Submission on the

Review of the Competition Provisions of the Trade Practices Act 1974

July 2002

ACA
Australian Consumers' Association

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About the Australian Consumers' Association

Mission: Test – Inform – Protect - Empower

The Australian Consumers' Association (ACA) is an independent, not-for-profit company limited by guarantee. ACA was established in 1959 to:

- provide individual consumers with information and advice to help them with their decision-making in the market;
- lobby on behalf of the consumer interest and to provide a countervailing voice to balance the powerful interests of business and industry.

To fulfil its mission, the ACA tests and researches products and services, and publishes its findings in print (CHOICE magazine, Computer CHOICE, CHOICE Books) and through CHOICE Online (www.choice.com.au). These activities are the means by which ACA raises its funds as well as being the basis of much of its work for consumers. The ACA also lobbies and campaigns for improvements in consumer protection and for the empowerment of consumers.

The ACA accepts no government funding for its ongoing running expenses, no commercial sponsorship, and no advertising in any of its publications. It buys the products and services that it tests in the market. ACA’s income is derived almost entirely from the sale of information to consumers - such as subscriptions to its magazines and online site, and sale of books; as well, a small income is derived from fee-for-service testing in its laboratories and related other expert services.

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Summary of Recommendations

The stated aim of the Trade Practices Act is to enhance the welfare of Australians through the promotion of competition and fair trading and consumer protection. Strong domestic competition law and its vigorous enforcement are crucial not only for the welfare of Australian consumers but also for Australia's economy. More generally, for the efficient functioning of the economy, it is crucial that consumers can be confident markets are operating honestly and fairly.

Competing Locally and Globally (Term of Reference 1a, 1c, 1f)

Some have suggested that one way to improve the welfare of Australians is to improve the chances of Australian companies being able to compete globally. This is apparently to be accomplished by permitting mergers that substantially lessen domestic competition so that these larger companies can have more chance of success abroad. Quite apart from the fact that there is no evidence that simply big is better – 50% of Australia's exports do not come from the big companies – empirical evidence suggests that it is a strong, rather than lax, domestic competition regime that assists in creating firms which are strong global competitors.

To use an analogy, proposals for softening competition law and particularly merger law are akin to suggesting that Australia should pursue the development of its world-class athletes by reducing the array of other possible top Australian athletes in the field. These "by definition" winners would then take the world by storm. Common sense suggests that such athletes, shielded from the rigours of competition, actually wouldn't stand a chance on the global stage; neither will companies which have not grown up in a culture of vigorous competition. Success globally, which is important for Australia's continued economic success, is a combination of ability to respond to customers, a strong price/value proposition, and most importantly, a finely honed competitive attitude. The suggestion that coddling companies at home can develop world-class competitors is a nonsense.

The economic concepts underlying competition law are reviewed in this section of the submission.

Accountability of the ACCC – Governance Structures, Use of Publicity (Term of Reference 1d, 1e)

The ACCC is currently accountable in a variety of ways: formally to the elected representatives in Parliament; more generally to the public; and in its enforcement activities to the courts by virtue of appeals or challenges to the Commission. Appeals against ACCC conduct or decisions can be made, depending upon the circumstances, through administrative appeals structures, the Commonwealth Ombudsman, and the Australian Competition Tribunal.

The ACA does not see the need for any additional levels of bureaucratic scrutiny to be added. Such proposals have little merit, are thinly disguised attempts at regulatory capture, and would considerably slow down the Commission in carrying out its duties. None of these outcomes would be of benefit to Australian consumers or to the Australian economy.

The ACCC's use of publicity is an extremely cost effective compliance and education strategy. Since our system of justice is a public one, inevitably those found guilty of breaches of the Act will suffer in terms of reputation – and so they should; in terms of possible reputational damage from the public being aware that a firm has been charged (not convicted), the ACA believes that the Australian society and media are sufficiently intelligent to be able to distinguish between an allegation and a conviction. It is more important from a societal point of view to maintain the justice system as a public one than to suffer the detriments of a secretive system.

The ACA believes that consumers have become far more aware of their rights because of the high public profile of the Commission and its Chairman, and far more comfortable in the market as a result. This is an excellent, if unmeasured, benefit of a market regulator acting with very high transparency. The media, which provides prominent coverage of the ACCC and its activities – which again is an important public outcome – also provides major public scrutiny of the Commission.

Throughout the world, public confidence in regulators has suffered badly. High-profile corporate collapses and apparent widespread dishonesty has undermined consumer and investor confidence in not only corporate governance but also regulatory effectiveness. The ACCC, and Allan Fels as its current Chairman, remind consumers, through public presence and transparency, that appropriate vigilance of a regulator is possible. This is welcome in a society where transparency, openness, and public accountability are increasingly valued.

Mergers, Authorisations - Section 50, Section 87B (Term of Reference 1a, 1b, 1c, 1e)

The current mergers regime in Australia has a number of important features. One aspect, which is critical, is the high transparency of the process and the opportunity for consumer organisations, businesses and other stakeholders who might be affected, and the public more generally to put a view and be heard in a merger proposal which would involve a substantial lessening of competition.

