursill was the importer of Salomon, a leading brand of ski boots, and as such had a significant degree of market power in that market. Further it had significant sales. Mark Lyons succeeded in that action.

The Coalition does not believe that small business should in any way be concerned about the addition of an effects test to s46.

> ***Recommendation 3:***
> It is recommended that section 46(1) of the Trade Practices Act be amended to add an effects test. It is also recommended that the Act be amended to allow for authorisation of conduct which might otherwise breach s46.

4.4 Proscribe Selling at Unreasonably Low Prices

There are various methods by which goods may be sold at 'unreasonably low prices'.

In the Australian oil industry the four oil majors have substantial interests/equity in distributors and each of the majors is heavily involved in the retail market. Even at their franchised sites, the oil majors exert a great deal of influence over retail pricing. This is done by charging a wholesale price unrelated to the market and then providing price support or rebates to resellers on the condition that they set their retail price at a level dictated by the supplier. This control over prices at all steps ensures that the petroleum industry remains highly vertically integrated. In addition three of the four majors have established substantial multi-site franchise networks. In the case of Shell a number of multi-site franchisees operate in excess of 40 sites.

Franchisees and other resellers also often have to compete in the market against sites which are directly controlled by the oil majors and at which retail prices are set at a price <u>below</u> which the companies will supply fuel to other resellers, particularly independents.

Individual resellers should be free to set their own retail prices – without influence or pressure from their supplier. Suppliers should not be able to set retail prices at their own controlled sites at prices which are lower than those at which they will make fuel available at wholesale to other resellers.

In the hotel industry inequitable taxation arrangements between licensed clubs and others in the hospitality sector effectively create opportunities for licensed clubs to offer alcohol, food

and increasingly accommodation services at a loss. This has resulted in licensed clubs being able to sell services at unreasonably low prices, unfairly undercutting those other entities in the sector which are subject to different taxation arrangements. This has resulted in reduced investment in the hotel and tourism sectors. This inequity has been recognised by the House of Representatives Standing Committee on Banking, Finance and Public Administration in its report *Taxing Relaxing* when it noted that:

> *'3.52 many clubs are operating in such way as to disadvantage bona fide tourism businesses, because their access to certain favourable taxation conditions, notably the principal of mutuality, they are in a position to compete unfairly with hotels and other genuine providers of tourism services.'*[31]

In the newsagent sector, the following issue highlights the difficulties faced by many in the sector:

> *'Newsagents in South Australia own a trading co-operative which deals in the supply of stationery products for sale to retail newsagents as well as supplying a wide range of public and private schools with school stationery and materials.*
>
> *The major sales period for school stationery supplies occurs during the lead up to the resumption of the school term in January. The suppliers of stationery compete for the supply of a whole range of stationery product via catalogue orders. The range of product and their prices to the schools are released toward the end of September and are ordered during October / November for delivery in mid-January. One of the major school stationery suppliers is attached to the Sate Government. This government-owned authority priced a range of exercise books at well below their cost. The newsagent-owned supply company claimed that this situation amounted to predatory pricing as the goods involved were a substantial section of the promotion and the timing of the pricing was at a time where a large part of annual sales were made.*
>
> *Upon enquiry of the ACCC, the newsagents' stationery supply company was informed that they would not only have to show that the below cost pricing occurred, but also provide evidence (preferably in the form of written evidence from the other supply company's records) showing that there was intent to damage competitors with the pricing, referred to in current legislation as 'proscribed purpose'!*
>
> *Notwithstanding the damage to other companies trading in this situation, no legal action is likely to occur unless "intent" is able to be established. Obtaining such proof is beyond the capacity of the other company and demonstrates just how ineffective the current legislation is, and yet predatory pricing is claimed to be one of the key elements in many claims of misuse of market power.'*[32]

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31 *Taxing Relaxing*, Report on the Inquiry into the Impact of Australia's Taxation Regime on the Tourism Industry, House of Representatives Standing Committee on Banking, Finance and Public Administration, March 1995

32 Australian Newsagents' Federation Submission to the Senate Legal and Constitutional References Committee Inquiry into the *Trade Practices Act 1974*, January 2002, pp14-15. It should be noted that this matter is yet to be resolved.

Currently there is no specific prescription in the Act dealing with predatory pricing, or unreasonably low pricing. Section 46 is said to proscribe predatory pricing and other predatory conduct through its prohibition on the misuse of market power. It is proposed that the law should specifically spell out such conduct as being proscribed under section 46. It is thus suggested that section should provide that businesses not sell at 'unreasonably low prices'. This is similar to provisions of like purpose in the Canadian Competition Act which provides that:

> ***'50****(1) Every one engaged in a business who:*
>
> *(a) is a party or privy to, or assists in, any sale that discriminates to his knowledge, directly or indirectly, against competitors of a purchaser of articles from him in that any discount, rebate, allowance, price concession or other advantage is granted to the purchaser over and above any discount, rebate, allowance, price concession or other advantage that, at the time the articles are sold to the purchaser, is available to the competitors in respect of a sale of articles of like quality and quantity,*
>
> *(b) engages in a policy of selling products in any area of Canada at prices lower than those exacted by him elsewhere in Canada, having the effect or tendency of substantially lessening competition or eliminating a competitor in that part of Canada, or designed to have that effect, or*
>
> *(c) engages in a policy of selling products at prices unreasonably low, having the effect or tendency of substantially lessening competition or eliminating a competitor, or designed to have that effect,*
>
> *is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.*
>
> *Defence*
>
> *(2) It is not an offence under paragraph (1)(a) to be a party or privy to, or assist in, any sale mentioned therein unless the discount, rebate, allowance, price concession or other advantage was granted as part of a practice of discriminating as described in that paragraph.'*[33]

What may be meant by 'unreasonably low prices' should be a matter for the ACCC to interpret taking into account all the circumstances of a case. In the case of Queensland horticultural producers, buying fruit and vegetables below the cost of production, whether they are being sold at 'unreasonably low prices' or not, distorts the market and needs to be considered further.

Members of the Coalition believe that the Trade Practices Act should be strengthened to address concerns about 'predatory' or unreasonably low pricing.

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33 Competition Act, Canada as at http://laws.justice.gc.ca/en/C-34/32893.html

Recommendation 4:
It is recommended that section 46 of the Trade Practices Act be specifically amended to proscribe selling at unreasonably low prices.

4.5 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 and at that time will have to prove any breach of the Act as well as any breach of the order.

The NZ Commerce Commission has recently been given the power to issue cease and desist orders and the US Federal Trade Commission has had such a power for many years.

The difficulty with the current enforcement arrangements in the Trade Practices Act is that once the ACCC commences an investigation, it can take a number of years (particularly if the matter is to be considered by the High Court) before it is finally resolved. In the case of restrictive trade practices matters, the damage that has been inflicted on consumers or other businesses leading up to and during the investigation and hearing may be quite severe. The benefits to the perpetrator may be quite substantial and exceed any possible penalty. There is currently no requirement for the company to cease the conduct in question once an investigation is begun.

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.

Recommendation 5:
It is recommended that section 46 of the Trade Practices Act be amended to provide the Australian Competition and Consumer Commission with the power to issue a 'cease and desist' order in circumstances where corporations are thought to have misused their market power.

4.6 Divestiture Orders

The power to order divestiture should be one of the remedies available to the Court for any breach of the anti-competitive conduct provisions. At present that is only possible in relation to (anti-competitive) mergers and the power is very rarely utilised.

However such a remedy is not available in relation to other anti-competitive conduct. Where market share is 'acquired' through anti-competitive behaviour, such as a misuse of market power, the ACCC, as part of the overall remedies it seeks, should be able to apply to the Court for a divestiture order. Only the ACCC should be able to seek such an order.

To some companies the gain in market share from anti-competitive conduct may be more 'valuable' than any fines a court could impose. In that case the reward for that anti-competitive behaviour should not be a greater share of the market.

> ***Recommendation 6:***
> It is recommended that the Trade Practices Act be amended to provide the Australian Competition and Consumer Commission with the power to seek a divestiture order where a corporation has misused its market power.

4.7 The Merger Test and Related Issues

4.7.1 The Merger Test

The current mergers test in section 50 of the TPA should not be changed. The current section 50 accords with most comparable jurisdictions and maintains consistency of thresholds within the TPA.

The 1993 change in the law from a test of dominance to a test of substantial lessening of competition (SLC) seems to have operated satisfactorily. Moreover, as more and more mergers in sectors that have recently been deregulated or demutualised are scrutinised by the ACCC it is increasingly evident that the change in the test was necessary. If deregulation and national competition policy is to work properly Australia should not to be left with a series of oligopolies or even duopolies across major sectors of the economy; most notably, banking, insurance, telecommunications, media, airlines and oil refining.

The Commission has published merger guidelines that do not differ very greatly from those in North America and Europe. There have been some updates in the guidelines covering such issues as the role of efficiency considerations in relation to s50 and in relation to "globalisation" arguments that anti-competitive mergers may be justified even if the merger is anti-competitive in the Australian market.

The ACCC's statistics show that only between five to seven per cent of mergers have been opposed and of them some were later not opposed once satisfactory undertakings had been given.

Some parties raise the question of whether or not the merger provisions of the Trade Practices Act prevent the mergers necessary for Australian firms to be of the size necessary to take part in global markets.

The answer to this is rarely, if ever, and, if so, then only in circumstances where it is on balance undesirable because of the anti-competitive effect in the Australian market. The fact is that the Commission has not in the last seven years opposed mergers where imports make up more than 10 per cent of the relevant market (this is not a rigid rule but it is a fact of history). In other words, the ACCC has not opposed mergers in sectors already exposed to international trade competition. It is in this sector that the argument for firms needing to be large to take part in world markets is most relevant.

If a merger is anti-competitive it should be blocked, however authorisation is possible on public benefit grounds. Relevantly to authorisations, since 1993 the Act explicitly has stated that export generation, import replacement or contributions to the international competitiveness of the Australian economy are public benefits.

Clearly the framework of the Act is not an obstacle to allowing Australian firms to merge to achieve the scale necessary for international competitiveness providing there is a sufficient public benefit. There are many cases where authorisations have been permitted. In fact over half of authorisations have been successful. However some Australian industries are dominated by a few groups that concentrate on converting market power into control of prices rather than pursuing innovation.

The real agenda of merger policy relates largely to the deregulating sectors of the economy. Deregulation gives rise to circumstances in which mergers are likely to occur. Some mergers are necessary for efficiency and should not be blocked. Others however are sought to undo the pro-competitive effects of deregulation and may need to be opposed. The likely improvement in a share price should not be a cause for the approval of mergers and the creation of monopolies, duopolies and oligopolies, particularly if their creation makes such companies targets for foreign ownership interests.

Merger policy is not some necessary evil. Rather it has a positive contribution to make to society and to Australia's international competitiveness. If mergers are allowed to occur without the application of competition law, then our exporters and import competitors may be supplied uncompetitively and inefficiently and their capacity to compete in world markets will be hindered.

The current test ensures scrutiny of mergers in industries that have deregulated and may seek to re-aggregate or seek to overcome the positive effects of deregulation. In any case the previous dominance test did not suit service industries that are unlikely to be subject to international competition.[34]

Many mergers have major national implications and should not be seen as only being the play things of shareholders. In particular small business interests should be considered in the case of any lessening of competition. Global issues are important but so are domestic interests.

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[34] In the days of the dominance test a then prominent politician who was initially strongly in favour of the dominance test is reported to have said "But not when it comes to Coles/Myer, News/Herald and Weekly Times, Ansett/East West".

The proponents of global issues *'uber alles'* are saying that the domestic market does not matter. There is also considerable doubt that the so called benefits of larger scale actually eventuate. It may often be the case that a domestic monopoly is created but that in no way assists in the international market.

The Coalition understands that the Australian merger regime is one of the fastest and least cumbersome of those jurisdictions having merger control. However the Coalition does accept that merger procedures can be improved. The emphasis should be on improving our current framework and the importance of community interests must always be remembered.

In the Coalition's view the best option for reform is to improve the speed and proper decision making processes of the current merger laws. This would mean that the current two tier process would be retained but the authorisation process would be dramatically altered. This would require the following:

- changing the public benefit test to a no significant public detriment test;
- retain and perhaps even tighten the current strict time limits on ACCC process;
- allowing only the applicant or the Federal Minister to have standing to appeal to the Australian Competition Tribunal;
- the ACCC role in Australian Competition Tribunal hearings to be clearly defined to include an amicus role;
- other parties to be allowed to seek leave to intervene in Australian Competition Tribunal hearings but to be required submit their views via the ACCC;
- an Australian Competition Tribunal review should no longer be *de novo* and unless there are very good reasons to do otherwise, the Australian Competition Tribunal should confine itself to consideration of the papers that were before the ACCC;
- imposing strict time limits on an Australian Competition Tribunal review, say 30 days, or an ACCC decision should stand; and
- the Australian Competition Tribunal be given the power to award costs.

The downside to this proposed new regime is that small business generally may not be well resourced to respond, in a relatively short time frame, to Australian Competition Tribunal reviews. The amicus role of the ACCC will need to accommodate such needs. However the current processes require improvement.

4.7.2 Merger Pre-Notification

The Coalition does not believe that there should be a requirement for mandatory pre-notification of mergers. However it does believe that the Act should specifically recognise the current system of voluntary notification. Failure, then, to notify where an eventual breach is found could attract a mandatory extra penalty. That is currently the law in New Zealand.

Fees should be imposed for voluntary notification. This would, hopefully, deter any unnecessary notifications. Currently the ACCC receives a substantial number of unnecessary applications.

4.7.3 Enforceable Undertakings and Mergers – Section 87B

The Coalition is of the view that where undertakings are being considered by the Commission in relation to mergers being allowed to proceed the ACCC must consult all interested parties on the proposed undertaking and the detail thereof. This would improve transparency, but would require legislative change.

There will be rare cases where the merger will be totally confidential and in that case the ACCC could defer seeking third party views but must do so as soon as possible. As interested parties have not been able to influence the undertaking before it was accepted it may be appropriate to provide that parties with standing can apply to the Federal Court within 14 days of the undertaking becoming public for it to be varied.

4.7.4 Ministerial Reference

There are instances where an entire industry is subject to a possible restructure or rationalisation. This will include some possible mergers and rationalisations.