The first step in the process of considering a merger requires the ACCC to determine if the proposal would significantly lessen competition. This determination is conducted privately and some 95% of proposals are approved. Where a merger might significantly lessen competition, firms have an opportunity to give undertakings, either structural or behavioural, to enable the merger to go ahead. In the small number of instances, about 2%, where the problem of substantially lessening competition cannot be overcome through undertakings, companies in Australia still have an opportunity to successfully merge by arguing the public benefits of the merger, on the basis that these outweigh the competitive disadvantage.

For the proposition to be accepted, that the public benefits outweigh competitive detriment (i.e. detriment to consumer welfare), companies appropriately must make this case in public. The public, media, consumers and business stakeholders, have a right to examine the claimed public benefits of a merger and to offer their view as to whether these claimed benefits are realisable and sufficient. Proposals to amend s 50 and s 87B, such that the public benefits test is inserted into the initial consideration of a merger, mean that these supposed benefits would be considered behind closed doors and not be subject to public scrutiny before a merger is agreed. There is no reason, in our view, to accord businesses this level of confidential privilege, in addition to having accorded to them the privilege of considering a merger even in situations where competition detriment occurs.

In the same vein, the formality of a quasi-judicial forum, the Australian Competition Tribunal, would effectively lock out consumers, small businesses and others without deep pockets, from making input into the decision-making process in the event that major mergers were allowed to be taken directly to that forum. The cost of QC representation and other legal advice would be prohibitive for most, if not all, smaller parties. As well, tribunal processes are not the most appropriate ones to handle complex issues of benefits and costs. Even inquisitorial tribunals operate within a legal tradition of constraint by the rules of presented evidence. It is very difficult for such bodies to undertake the necessary research in relation to determining whether a merger should proceed.

For reasons of public accountability, the ACA does not support amendments to s 50 or 87B which inserts the public benefits test early into a consideration of a merger and does not support the proposal that businesses have the option of going directly to the Tribunal for a merger decision. Nor do we accept that the authorisation process is truly problematic. Our view is that business is reluctant to make its arguments in public since it does not wish to subject itself to the public scrutiny that this process involves. The ACA would maintain that business needs to get itself into the 21st century, where societal requirements for transparency and public scrutiny will be increasing, not decreasing.

Specific Improvements to the Trade Practices Act

The Australian Consumers' Association believes that the time is opportune to strengthen the Trade Practices Act in certain important ways and to ensure that the regulator can be vigilant and forceful in the pursuit of firms which breach the law. Eight suggested changes to the Act are outlined.

1. Effects test – Section 46 (Term of Reference 1b, 1c, 1e, 2)

The current test in s. 46, a purpose test, creates enforcement difficulties in obtaining sufficient evidence to prove the proscribed purpose. This type of evidence is very rare, increasingly so.

At the moment, there is probably at least some conduct taking place in the Australian market that would be deemed to be a misuse of market power (such as predatory pricing, refusal to supply, and so on) if it was not placed outside the reach of the law by the inability of either the Commission or a competitor to show evidence of actual anti-competitive purpose. Allowing this situation to continue is neither helpful for competition in Australia nor fair to competitors. It would be far better if companies with a substantial degree of market power faced a law that proscribed misuse of market power where the regulator can show that a company's behaviour clearly took advantage of its market power to the detriment of a competitor whether or not documents about purpose were obtainable.

> **Submission: That s 46 be amended to include an additional phrase such that corporations with substantial market power cannot take advantage of their power for the purpose *or effect* of damaging competitors or potential competitors.**

Penalties, Deterrence, Compensation, Disgorgement

For breach of the Trade Practices Act, the penalties available to the courts should allow for the ability to punish individuals by gaol sentences or through fines, the setting of possible fines at a level that acts as a deterrent, and also for opportunity to compensate wronged parties and ensure that firms do not retain ill-gotten gains, even where the class of consumers harmed by the breach of the law is dispersed.

2. Criminal Sanctions (Term of Reference 1b, 1c, 2)

In the interests of equality of justice, there is no reason that corporate criminals engaged in cartel behaviour, which is a form of theft, should be immune from a jail sentence which is faced by other thieves. There is clearly insufficient personal deterrence at the moment and overseas experience suggests that a jail term is far more feared than a pecuniary penalty. Immunity from prosecution for crimes is granted to children or those who are deemed to be mentally deficient. The ACA does not perceive any rationale for Australian society to accord such tender treatment to business executives breaking the law.

> **Submission: That a new section be inserted into the Trade Practices Act to provide for criminal sanction for serious or "hard-core" cartel behaviour.**

3. Civil Penalties for Part V (Term of Reference 2, 3)

It is possible for the Commission to get criminal penalties in the form of fines (but not jail sentences) for Part V offences, but not civil penalties. This is a very curious feature of the Act. It is not fair for businesses always to face criminal penalties for breaches of Part V and there are innumerable (but not pursued) cases where a company should face a pecuniary penalty but where the conduct does not justify criminal action. The addition of civil penalties for contraventions of Part V would help to provide a deterrent to offences against the Act, would allow more fairness in the enforcement of that part of the Act, and would also enable justice to be carried out promptly and at lower cost.