It is proposed that the Federal Minister should have the power to refer to the ACCC for an authorisation assessment proposed or possible industry-wide structural reform matters. In this regard it would be expected that the Minister provide a view to the ACCC on what the Government's view of the long-term future of the relevant industry might be. This approach may be, or may have been, relevant to petrol, airlines, insurance and groceries.

In its response to the White Paper, *Productivity and Enterprise – A World Class Competition Regime*, the UK Government has stated that where exceptional public interest issues arise in relation to market investigations, Ministers will be able to intervene in cases. The UK Government has stated that:

> *'The Government has concluded that where EPI [exceptional public interest] issues arise in a market investigation, Ministers will be able to intervene in a case. The CC [Competition Commission] will still investigate the market and make a finding against the competition-based test, but instead of implementing remedies they will make recommendations to Ministers who will take the final decisions on remedies. The market investigation regime, like the merger regime, will specify national security as an EPI issue. There will also be a reserve power for the Government to list further grounds by secondary legislation subject to affirmative resolution. …'*[35]

There is thus precedent in modern competition regulatory arrangements for Ministerial involvement in matters under consideration by competition regulatory authorities. While the independence of the ACCC is highly valued and indeed necessary, the members of the Coalition believe that in certain circumstances there should be some (reserve) power for the Government to facilitate structural changes in markets, which might not otherwise proceed, to occur; where that reform may have national benefits.

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[35] UK Government Response to Consultation on a White Paper, Productivity and Enterprise – A World Class Competition Regime', December 2001, p 15

4.7.5 Creeping Acquisitions

The current merger law does not generally cover what is known as 'creeping acquisitions'. Any one small acquisition, in isolation and by itself, is unlikely to substantially lessen competition in a market. The concern is that major firms can acquire small players without breaching the law and yet over time substantially diminish competition. Small business needs some protection from such predatory acquisitions that have that effect.

This benefit of being able to deal with creeping acquisitions is well demonstrated in the recent dismantling of Franklins, which enabled restoration of market share of the independents from 17 per cent to 25 per cent. Market share of the majors was a prime consideration in that, but such opportunities for 'reassignment' on account of creeping acquisitions rarely arise.

It is proposed that the merger provisions of the Trade Practices Act be amended to allow the ACCC to take into consideration previous mergers and acquisitions by an acquirer and to aggregate the effect of previous mergers and assess the resultant state of competition in any relevant market.

Such a power should ensure that new players could freely enter a market. While this is acknowledged as being a key issue for the supermarket sector, the impact of such a change would not be confined to that sector.

It would address not only the large and increasing market share of the majors in grocery retailing but also that occurring in liquor retailing, hardware and any other retailing sector with a growing domination by a relatively small number of large corporations.

The Trade Practices Act should also be amended to provide that where a company reaches a certain market share, for example CR4,[36] any further acquisition must be notified to the ACCC and assessed under the proposed amended merger authorisation test.

Alternatively, the Government could 'declare' certain highly concentrated industries and where declared any acquisitions would need to be notified to the ACCC and assessed by the ACCC on public benefit criteria. The Australian Newsagents' Federation, in particular, believes that in highly concentrated sectors there is a need to seriously consider whether the Trade Practices Act should be amended to provide for just such a declaration and assessment process.

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[36] Defined as being where the combined market share of the four largest companies is greater than 75 per cent

Recommendation 7:
It is recommended that:

- there be no change to the substantial lessening of competition test in section 50 of the Trade Practices Act;
- the merger authorisation process and the subsequent appeal process be amended as outlined in section 4.7.1;
- the Trade Practices Act should clearly recognise the voluntary notification system and also provide that where a merger is found to breach the Act and wasn't notified to the Commission additional mandatory penalties should apply in respect of the breach of s50;
- the process for accepting s87B undertakings should be made more transparent, with the Commission being required to consult with all interested parties about the nature of the proposed undertakings before those undertakings are accepted by the Courts;
- the Federal Minister with responsibility for the ACCC be given the power to refer to the ACCC for an authorisation assessment proposed or possible industry-wide structural reform matters; and
- where market concentration has passed a nominated threshold, for example, CR4, the Act should be amended to allow the ACCC to take into consideration previous mergers and acquisitions by an acquirer and to aggregate the effect of previous mergers and assess the resultant state of competition in any relevant market; and
- there should also be an amendment to the Trade Practices Act so as to provide that where a company reaches a certain market share, any further acquisition must be notified to ACCC and assessed under the proposed amended merger authorisation test.

4.8 Trade Practices Act to Apply to all Government Agencies' Commercial Dealings

In order to maximise fairness in the trading environment, all government agencies' commercial dealings must be subject to the provisions of the Trade Practices Act in the same way that all corporations in the economy are. This has long been Federal Government policy, but there have been some court decisions which have made it clear that in fact not all government activities are covered by the Trade Practices Act.

It was clearly the view of Government when the National Competition Policy was first introduced that the principles of free, open competition apply equally across all sectors of enterprise in Australia. The fact that the Trade Practices Act does not extend to Government agencies causes anomalies and inconsistencies, with small business and their representative associations being precluded from action and conduct which is permissible by government agencies. For example, the private sector would not be able to profit from GST in the same

way as the state governments now can by applying stamp duty to the GST-inclusive price of a property.

> ***Recommendation 8:***
> It is recommended that the Government ensure, if necessary by legislative amendment, that the Trade Practices Act apply to all Government agencies' commercial dealings.

4.9 Penalties

The Coalition believes that it is appropriate that the range of penalties available to the Courts for breaches of the Trade Practices Act be increased.

In particular the Coalition believes that the range of penalties available to, and in fact the penalties imposed by, the Courts should act as deterrent for both corporations and individuals to engage in anti-competitive conduct. While much of the focus and a substantial portion of the resources of the ACCC should be devoted to ensuring compliance with the Trade Practices Act, compliance being at the base of the regulatory pyramid, it is important that the sanctions at the apex of that pyramid are sufficient to ensure that there is greatest incentive possible to comply with the law.

One of the most harmful types of anti-competitive conduct is price-fixing or cartel behaviour. A 1998 Recommendation of the OECD Council Concerning Effective Action Against Hard Core Cartels stated in part that, *'hard core cartels are the most egregious violations of competition law and .. they injure consumers in many countries by raising prices and restricting supply, thus making goods and services completely unavailable to some purchasers and unnecessarily expensive for others'*. The Recommendation called on OECD Members to provide for *'…. effective sanctions, of a kind and at a level adequate to deter firms and individuals from participating in such cartels'*.

In a recent report on hard core cartel activity, the OECD Financial Fiscal and Enterprise Affairs Competition Committee[37] stated that cartels *'offer no legitimate economic or social benefits that would justify the losses that they generate. Thus, they are condemned in all competition laws; in some countries they are classified as a crime. Sophisticated cartel operators know that their conduct is unlawful and so they conduct their business in secret, sometimes taking great pains to keep their agreements from the public and from law enforcement officials'*.

The report goes on to say *'Several countries have just completed or are in the process of reviewing their laws and policies relating to cartels with a view to increasing their enforcement efforts in this area'* and that *'Available data indicate that sanctions actually imposed have not reached the optimal level for deterrence.'*

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[37] OECD Directorate for Financial, Fiscal and Enterprise Affairs, Competition Committee, *Report on the Nature and Impact of Hard Core Cartels and Sanctions Against Cartels Under National Competition Laws*, 9 April 2002

The same report notes, as an example, that in Australia in relation to a case involving price fixing for fire protection devices: *'Officials from one of the largest corporate defendants provided detailed evidence of deliberate destruction of incriminating documents after ACCC document demands were received. Two men, with the approval of their superior, loaded two automobiles with bid files and took them to the country, where it took a full day to burn them in "four huge bonfires".'*

There is strong international precedent for the imposition of criminal sanctions for hard core cartel (price fixing) behaviour. Competition laws in Japan, Korea, Canada, Germany, Ireland, Mexico, Norway, the Slovak Republic and the USA provide for imprisonment of persons convicted of involvement in cartel behaviour[38].

The OECD report also notes that a recent report to the UK Parliament by its Department of Trade and Industry recommended creating a new criminal offence for individuals who participate in hard core cartels. The report proposed that the crime would be punishable only by imprisonment and recommended against individual fines as punishment, given the risk, apparently unavoidable, of the employer paying the fine for its employees.[39] However in its response to the report, the UK Government concluded that *'… the new offence should carry a maximum custodial sentence of five years. …….. fines should be an option available to the courts to be imposed in addition to – or as an alternative to – custodial sentences, where there are mitigating circumstances'*.[40]

The Coalition understands that legislation proposing the introduction of criminal sanctions in the UK has now passed the House of Commons and is being considered by the House of Lords.

In an Australian context the introduction of a criminal sanction regime would be directed at large companies who engage in hard core price fixing in breach of s45 and exist alongside the civil penalty regime. A size threshold would be required to ensure these sanctions would apply only to firms large enough to abuse market power.

The Coalition also supports the proposal submitted by the ACCC that only large companies which satisfy two of the following criteria would be liable for criminal sanctions:

- gross revenue in excess of $100 million;
- gross asset value in excess of $30 million; or
- more than 1,000 employees.

The Corporations Act has a dual system of civil and criminal sanctions; as does Part V of the Trade Practices Act (although civil fines do not apply in Part V). As breach of the proscriptions of the Trade Practices Act, even more so than breach of those of the Corporations Act, can impact on consumers widely, for example, price fixing in relation to

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38 OECD Directorate for Financial, Fiscal and Enterprise Affairs, Competition Committee, *Report on the Nature and Impact of Hard Core Cartels and Sanctions Against Cartels Under National Competition Laws*, 9 April 2002, p10

39 UK Department of Trade and Industry, 'A World Class Competition Regime', July 2001 pp 37-45 as reported in OECD Directorate for Financial, Fiscal and Enterprise Affairs, Competition Committee, *Report on the Nature and Impact of Hard Core Cartels and Sanctions Against Cartels Under National Competition Laws*, 9 April 2002

40 UK Government Response to Consultation on a White Paper, Productivity and Enterprise – A World Class Competition Regime', December 2001, p 23

say biscuits, it is logical and consistent for the Trade Practices Act to have an additional layer of criminal sanctions. It must be remembered that criminal sanctions also require a higher burden of proof, that is beyond reasonable doubt, than is required under a civil action.

In an environment where breaches of the Act are difficult to detect, where there is a high level of complaints to the regulator and where sophisticated businesses prepared to have strategies to avoid detection, the Court should be given a wide range of choices to impose penalties subject to the particular circumstances of each case.

Individuals must also be made to bear responsibility for their actions. Officers and employees of companies breaching the Act should potentially be exposed to the consequences of successful legal actions against their companies. In relation to price fixing it needs to be acknowledged that any consequential increase in prices paid by consumers for goods and services is equivalent to theft and as such should be subject to a criminal penalty, including a jail term.

The OECD Financial Fiscal and Enterprise Affairs Competition Committee[41] offers the following comments on sanctions against individuals:

> *'Whether or not it is possible to calculate accurately an optimal financial sanction against enterprises, in practice is difficult to implement it. Sanctions against natural persons, placing them at risk individually for their conduct, provide an overall enhancement to deterrence. While, ….., relatively few countries currently impose any kind of sanction against individuals for cartel conduct, some are considering the enhancement of such sanctions.'*

The Coalition is thus of the view that there are quite powerful arguments for strengthening the penalty provisions of the Trade Practices Act in relation to breaches of s45.

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[41] OECD Directorate for Financial, Fiscal and Enterprise Affairs, Competition Committee, *Report on the Nature and Impact of Hard Core Cartels and Sanctions Against Cartels Under National Competition Laws*, 9 April 2002

Recommendation 9:
It is recommended that the current penalty regime in the Act be amended as follows:

- criminal penalties (jail terms) should be available to the Courts to apply to individuals for breaches, by big businesses, of s45 of the Act. The current civil prosecution regime should be maintained, and the ACCC would therefore have the option of commencing legal action under a civil or criminal regime;
- corporations should not be able to indemnify their employees in relation to any penalties that might be imposed on them by the Courts for breaches of Part IV of the Trade Practices Act and those penalties must be paid by the individuals concerned;
- corporate and individual parole to be available to the Courts as a specific remedy; and
- the Act should also be amended to provide for pecuniary penalties in relation to breaches of Parts IVA and IVB. These are currently not able to be sought by the ACCC in its enforcement of the law.

In recommending that the Act be amended to provide for jail terms, in certain circumstances, for breaches of s45, the Coalition is mindful that a higher burden of proof would be required and that prosecutions should be conducted by the Director of Public Prosecutions. Trials would be held before a jury which would be required to reach a unanimous verdict.

4.10 Strengthening the Unconscionable Conduct Provisions

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.

The Coalition believes that it is not possible to properly address small business concerns about misuse of market power without also dealing with the behaviour which typically is made possible because of the market power held by large corporations. Practices which are increasingly being employed by large corporations that should be declared unconscionable include:

- contracts or franchise agreement provisions which allow for:
    - unilateral variation of contract or associated documents on a take it or leave it basis;
    - the bringing into existence of documents or policies after the signing of the contract which are then binding and which can also be used to vary the original agreement or contract on a take it or leave it basis; and

- termination of contracts by one party without just cause or due process. (NB it is not intended that the rights of parties to repudiate a contract be removed.)

In most all cases, behaviour of the type referred to above only occurs because one party to a commercial transaction has much greater market power than the other. Franchisees for example are dependent in many ways on their franchisor for their survival. If after entering into a franchise agreement the terms and conditions of that arrangement are changed, the impact on the franchisees business plan and thus 'bottom line' can be quite significant. In the same way small retailers in shopping centres are sometimes required to relocate to other parts of the centre, and the impact on the turnover of that small business can be quite detrimental to its survival.