> **Submission: That a new section for contraventions of Part V be introduced into the Trade Practices Act providing for civil penalties.**

4. Fines (Term of Reference 1b, 1c, 2)

While it appears that the level of Australia's pecuniary penalties has had some deterrent effect, it is clear that the ACCC does not lack for business - the level of fines does not appear to be sufficient to deter breaches of law by companies which assess the benefit/risk favourably. Fines need to be set at a level that can ensure that a company suffers a financial disadvantage in relation to its competitors from its inappropriate and illegal behaviour. By preference, it should not be possible for a company to base its decision-making on a calculation that the benefits of illegal action outweigh the likely impact of fines.

> **Submission: That the Trade Practices Act be amended to allow for the appropriate pecuniary sanction of companies such that the company can be fined as a percentage of its gross turnover or as a multiple of the ill-gotten gain from which it has benefited.**

5. Cy-pres Solutions (Term of Reference 2, 3)

A fair number of breaches of trade practices law have dispersed effects on consumers such that a price-fixing arrangement, for example, could have a small effect on each individual consumer but a large effect in aggregate. While the perpetrators of collusion who are caught and found guilty are fined, it has not been usual for the Australian courts to also ensure that the ill-gotten gains of a company are disgorged and returned to consumers in some form. The doctrine of cy-pres provides not only for the compensation of consumers who have been wronged where they can be identified, but also for the disgorgement of gains through a distribution of funds to be used for consumer benefit broadly.

The Consumer Law Centre Victoria is one of the few instances of a cy-pres solution in Australia. A finance company, which was engaging in dishonest and unfair selling practices, was required to compensate consumers at large by paying $2.25 million to a fund establishing the Centre. The outcome is a consumer advocacy group which can represent the interests of consumers in a manner which ultimately assists in reducing consumer detriment and improves the protection of consumer interests broadly.
At the moment, the Act is silent in providing direction to the Court on how penalties might be distributed. The ACA submits that consumer welfare in Australia could be enhanced through more use of the cy-pres doctrine.

> **Submission: That provisions be introduced into the Trade Practices Act 1974 (with mirror provisions in the ASIC Act) formulating cy-pres solutions in Australian consumer protection law.**

6. Regulatory Intervention in Unjust Contracts (Term of Reference 1c, 2, 3)

There is increasing recourse by companies in Australia to contracts which shift business risks to consumers (including small business in its dealings with large businesses) or unjustly burden consumers with inappropriate contractual terms. Some examples of contracts which are allegedly unfair in ACA's opinion are provided at Appendix II.

Terms in these contracts include: unilateral change clauses, tendentious default provisions, clauses that confer a particular evidentiary value upon certificates or other documents issued or held by a business or third parties, onerous obligations on the customer, apparent attempts to contract out of "fit for purpose" warranties under the Act, and onerous terms in "clickwrap" contacts for e-commerce services.

Unlike many other countries, Australia has no systematic process or effective law for dealing with such unjust terms in contracts and the federal Government has been completely lenient about this. This may account for their proliferation here. Other country governments either have addressed or are in the process of addressing this problem and are not simply leaving consumers to the "mercies" of an unequal power relationship between consumers and business.

Submissions:

- **That a new *Part IVB – Unfair Terms* be inserted into the *TPA*;**

- **That this new Part be modelled on the key features of the UK *Unfair Terms in Consumer Contracts Regulations 1999*, appropriately adjusted to fit within the TPA framework;**
- **That, consistent with the UK *Regulations*, the new Division:**
  - **declare that unfair contract terms, as defined, are not binding on consumer parties;**
  - **impose a positive duty on the ACCC, as regulator, to consider complaints about unfair terms; and**
  - **give the ACCC (and, perhaps, other specified bodies) the power to seek both enforceable undertakings and injunctions to restrain the continuing use of unfair terms.**
- **That mirror provisions dealing with contracts in relation to financial services be inserted as a new Subdivision within Part 2, Division 2 of the *ASIC Act*, and**
- **That additional resources be provided to both the ACCC and ASIC to ensure that the new legislative responsibilities proposed are effectively and actively administered.**

Further, the ACA considers that extensive work needs to be carried out on the magnitude and nature of unfair contract terms in the marketplace and recommends that as a priority the three key regulators – Australian Competition and Consumer Commission, Australian Securities and Investments Commission and Australian Communications Authority - jointly undertake a wide-ranging study into the matter, consider what terms should be "black listed", and report on their findings.

Small Business Issues

7. Cease and Desist Orders (Term of Reference 1b, 1c, 1f)

In situations of misuse of market power against a small business, before a decision can be obtained in the courts (which can take a number of years) the small business may well be bankrupt. Thus the ACA supports the introduction into the Act of "cease and desist" orders to provide a breathing space while evidence is collected to injunct such a behaviour.