The difficulties associated with 'take it or leave it' contracts are not, however, confined to retail tenancies or franchise arrangements. In its recent submission to the Senate Legal and Constitutional References Committee, the Australian Newsagents' Federation advised that:

> *'In the period of restructure of the newsagency industry, following the Tribunal findings, the prevailing interpretation of the law by the ACCC, the political sentiment at the time, and the actions of Publishers/Distributors, has resulted in the development of contractual and trading arrangements, confined to a non-binding consultation process, that precluded any discussion on gross margin, service fees, or any other remuneration stemming from the proposed agreements. Subsequently individual newsagents were offered an agreement which while unique to the publisher/distributor was for the most part the same in its general terms and conditions across Australia. Moreover the agreements from each publisher / distributor were offered on a 'take it or leave it basis', which in many circumstances may be changed unilaterally by the Publisher/Distributor during the term of the agreement. Furthermore some of the agreements contain 'confidentiality clauses' that preclude any divulging of information contained within the agreement or flowing from it, at any time, to any person, without the express written permission of the publisher / distributor beforehand!'*[42]

In April 2001, the ACCC, obtained enforceable undertakings from Medibank Private Limited in relation to its dealings with Toowong Private Hospital. The ACCC's investigations related to the attempted imposition of a unilateral variation clause contained in the proposed Hospital Purchaser Provider Agreement with Toowong Private Hospital. In its media statement[43] announcing the enforceable undertakings the ACCC noted that there was a disparity of bargaining power between the parties and that the clause, in the ACCC's view, was not reasonably necessary to protect Medibank Private's commercial interest. The Commission was also concerned that the Hospital had incurred significant costs and delays in dealing with the Hospital Purchaser Provider Agreement due to the clause being in the Agreement.

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42 Australian Newsagents' Federation Submission to the Senate Legal and Constitutional References Committee Inquiry into the *Trade Practices Act 1974,* January 2002, p12

43 Medibank Private Provides Enforceable Undertakings Over Unconscionable Conduct Concerns Regarding Toowong Private Hospital, ACCC media statement, 22 May 2001

It is proposed that the inclusion of provisions such as those outlined above in contracts or franchise agreements should be proscribed; as should the presentation of 'take it or leave it' contracts or agreements.

Recommendation 10:
It is recommended that section 51AC of the Trade Practices Act 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 *(see earlier comments on repudiation)*;
- the bringing into existence of documents or policies after the signing of the contract which are then binding 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.

It is also recommended that misuse of market power should be listed as one of the 'allowable' matters under s51AC.

4.11 Codes of Conduct

While the members of the Coalition acknowledge the benefits of generic regulation (such as the fair trading amendments) they are also aware that some sectors of the economy, for example franchising, grocery retailing, the petroleum industry, have specific structural concerns which cannot be addressed through generic legislation; or to do so would impose a significant and unwarranted burden on other sectors of the economy. However rather than recommending that the Government introduce sector-specific legislation to deal with those concerns it is suggested that the most appropriate method of regulating those sectors is through mandatory codes of conduct. The Franchising Code of Conduct is an example of such regulation. Compliance with the code is mandatory for all franchisors and breaches of the Code are breaches of the Trade Practices Act. The Franchising Code of Conduct is set out in regulations under the Trade Practices Act and this is generally agreed as being a more flexible regulatory instrument than if the Code itself was set out in the body of the Trade Practices Act.

The fruit and vegetable sales and distribution system now in place is the result of a process of deregulation where rules and regulations were removed (notably the Farm Produce Marketing Act 1964 in Queensland and similar legislation in NSW and Victoria). New practices were developed by the trade to suit their own businesses, and a voluntary code of practice (applying only to the Brisbane Market) was later introduced to tighten up loose practices.

Many growers, who deal either through market agents or direct with the retail chains, have very good relationships with their customers and are satisfied with their trading arrangements. However, there are numerous examples where producers, in dealings with

both wholesalers and retailers, have experienced situations unique to the fresh produce wholesale marketing system, including:

- a lack of clarity in the method of selling, with the wholesaler being able to operate as an agent (the grower's 'man in the market'), or a merchant (the growers customer in the transaction) at his/her discretion. In reality, wholesalers have the best of both worlds taking the merchants profit and purporting to carry the agents' risk which is in reality, nil, as the risk remains with the grower;
- there is no transparency in transactions and no guarantee that the grower receives payment based on what his/her product actually sold for;
- there is no clear change of ownership of, or responsibility for, the product, even after it has been through several dealers;
- there are no prudential standards (or trusts for proceeds of produce sold on consignment) to protect growers money should a wholesaler's business fail;
- claims against the product always come back to the grower, even if the product had subsequently been "purchased" or conditioned/held by another party;
- there is a problem with retailers sometimes returning product for spurious quality reasons, when the real reason is that they over ordered;
- both wholesalers and growers being too afraid to complain about problems for fear of being cut out of dealing for a period – known as being 'sent on holiday';
- having produce initially rejected on quality issues only to later see it on sale in another store;
- buyers over ordering and sending produce back, only to later order it back at a lower price; and
- having produce sitting on a loading dock for hours to then be sent back because it has begun to break down.

These problems persist in the system and relate to all horticulture, not just a few commodity groups. Growers believe that the wholesale marketing system requires further examination with the aim of introducing a greater level of transparency and openness in transactions between growers, wholesalers and retailers. The experience of growers makes it clear that operating on trust alone does not provide adequate protection in a commercial market subject to great variability in supply and demand, increasing costs and changing consumer expectations.

There would appear to be a clear case for the introduction of measures that improve the supply chain, rather than simply policing alleged misconduct after the fact. Making the Retail Grocery Industry Code of Practice and the central market codes in operation throughout Australia mandatory would assist in improving the environment for fair trading between businesses.

The Coalition believes that even if the market power provisions of the Trade Practices Act are strengthened and if small businesses are allowed to collectively negotiate, there may well still be some sectors of the economy which require further regulation. Where that is the case, the Coalition believes that the Government should make use of the current provisions in the Trade Practices Act relating to codes of conduct. The Coalition's preference is that regulatory codes be mandatory for all in the particular sector and not apply only to those who 'volunteer' to be bound by a code. Voluntary codes of conduct have not proved to be particularly successful in the past.

Recommendation 11:
It is recommended that the Government should make use of the current provisions in the Trade Practices Act relating to codes of conduct to regulate sectors of the economy which have specific problems which cannot, or should not be addressed through generic legislation.

4.12 Establish a Joint Parliamentary Committee to Oversight the ACCC

At present, there is 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. This scrutiny should be placed on a formal basis by the establishment of a Joint Standing Parliamentary Committee to oversight the ACCC and related institutions, including the National Competition Council. Both the ASIO and the NCA already have such oversight and thus there is no reason why such oversight should not similarly apply to a crucial body such as the ACCC. Over time the Joint Committee and its supporting Officers will be able to develop an institutional memory and formal continuity that will greatly assist in the transparency and accountability (and in the perception of transparency and accountability) of Australia's competition process and will also provide small business with a prominent and public outlet to address issues as they arise.

It should, as has the Joint Committee of Public Accounts and Audit, become a powerful Committee of the Parliament and be properly resourced in the way that US legislative committees have resources far beyond a secretary and a research officer.

It is proposed that the establishment of a Joint Parliamentary Committee to oversight the ACCC is much more appropriate than having the Commission's activities reviewed by a 'panel of experts' or a 'tribunal'. Non-parliamentary oversight of the ACCC would inevitably raise questions as to who is to be appointed to the panel or tribunal, who is to appoint them, conflicts of interest, what issues can be referred to the panel or tribunal and thus is that body a body of appeal and so on.

Recommendation 12:
It is recommended that a joint standing committee of the Parliament be established to oversight the Australian Competition and Consumer Commission. That committee should assume the current review activities of the House of Representatives Standing Committee on Economics, Finance and Public Administration in relation to the ACCC.

4.13 Strengthen the Small Business Focus of the ACCC

4.13.1 ACCC Complaint Handling Role

The Trade Practices Act does not specifically give the ACCC a role to handle complaints, be they consumer or business complaints. This works against a complaint handling culture and moves resources away from handling individual complaints.

Small business is a consumer and yet the culture of the ACCC does not see it as that.

The Act should be amended to specifically provide that the ACCC handle complaints. The ACCC should be required to monitor that effort and to take action on systemic issues. The Commission should be required to establish and maintain a public register of complaint trends.

4.13.2 Appointment of a Second Small Business Commissioner to the ACCC

The appointment, following the fair trading reforms, of a Small Business Commissioner to the Australian Competition and Consumer Commission was most welcome. Since that appointment, the Commission has increased its focus on small business issues; albeit perhaps not quite to the extent small business would like. However, it often seems that there is a conflict within the Commission in respect of its pursuit of small business issues.

Often it seems that in the drive to present the lowest price to consumers, big business seeks to cut its costs and that nearly always impacts on small businesses; who either purchase from or supply to big business. While the impact of this behaviour by big business can substantially affect the viability of the small business, representatives of small business inevitably find that there is a view within the Commission that little can be done because the result for consumers is lower prices and/or greater competition and so on and that that is the only issue or imperative under the Act.

It seems that within the Commission the consumer viewpoint dominates and small business concerns remain unresolved if there are perceived or alleged to be 'benefits' for consumers. Small business believes that a more balanced approach should be adopted by the Commission in dealing with these matters. The appointment of a second, specialist, small business Commissioner would assist in achieving that balance. The Coalition believes that it would be appropriate that the Deputy Chairman be one of the two small business Commissioners.

4.13.3 Establishment within the ACCC of a Small Business as Consumers Division

This division should focus small business activities within the ACCC, take small business representative actions and generally act as a small business advocate within the ACCC, within the ambit of an amended Trade Practices Act.

This could include acting as an advocate for small business interests in relation to trade practices matters.

Recommendation 13:
It is recommended that the ACCC's role in relation to small business should be strengthened as follows:

- the Trade Practices Act should be amended to specifically provide that the ACCC handle complaints and take action on systemic issues;
- to provide for the appointment of a second small business commissioner to the Commission. It would be appropriate that the Deputy Chairman be one of the two small business Commissioners;
- to establish within the Commission a Small Business as Consumers Division.

4.14 A Small Business Ombudsman

The Government should appoint an adequately resourced Small Business Ombudsman. The role of the Small Business Ombudsman would be to investigate complaints by small business against the actions of, or treatment by, Government and its agencies (ACCC, ATO, DITR, DEWR and so on) and would perhaps act more like an agency of review.

Recommendation 14:
It is recommended that the Government appoint an adequately resourced Small Business Ombudsman.

5. THE MYTHOLOGY OF TRADE PRACTICES LAW REFORM

Myth 1 – Commercial Uncertainty

Those who oppose changes to the Trade Practices Act, as chiefly evidenced by the content of submissions to numerous inquiries that have taken place since the legislation commenced in 1974, argue that changes should not be made because they increase business uncertainty in commercial transactions. Relevantly, in early 1995, the Ministerial Small Business Forum Working Party sought advice from Access Economics on unconscionability and commercial transactions. The reason for doing so was that the Working Party's recommendation for amendment of the *Trade Practices Act* had attracted criticism on the grounds that it would create uncertainty in commercial transactions.

Access Economics advised, in part:

> *"Some have argued that the additional uncertainty that would flow from legislation to strengthen protection against unconscionability in commercial transactions is a reason for not taking such action.*
>
> *"That argument needs close scrutiny. Depending upon how any legislation is drafted, the result may be either less uncertainty overall, or at least a more even distribution of uncertainty as between the parties to a commercial contract, rather than the claimed increase in uncertainty. We would want to review the reasoning advanced for claims of increased uncertainty in order to assess the strength of any such case. That said, we recognise that the precise drafting of any legislative amendments, and their application, could have potentially important efficiency implications."*[44]

In any case the question of uncertainty can be argued to be one that is a 'zero sum game'. That is an increase in uncertainty for one party is likely to result in an increase in certainty for another party. Thus as pointed out by Access Economics, it is a redistribution issue. Many small business operators, particularly those who have contractual supply or purchase arrangements with large business, would argue that the nature of those arrangements means that the small operator faces the greatest commercial uncertainty. For example, a franchise agreement which allows the franchisor the right to unilaterally vary the agreement (without the consent of the franchisee) means that the franchisee faces quite a deal of uncertainty in respect of its future rights and obligations under that agreement. A more equitable arrangement for, say, varying a franchise agreement would likely decrease the uncertainty faced by the franchisee.

In any case it should be pointed out that the effects of any change to the Act can be ameliorated by information guidelines published by the ACCC setting out the Commission's views as to its interpretation of such changes and its approach to enforcement. Over a period

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[44] Letter from Access Economics to the Motor Trades Association of Australia, dated 13 March 1995

of three to five years uncertainty is also diminished when the Federal Court hands down judgments on individual cases. Other initiatives can also be taken to reduce commercial uncertainty for example by introducing an authorisation process for companies to employ prior to engaging in conduct that is of concern.

Myth 2 – No Need to Change the Purpose Test of Section 46 Because 'Purpose' is Inferred

Some of those who argue against the introduction of an 'effects' test propose that there is no need to change the purpose test contained in section 46 because 'purpose' can be established with the assistance of section 46(7) by inference. Section 46(7) provides that *'….. notwithstanding that, after all the evidence has been considered, the existence of that purpose is ascertainable only by inference from the conduct of the corporation or of any other person or from other relevant circumstances'*. This inference provision was inserted into the Trade Practices Act in 1986 following the Blunt Report which recommended its inclusion. Despite the introduction of this inference provision into section 46, there is little or no evidence that would suggest that the provision is working satisfactorily to address abuses of market power undertaken by large businesses in the economy. The reasons for this include:

1. section 46(7) was only a 'bandaid' solution to addressing the significant inadequacies of the purpose test in section 46;

2. in terms of cases brought since the amendment, there is little or no evidence that section 46(7) has resulted in the legislation working in the way it was intended; and

3. the application of section 46 with the requirement that the purpose be demonstrated, even with an inference provision, is too difficult to establish and abuse of market power conduct by large corporations is not addressed and continues unabated.

The opponents of reform to section 46 also argue that the inference provision is equal to or represents a reversal of the onus of proof requiring a defendant to demonstrate that it does not have the requisite purpose. The Coalition considers that this is an overstatement of the role of the inference provision and that it falls well short of a reversal of the onus of proof. Accordingly, and in support of this position, the ACCC quite properly points out that the two options available to a give proper effect to section 46 are to either reverse the onus of proof or amend section 46 so as to incorporate an 'effects' test. The Coalition strongly supports the introduction of an 'effects' test.