8. Collective Bargaining by Small Business (Term of Reference 1b, 1c, 1f)

With the caveat that certain protections would need to be in place, the ACA can support an amendment that would permit small businesses to bargain collectively in some cases. The protections include: no blanket exemption from the law; the ability of the Commission to intervene to redirect a proposed collective bargaining arrangement to the authorisation process in situations where such bargaining could significantly harm competition; and that the collective bargaining be permitted only in relation to dealing with businesses which have a significant degree of market power.

Competing Locally and Globally (Term of Reference 1a, 1c, 1f)

In the past 10 – 15 years, the context in which Australian business operates and in which economic regulation is conducted has changed dramatically. Financial deregulation and trade liberalisation measures have been enacted in all developed economies. Freely flowing capital, coupled with instantaneous communications and the widespread availability of computing power, have forever changed the perception of any economy that it can operate as an isolated "island" in the overall global economy. The opening up of trade and the strengthening of our competition laws have helped boost the standard of living for most Australians.

In the 2001 *World Competitiveness Yearbook*, Australia's report card is reasonably strong. Surveys of business executives put us at the top of the world in terms of our legal framework and the availability of financial skills. We are number two, just behind Finland, in response to the survey question "Competition laws prevent unfair competition in your country."

By now we have become so used to a strong level of consumer protection through the Trade Practices Act that consumers tend to take it for granted. In such a situation those who seek to change the Act have a much stronger voice than those who benefit from its current provisions. Because the benefits are widespread, the constituency for support of a strong competition regime is also quite dispersed. By contrast, those who stand to benefit from weakening of the Act, particularly in relation to mergers and acquisitions, are strongly organised and have substantial access and political influence in Canberra and elsewhere.

To see the benefit of our trade practices legislation, we would have to imagine a reversion to Australia of the 1960s or earlier. Some evidence of the benefits of competition is revealed in the fall in consumer price inflation from the eighties to the nineties, and in the improvement in the quality of consumer goods. In any economic development over time, direct attribution of cause and effect is difficult; many economists point out that much of this improvement can be attributed to innovation, but to a large extent innovation has been spurred by competition.

There is now political pressure to soften the provisions of the Trade Practices Act in the interests of the need for "business efficiency" and "business scale" especially given that Australia is part of a global market. In particular it is contended that the way in which the Act restricts mergers is an impediment in the development of efficient and competitive industries, especially in situations where it is difficult to achieve scale economies in a small domestic market.

From an economic perspective, however, there is no case for softening the provisions of the Act.

Economists from the time of Adam Smith have understood two basic maxims. The first maxim is that competition is the *sine qua non* of successful capitalism. It is customer choice, exercised by consumers or intermediate producers, that makes markets work. The other maxim is that businesspeople, while hailing the values of market competition, will do all in their power to protect themselves from the harsh discipline of competition.

Economic Concepts Underlying Competition Laws

Political discourse often refers to the need to balance “business interests” and the “public or consumer interest”; for example, it is often suggested that significant lessening of competition can be outweighed by business efficiency gains.

But to posit such a tradeoff is to overlook one of the basic principles of economics. To refer to “business interests” is to confuse means and ends. The purpose of economic activity, in any framework, capitalist or socialist, is to improve people’s living standards. Businesses are vital instruments in that process, and it is important that firms have adequate profitability to reward their stakeholders and to reinvest in their own businesses. But the health of business is a means to an end, not end in itself. Businesspeople are apt to forget that corporations are simply agents in the economic process.

This point is illustrated by an anecdote from a recent delegation of business people visiting Australia from one of the former Soviet republics. One member of the delegation was from the concrete industry, and he boasted that in his country the concrete industry provided one of the most highly successful cases of privatization in the post-Soviet era. It was based on several medium sized firms, each with its own territory. Such a territorial allocation ensured orderly supply and good strong profitability for the industry. When he was asked how such orderly supply was sustained he pointed out that this was done administratively, helped by drivers’ assistants who rode in the concrete trucks with a shotgun, on the lookout for competitors’ trucks which had strayed from their territories. He was keen to learn about the Australian concrete industry, and when he saw the reports of Australia’s major building product firms – CSR, Boral etc – he was most unimpressed with their low profits. He had a long way to go to learn about successful capitalism, and he failed to connect his country’s dreadful shortage of housing and roads, and the poor quality of its buildings in an earthquake zone, with the orderly market arrangements of the concrete industry.

Coming back to Australia in 2002, many businesspeople must envy the easy life of a concrete supplier in the former Soviet Union. It is quite understandable that businesspeople, *from the perspective of their own firms*, might prefer the protection of legally sanctioned oligopolies and orderly marketing arrangements to the chill winds of competition. But from an economy-wide perspective such restrictions on competition are expensive and inefficient in three ways.