The Coalition points out that the opponents of reform to section 46 rely on technical legal arguments for any change and they importantly omit the need to give weight to the role of the section consistently with Parliament's economic and social objectives for the Act. The opponents do not deny or address the existence and extent of the conduct sought to be captured; they merely rely on legal obfuscation to see it is not.

It should also be noted that since the Trade Practices Act commenced, corporations have become increasingly sophisticated in their avoidance of detection of breaches of the Act. It is now common knowledge in business, particularly amongst large business enterprises, that offending matters are not put in writing and there is an increasing tendency to destroy

documents and to challenge statutory requests for documents made by the ACCC. The recent Enron case, although not in Australia, demonstrates the preparedness of corporations to destroy relevant documents.

Myth 3 – We Should Await the Outcome of the Market Power Case Currently Before the High Court

Opponents of any change to the current s46 also propose that as there is a relevant case (Boral Masonry Ltd v ACCC) before the High Court any decision on possible amendment of the section should wait until after the Court has handed down its decision.

In relation to that argument two points should be noted. The first is that there will always be relevant cases before the courts, perhaps not necessarily before the High Court, but business and regulators will always be awaiting the outcome of a case; which may or may not set some legal precedents. Small business cannot afford to wait for ever, especially when it expects the ambitions of the Parliament in respect of the Act to be applied to it.

The second point is that the High Court will, and can, only interpret the law as it is currently written. The Coalition does not believe that the current law provides sufficient protection against big business misusing its market power. The current law requires strengthening by Parliament and then it too can be interpreted by the High Court.

Myth 4 – The Act and the Commission's Powers have been Substantially Strengthened in Recent Times

It is possible that proposals for a strengthening of Part IV of the Trade Practices Act and/or an increase in the enforcement tools available to the Commission for suspected breaches of Part IV will be opposed by some on the grounds that the Act has in fact been strengthened quite considerably in recent times (for example by the inclusion of the prohibition on unconscionable conduct in business transactions) and that the Commission's power has, as a result of those changes, been quite substantially increased.

However, there has in fact been no substantial change to the competition tests in Part IV of the Act in the last decade. The last major change was the amendment to s50 in 1992, which saw the 'dominance' test changed to one of a 'substantial lessening of competition'. At the same time the penalty regime under the Act was increased for both corporations and individuals and section 87B providing for enforceable undertakings was added.

The greatest increase in the Commission's powers and responsibilities in the past few years has been in relation to its role in monitoring and enforcing the transition to the goods and services tax. That role ceased on 30 June 2002.

Myth 5 – Market Outcomes Should be Allowed to Flourish

In a perfectly competitive market place where there are lots of willing buyers and willing sellers, where all parties had access to the same information about the workings of the market and no one party had an advantage over another, then it is true that markets should be allowed to flourish and there would be little need for intervention in markets.

The reality though is quite different. In some cases while there may be many sellers, there may only be a very small number of buyers or there may be many buyers, but only a small number of sellers. Most small businesses are price-takers. Most large businesses are price-setters; certainly on the domestic market. There is an imbalance in our economy. That businesses should be able to reap the rewards of their efficiencies, innovation and so on is not in dispute. If part of that 'reward' is the ability to grow then that cannot be disputed either. However, the difficulty is that large firms can use their size and their power in the market place to the disadvantage of smaller firms. Left unchecked that power can damage competition and competitors. There thus needs to be checks and balances on that power; partly to protect competition and competitors, partly to ensure that social objectives can be met.

Markets in Australia are not 'perfect' markets. Successive governments have already determined that not only do they have a role in regulating business behaviour, and that they seek not only economic and legal outcomes, but there social aims which need to be met as well.

Myth 6 – The Introduction of an "effects test" into Section 46 would place the Onus of Proof on to Business to Show that it had not Contravened the Act

At its March General Council meeting the Australian Chamber of Commerce and Industry (ACCI) passed a resolution which stated that it was opposed "to the introduction of an 'effects test' into section 46" to show that it had not contravened the Act rather than, as at present, requiring the ACCC to demonstrate 'wrong doing'. The true position is that the addition of an "effects test" would result in the ACCC or another party being required to prove that the conduct complained about was engaged in either for a proscribed anti-competitive purpose or that it had the effect of substantially lessening competition. In either case, the burden of proof remains on the applicant to prove each of the elements of section 46. The resolution passed by ACCI is erroneous and misunderstands the nature of the amendment proposed.

Myth 7 - The Regulator Must be Regulated

Big business dislikes a number of things about the current activities of the ACCC. Among them is the fact that the ACCC is able to garner media publicity for its activities. The ACCC is able to attract attention when it particularly takes action of any kind against the oligopolies of the business world – banks, media companies, telecommunications companies, oil companies and airlines. Naturally those companies resent the public attention.

Out of this resentment has arisen a mantra that there is a need to regulate the Regulator. Proposals for oversight range from the appointment of a "suitably constituted Board with a

non-Executive Chairman, all appointed on merit, to oversee the activities of the Commission."

The proposal is in essence a recipe put forward by those self-interested oligopolies to ensure inaction, inactivity, delay and obfuscation. While no duties of the proposed Board are known to have been detailed, most likely, in the mind of big business at least, it would involve consideration by the Board at monthly or even quarterly the fact of:

- all media statements;
- all media appearances by ACCC Members or officials;
- the approval of all litigation; and
- the approval of all investigations, especially those involving the seeking of documents or the interviewing of witnesses.

In the case where such matters required urgent attention, no doubt the Board would be required to delegate its responsibilities to its Chairman. The Chairman would only be able to act on written advice and may need to seek further approval for certain actions, most especially dealings with the media from the Minister responsible for the administration of the ACT.

It is incumbent on those making such a proposal to spell out precisely how such a role would work, the international precedents and the likely effect. In the absence of such detail any such proposal should be treated with the deepest suspicion for it would appear to represent nothing more than an attempt to precluding the ACCC from embarking on any activity without obtaining prior approval.

Such a proposal would compromise the ACCC's independence and make it beholden to the whims of the Government of the day responsible for Board appointments presumably without reference to the states and territories but no doubt after consultation with the "relevant" business organisations.

6. INTERNATIONAL COMPARISONS

6.1 Introduction

Competition law and its administration cannot be viewed in isolation from the global environment. Much is said about globalisation and in this regard business must take into account that many issues are now becoming global; competition law and policy is a global issue and with the breaking down of trade barriers competition law becomes the market policeman rather than trade law. Globalisation is a double edged effect; on the one hand it frees up markets but on the other hand companies should no longer be free to regard the international scene as permitting of abuse of competition law principles.

That is not to say that competition law is a new concept around the world, far from it. What has happened is that it has spread, with some 100 economies now having competition law, with more to follow, plus more and more inter-jurisdictional issues arising both for business and for regulators.

All this requires or facilitates varying degrees of harmonisation of law and processes, cooperation between regulators and a need for business to think globally when engaging in ventures such as mergers. In some areas, such as Australia and New Zealand relations this closeness is critical, as it is also with our major trading partners. Business is entitled to have a degree of familiarity of the regulatory regime it faces. This does not necessarily mean identical laws or diminished sovereignty but it does mean cooperation and transparency and a basic degree of harmonisation.