Higher Prices: First, they result in prices being higher than they would be under more competitive conditions. In common parlance this is called a “rip-off”. Not only is consumer welfare reduced, but also consumers have less money to spend on other products and services, thus slowing down the whole economy. Businesses that might have arisen and thrived in a more competitive environment either do not emerge or do not thrive simply because consumers do not have that money to spend. Shareholders, or increasingly managers and directors, also benefit at the expense of consumers. In terms of macroeconomic performance, the effect is inflation being higher than it might otherwise be. When firms are enabled to charge higher prices than economically necessary and to distribute their gains as high executive salaries rather than to consumers as lower prices, real income disparities widen. The rewards of managerial salaries are concentrated among a few people, and going to a group which is already relatively privileged.

Reduced Output: Second, a firm operating in a privileged market position can suppress output and maintain prices at such a level that many potentially beneficial transactions never take place at all. If a firm can make enough money by selling a small output to a few customers willing to pay a high price, it will not jeopardize its market by lowering its prices, even if it can still cover the cost of production. In a competitive market, output expands just so long as there is some profit in expanding production; prices reduce and output expands until the price equates to the cost of production.

There is often dispute over the practicality of such a concept, for if the price equates to cost, there is theoretically no profit. But economists include a reasonable return to capital – what accountants would call a "normal profit" – as part of the cost of doing business. That is the essence of the competitive capitalist market – adequate returns are made by efficient producers, the benefits ("surplus value") accrue to consumers, and resources are efficiently utilized.

In a market with restricted competition, however, firms often restrict output in order to maximize profits. This results in waste as resources go underutilized. An airline in a monopoly position, for example, may prefer to fly with empty seats rather than offering low-priced fares which it perceives would undermine its entire fare structure. A chemical firm may restrict supply so it can sustain high prices through contrived shortages. A toll road operator may prefer to keep high prices for few cars using its road rather than lower prices for many more cars.

The economists' term for the resulting waste of underutilized resources is *deadweight loss* – "deadweight" because such underutilized capacity benefits neither the producer nor the consumer. Deadweight loss contributes to *allocative inefficiency* (or *economic inefficiency*). In short, this is the inefficiency resulting from not having all resources used to their best capacity – a much broader sense of "efficiency" than that which is used by most businesses. It may look "efficient" from the perspective of a firm's board or CEO to engage in monopoly pricing, but this is to confuse efficiency with profitability.

Innovation: Third, a firm in a monopoly or strong market position has little incentive to engage in product or process innovation. Businesspeople will often argue for market privilege on the basis that it gives them the financial capacity to invest in innovation. That is correct, but it provides them with no incentive to do so. Just so long as potential

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competitors can be kept at bay, a dominant firm has no reason to innovate. The result of such slothfulness is *technical inefficiency*. One manifestation of such inefficiency is that firms often engage their efforts in sustaining their market position, through fending off competitors or through seeking privilege from regulators, rather than competing on the basis of price or service. (There is the possibility that this may be happening in a number of industries in Australia.)

These general economic arguments notwithstanding, businesspeople often suggest that mergers which allow for more local market power would have efficiency benefits which would outweigh the costs of lost competition. They centre on the related notions of the benefit of scale economies and of creating "domestic or national champions".

Scale economies

In many industries there are significant returns to scale. Fixed costs are high, while variable costs are relatively low. If there are two or more firms in such an industry, it is argued, inefficiency results because fixed costs are spread over too low a volume. A merger would allow for longer production runs, and investment in fixed equipment with lower unit cost.

Such an argument should be familiar to anyone who has studied the justification for central planning, which was the cornerstone of economic management under Soviet Communism. At the core of such central planning was the notion of exploiting economies of scale, and dispensing with the waste of excess competition which occurs under market capitalism. The consequences do not have to be pointed out.

Scale economy arguments have even less validity now than they did in 1917. Technological developments, particularly in information technology, have made for much more flexible production and have offset many of the competitive benefits offered by large-scale mass production. When Henry Ford said, "you can have any color you like – as long as it's black" he couldn't have envisaged the flexibility that would be offered by computerized production control, numerically controlled machine tools, and flexible tooling.

In most industries, competition is about responsiveness to customers' needs. The large juggernauts of mass production may be able to achieve low costs and scale economies, for a while, but they prove to be inflexible in time. Competition is a tough master; in a competitive market, firms which do not keep up with consumer's needs, which do not match the price and quality of their competitors, go out of business. It is quite understandable that some businesspeople, particularly in Australia where there is still the legacy of paternalistic industry policies, should desire to be shielded from competition. But what is good for individual firms is not necessarily what is good for the economy.

The Austrian-American economist Joseph Schumpeter referred to the dynamic of capitalism as "creative destruction", as old firms give way to new entrants.[1] National productivity gains are more likely to arise from new firms with new processes and products than from established firms making incremental productivity improvements.