The Australian model of competition law is extensive and of a heterogeneous nature. It has as its features or is about:

- competition law with a public benefit override;
- per se offences for a number of anti-competitive forms of conduct;
- merger review – no pre mandatory notification;
- consumer law;
- general access laws;
- specific access, for example telecommunications and airports;
- regulatory issues, for example telecommunications;
- small business protection;
- prices surveillance;
- product safety and recall;
- corporate compliance role;
- community education role;
- a single, conglomerate, regulator;
- high transparency;
- significant international focus;
- cross memberships with other regulators; and
- representative actions.

Whilst the Australian model is unique in its scope, it still fits well with those of our major trading partners or similar jurisdictions. Further, developing countries are adopting our model as a desirable one. Australia is seen by many as being in the forefront of competition law and enforcement.

A comparative snap-shot of the laws and institutions in some of our major trading partners, similar jurisdictions or close neighbours follows:

6.2 New Zealand

The New Zealand Commerce Act 1986 is very similar to the Australian Trade Practices Act and was recently amended to bring it further into line with the TPA.

The Australian New Zealand regime features close cooperation and a legislative framework aimed at trans Tasman misuse of market power. That framework includes permitting the competition agencies to be able to act as agents for each other in relation to the collection of evidence and our respective Courts to have jurisdiction trans Tasman. This regime could be extended to cover all of the competition provisions and not only the misuse of market power provisions.

Institutionally the Australian and New Zealand regimes are almost identical.

The New Zealand merger test is now a substantial lessening of competition test and New Zealand has a voluntary, albeit legislative system of merger pre-notification. In relation to misuse of market power the laws of the two countries are now largely the same.

6.3 USA

The US has had anti trust law since 1890 and in 1914 added merger control. These are the Sherman Act and Clayton Act respectively.

The US regime has broad prohibitions on price fixing, monopolisation and other anti-competitive conduct. The violations are criminal and are punishable by fines and imprisonment. The mergers test is a substantial lessening of competition test and the US has mandatory merger pre-notification. Misuse of market power relates to dominant businesses and conduct that has the result of substantially lessening competition.

The US does not have a public benefit authorisation process such as Australia and New Zealand but the Courts have over the years developed a ‘rule of reason’ concept to allow unlawful conduct that will result in economic efficiencies.

In relation to institutions, the US has two at the Federal level. The Anti-Trust Division of the Department of Justice, headed by an Assistant Attorney-General and the Federal Trade Commission (FTC), headed by a board of members. Both handle competition law offences but only the FTC handles consumer issues. The former is part of the Executive Government; the latter is a creature of the Congress.

State Attorney Generals have retained the power to take anti-trust actions along with the Federal agencies.

6.4 Canada

Canada has a very similar regime to Australia but does not have the public benefit authorisation process. However, there is an efficiency exception in relation to mergers. Canada was a pioneer in competition law introducing its law in 1889. This was the Combines Act which became the current Competition Act in 1986.

The Canadian law is somewhat more proscriptive than Australia and matters such as price fixing are criminal offences and include the possibility of jail. The mergers test is substantial lessening of competition and Canada has mandatory merger pre-notification. Misuse of market power law relates to those in a dominant position and conduct that has the effect of damaging competition. There are specific provisions for predatory pricing and discriminatory dealing.

The Canadian institution is the Bureau of Competition Policy, headed by a Competition Commissioner, and there is the Competition Tribunal to adjudicate on matters, such as mergers.

6.5 Japan

Japan introduced its competition law in 1947; the Anti-Monopoly Act. The Act contains the traditional competition law prohibitions and merger control. The merger test is substantial lessening of competition and there is mandatory pre-notification.

The law is administered by the Fair Trade Commission and sanctions are potentially criminal.

6.6 European Union

Article 3 of the Treaty of Rome, 1957 requires that the activities of the Community achieve the objectives of the Treaty by, inter alia, instituting a system ensuring that competition in the common market is not distorted.

The relevant provisions are Articles 81 and 82 of the Treaty of Rome, dealing with cartels and monopolies.

The EU law is administered by the European Commission and the Treaty and Regulations combine the investigative, prosecutorial, adjudicative and remedial functions into one body.

The regime includes some concepts of authorisation. In relation to mergers the EU law has different language; that is, dominance or joint dominance, to substantial lessening of competition but essentially the same result. There is also mandatory merger pre-notification of cross border mergers over a certain threshold. Misuse of market power has a dominance threshold but as joint dominance is possible that effectively lowers the threshold.

6.7 Indonesia

The Government of Indonesia promulgated on 5 March 1999 the Law Number 5/1999 on the Prohibition of Monopolistic Practices and Unfair Business Competition.

In general, the Law contains provisions on prohibited contracts and activities, including mergers, dominant positions, legal enforcement of the provisions therein, and the establishment of the Commission on Business Competition Supervision (KPPU).

The Law became effective in March 2000.

6.8 PNG

PNG has just introduced competition law, very much based on the Australian Trade Practices Act. The law is the Independent Competition and Consumer Commission Act 2002. The law will be administered by the Independent Competition and Consumer Commission.

The law has an authorisation regime and a substantial lessening of competition test for mergers.

6.9 Taiwan

The Taiwan competition law is the Fair Trade Act 1991. It is administered by the Fair Trade Commission.

The law covers a wide range of competition and unfair competition issues. There is some provision for an authorisation process in some instances. The merger test is a substantial lessening of competition one and there is mandatory merger pre-notification. The law relating to misuse of market power targets the result of such conduct.

6.10 United Kingdom

The UK is subject to the European Union competition law for cross-Europe issues but also has its own competition law. The current law is relatively new and introduced a prohibition based regime from the earlier permissive regime.

The 1998 Competition Act was a major departure for the UK and mirrors much of the EU position. The law has the usual anti-trust prohibitions but has provision for public benefit assessments. The sanctions are currently not criminal but legislation to introduce criminal sanctions is currently before the Parliament.

The merger law is based on a public benefit assessment and the Government can refer mergers to the Competition Commission for assessment. This is often after a recommendation of the Office of Fair Trading (OFT) but not exclusively. There is a system of voluntary pre-notification. The OFT regards a substantial lessening of competition as significant public detriment.

In relation to the institutions, the main body is the Office of Fair Trading. The Competition Commission considers various issues either from referral by the Government or the Office of Fair Trading.

One interesting aspect of the UK regime is that the OFT is excluded from certain sectors where there is an industry specific regulator but the Competition Act is administered by the industry regulator. As a result most guidelines and policy statements are jointly issued and close cooperation is essential.

6.11 Conclusion

As can be seen there is a certain sameness of policy, law and administration in competition law around the world and that sameness is increasing. Australia is largely in step with others and in fact others are falling into step with Australia.

Competition law is no longer the province of the developed world, nor the province of a few domestic experts. It is populist, global and spreading. Countries need to enshrine competition law and be ready to meet global challenges of the same nature as were met domestically when competition law was in its infancy.

There are considerable efforts under-way to develop cooperation between regulators and to generally make more effective, efficient and transparent the international anti-trust environment. These efforts come through the OECD, APEC, WTO, various Free Trade Agreements and the newly established International Competition Network.

These efforts are aimed particularly at issues such as global mergers and to facilitate the review of these and at global cartels and to facilitate detection and punishment.