But with large corporations in entrenched market positions, using the power of incumbency to block the entry of rivals, these dynamic processes are stymied. Unfortunately, those firms which never get a chance to come into being don't get a political voice to influence public policy. In a seminal empirical study, US economist Mancur Olson found that those nations which provided platforms and channels of political influence for special interest groups, particularly industry associations, tended to have slower economic progress than other nations.[2]

Furthermore, the conditions which make for exploitation of scale economies are precisely the conditions which make for monopoly pricing – that is, restricting output so as to sustain prices at a high level. Businesspeople may argue for protection from competition to give them resources to exploit scale economies, but it is quite probable that, having achieved such market power, they will take the easy path to higher profitability and actually restrict output, particularly on the domestic market.

If the issue of concern to industry relates to access to funds for capital investment, then there is some validity for such concern. Australia's capital markets are far from perfect – recent years have seen far more profitable returns from strategic financing maneuvers (such as leveraged buy outs, capital returns and equity dilution, and sale and leaseback) than from investment in new products and processes. The opportunity cost of funds for productive purposes is high. This is indicative of a set of distortions in financial markets and tax laws. Government policy should be directed to addressing those distortions, not to adding to economic distortions by watering down the instruments of competition policy.

National champions

There is a notion that because Australia has a small domestic market we cannot afford the competition regimes of the USA or EU. In these markets firms can achieve large-scale economies in their domestic markets, even when there is open competition. Firms can become big enough in their home markets to take on global competition. Australia, by contrast, has a small market, and therefore should allow domestic monopolies ("national champions") to build up strength to take on global markets the argument goes.

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[1] Joseph Schumpeter, *Capitalism, Socialism and Democracy* (Harper and Brothers 1942)

[2] Mancur Olson *The Rise and Decline of Nations – Economic growth, Stagflation and Social Rigidities* (Yale University Press 1982)

This line of reasoning is spurious on two counts – one in terms of corporate behaviour, the other in terms of economic theory.

Global markets are tough. But it is absurd to think that a firm which is coddled at home will develop the resilience and flexibility to take on global competition. Competitiveness is as much about patterns of relationships between firms and customers and attitudes as it is about production economies. Competitiveness is learned at home.

To put it in another context, it's useful to think of the analogy of building another type of national champion – the creation of Australia's elite athletes. The process by which this is done is to submit athletes, throughout their careers, to the most stringent competitive pressures; Australia has one of the highest rates of producing elite athletes in the world given its small population. We are among the best in the world because our domestic competition regime for the creation of elite athletes is one of the fiercest on the globe, even importing top athletes or sending ours overseas to train when the domestic competition is insufficient. Australia's Institutes of Sport understand that creating an elite athlete is tough and painful, but that the process is necessary if we are to succeed.

The proposals of some business lobby groups for creating world-class competitive companies would be akin to suggesting that the way for Australia build elite athletes would be to ensure that there was less competition, fewer world rank competitors, in order to ensure that certain Australian athletes were, by definition, winners on their home ground. Then, apparently, these "winners" would be sent into global athletic competitions and be winners there too. The falseness of this proposal is immediately apparent. Those athletes who haven't been tempered by the heat of fierce competition in their domestic "market" are not going to be the winners elsewhere.

Australia has already had the opportunity to demonstrate that there is no validity to the "domestic champion" theory – it fails in business as it does in sporting competition. For most of the postwar years, Australian manufacturing was protected from competition by high tariff barriers. While these barriers sustained a high *average* cost structure, there were many firms which would have been cost competitive at the margin – that is, their *variable* or *marginal* costs were low enough to allow them to be cost competitive on international markets. But, in spite of various export incentives, they generally did not succeed, because they had not developed a competitive culture within their own countries, let alone in global markets.

The economic fallacy underlying national champion theory is the notion that we must export at all costs. The domestic champion theory is basically about having a firm cover its fixed costs in a protected market, while exporting at marginal cost. Fixed costs would be absorbed through sustaining high prices in domestic markets. At first sight this looks like a clever way of giving an export subsidy (though it may still come under a definition of "dumping"). But we need to ask what is the economic benefit of doing this. Exporting is a means to an end, not an end in itself. We export so we can afford to buy imports. But if those exports have to be subsidized, then we are paying dearly for them.

It makes no economic sense for Australian consumers to subsidize consumers in other countries.

Pursuit of export, as if it is an end in its own right, is known as the *mercantilist* fallacy. It may be of benefit to consumers in other countries; indeed it is probable that Australians have benefited from dumping of other countries' surplus production from industries abroad where there is little domestic competition. And it may benefit exporting firms. But our national welfare will be far more advanced if we can export profitability at a price that covers average cost, rather than at a low margin on variable cost.

If firms want access to larger markets, there would be some virtue in government policies which attended to impediments in domestic markets, such as investment in surface transport infrastructure to reduce domestic distribution costs. When it comes to overseas markets there are more direct ways of supporting global competitiveness than watering down competition laws. Indeed, as pointed out by Michael Porter of the Harvard Business School, domestic competitiveness is an asset in aiding international competitiveness.[3] This holds both at the level of the firm and at the level of the national economy.

Some people may believe it is possible to have a set of coddled firms in domestic markets and a set of competitive firms in global markets – an "enterprise zone" notion. While this separation has on occasion been successful as a transitional strategy in developing countries, Porter points out it is not sustainable in industrial countries. The domestic and global sectors cannot be separated – they share labour markets, financial markets, and, above all, attitudes and cultures. The inability to separate the sectors in developed economies has spurred micro-economic reform.

There is much that can be done to address Australia's global competitiveness without damaging domestic competitiveness. Shipping and waterfront reform still have a way to go. A wildly fluctuation exchange rate does little to add to investor confidence. Dependence on foreign investment often means Australian firms are excluded from global markets because of franchise restrictions. On a broader scale we need investment in public goods such as education and research which will enhance our competitiveness in a global economy where competition is based more on knowledge rather than traditional cost factors.[4] These reforms and investments should be pursued.

An easing of merger provisions to allow firms to make more profit in domestic markets is, in effect, a new layer of consumption tax on Australians. There is no guarantee that it would result in greater global competitiveness since there is no reason to expect that firms granted such a privilege will be compelled to expand into new export markets; its result would probably be only to improve corporate profitability to the benefit of managers and possibly investors (including overseas investors). It may appear attractive

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[3] Michael Porter *The Competitive Advantage of Nations* (Free press 1990).

[4] Robert Reich *The Work of Nations – Preparing Ourselves for 21st Century Capitalism* (Knopf 1991)

to some in government because it would not be officially called a “tax”, but it would have all the burdens of a tax without the visibility, control and accountability of official taxes.

It is interesting to note in passing that many of the concerns raised by small business in relation to difficulties competing against large players, are echoed by the big business sector about the difficulties in competing globally. In neither case do we support weakening the trade practices laws as a solution.

The ACA remains entirely unconvinced by the “national champions” argument. The term “national champion” conveys nice warm fuzzy feelings; it is, in fact, simply another term for a monopoly, or at least a business entity of sufficient scale in the market that monopoly rents could be extracted to the detriment of consumers and other businesses. Since almost 50% of Australia’s exports do not originate from large businesses, it’s clear that success in the world market isn’t a matter of scale or size, it’s a matter of the right attitude and smart competition.

Accountability of the ACCC: Governance, Use of Publicity (Term of Reference 1d, 1e)

The ACCC over the past 10 years has become a very vigilant and effective regulator. It is thus not unexpected that those who have borne the close inspection of the market regulator would not be well pleased with it.

Not only has the ACCC been vigorous, it has also succeeded in the vast majority of its actions before the courts. If one looks at both Part IV and Part V statistics over the past six years (excluding matters settled), the ACCC is running a win/loss ratio of about 27 to 1 for Part V and 15 to 1 for Part IV. One could certainly not accuse it of much adventurous enforcement action given the record. The ACCC is not only a winner, the matters which it has brought before the courts have often resulted in reasonably significant fines. Since 1995/96 (not including costs awards), pecuniary penalties have amounted to $88.7 million – a very large increase over the prior six years, but perhaps not a significant enough amount in comparison with the ill-gotten gains that might have accrued to companies. Some companies have taken big hits in terms of the fines awarded and a number of these are mentioned in the ACCC submission as well as in recent media reports[5]. In being a vigorous enforcement agency, and in particular one that wins, the ACCC will inevitably create a large number of vociferous enemies.

Those interests that do not see themselves as benefiting directly from a strongly enforced competition regime – or in fact see the competition law as primarily a nuisanceful interference with their expansion plans – will inevitably seek to curtail or interfere with the operation of the market regulator. When a regulator has actually been successful in exposing the behaviour of some of these interests or in thwarting their plans for easy growth by assimilation, and to add insult to injury, if these enforcement matters are conducted in the public spotlight, then the debate can get quite warm – outrage will run strong!

That is the situation in which Australia currently finds itself. There is not only criticism of the ACCC by big business at the moment – business criticism of regulators is a feature ACA watches for since it indicates at least some level of vigour in enforcement activity - but there appears to be a highly orchestrated crescendo giving the appearance of huge dissatisfaction in the market. The facts are less exciting.

Consumers, small business, and the public more generally are highly supportive of the ACCC and have learned that this regulator can be trusted to keep their interests at the forefront of its work. By and large, the interests that oppose a vigorous competition regime – in other words, those who stand most to benefit from the weakening of either the competition rules or the regulator - are also often the representatives of those firms which have a substantial degree of power in the market. That appears to be the case in this instance. The main attack on the ACCC is coming from the "bigger end of town" and from many of those whom they hire.

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[5] Ross Gittins, *Watchdog who bit the big boys*, Sydney Morning Herald, July 10, 2002.

There are a variety of methods by which business generally seeks to curtail a successful regulator or to weaken the competition law. In the ACA's experience, these take the form of apparently modest proposals for "improvements" in administrative process, new governance structures and suggestions for "improvements" to the competition law often in the national interest. Occasionally one can have extreme proposals, such as removing the enforcement role from the regulator,[6] presumably giving large businesses a window of opportunity while a new regulator attempts to become established and fully able to exercise its functions.

The serious "reform" suggestions that have been proposed to date include: a governance body over the regulator which would include big business interests[7]; guidelines or charters to control the ways in which the regulator can pursue its function; codes of practice about publicity and how the law should be implemented (these may serve at minimum to slow the regulator down and, equally attractive, to limit its public transparency and visibility); and a watchdog to watch the watchdog.

Much of the thrust of these suggestions will be in the nature of what is generally called "regulatory capture" or trying to obtain a more "gentle"[8] regulator that will be less vigorous in the pursuit of misuse of market power and less clamorous in ensuring the public visibility of its functions.

Governance Structures, Appeal Structures

The ACA opposes suggestions that the regulated should be allowed an opportunity to try and govern the regulator – essentially a proposal that would permit potential law-breakers to police the police. This suggestion is, in our view, a thinly disguised attempt at regulatory capture and muzzling the competition regulator.

There is no lack of history of regulatory capture in Australia or of industry successfully and inappropriately influencing the ways in which a regulator operates.[9] However, changes in public perceptions over the past 20 years, as well the opening up of Australia's economy, have altered what is acceptable practice to the Australian community.

The independence of the economic regulator is central not only to consumer protection but to the fair operation of competition in our marketplace. As ACA notes in the earlier section of its submission, competitive economies are healthy economies; it may not be pleasant or comfortable for market participants at all times, but strong competition

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[6] *Caltex call to strip ACCC of powers*, AFR, 8 July 2002

[7] On recent evidence, the ACA assumes that this proposal is not made on the basis that anyone is offering well-publicised business governance failures as a standard to be emulated.

[8] Grabosky, P, Braithwaite, J *Of Manners Gentle: Enforcement Strategies of Australian Business Regulatory Agencies*, Oxford University Press, 1986.

[9] ibid

remains the single most effective way of ensuring consumer welfare and that the Australian economy is positioned to succeed in the global arena. Establishing a governance board that lets the “poachers influence or capture the gamekeeper” is a highly damaging suggestion for Australia’s economic future, for Australian consumers, and a proposal which we reject.

There also seems to be some misconception, in some quarters, that the ACCC is like a big business in its operations – with a CEO that calls the shots and directs senior executives in their functions. In fact, the ACCC operates in a Board-like structure. The Chairman and Commissioners are independently appointed by the government (within a COAG consultation framework), and regulatory action is discussed by the “board” of Commissioners prior to going ahead. Both the independent appointment process plus the process of consultation and consensus before enforcement action takes place provide checks and balances on the ACCC’s operation. In addition, the ACCC publishes its priorities for enforcement, having consulted widely on these before finalising them. One could wish that all influential regulators were as transparent.

An additional and related proposal to a separate board is for some form of “inspector” to reconsider the actions of the ACCC – a sort of “second-guess shadow ACCC”. At the moment there are a number of avenues of appeal for business which feels hard done by: these are the Courts, the administrative appeals processes, merits review in certain cases by the Australian Competition Tribunal and complaints to the Commonwealth Ombudsman.[10] This proposal by business for an additional inspectorate is not only bureaucratic and unnecessary, it serves to confuse the lines of authority which are already established in our systems of oversight. Big business does not need an additional body to handle its complaints and the public does not need the resources of the regulator taken up in a never-ending process of reconsideration, reassessment, reevaluation and reanalysis. Nor does the ACA support this proposal, which on the surface seeks to interfere with the operation of the justice system, and the appropriate role of the Courts especially in appeals processes.

The ACCC currently has a number of groups which advise it on matters of concern – for example the consumer consultative committee and similar groups for business. This allows the ACCC to determine its priorities on the basis of wide-ranging input. In general terms, ACA also does not find a compelling argument for a proliferation of additional layers of bureaucratic structures, especially structures or processes which could serve to undermine consumer confidence in the perceived independence of the ACCC. Proposals which weaken the public’s confidence in the ability of the main consumer protection regulator to act “without fear or favour” are a poor idea.

[10] As an aside, the ACA would note that if the Commonwealth Ombudsman were not so invisible, suggestions for additional complaints structures would probably be completely superfluous.

Use of Publicity

One of the issues, primarily raised by big business, is that the ACCC uses publicity excessively and/or inappropriately – that they are subject to “trial by media”. There are a number of intertwined issues in relation to this matter.

From a consumer perspective, one wants a highly visible competition and consumer regulator – especially when the regulator is launching actions in the courts. The Act in fact requires at s 28 that the ACCC keep the public and consumers informed. One important consequence of a highly public regulator is that both consumers and businesses are very aware of the Trade Practices Act in Australia. An education program designed to achieve the same level of public recognition would be prohibitively expensive. Awareness of the Act has two important effects: an increase in consumer confidence about the market and a high awareness by the business community about the care they should take in the conduct of their business.

Confidence and Reduced Transaction Costs
The power in the market between a business and a consumer, or a big business and small business for that matter, is very uneven. This is not simply the standard economic notion of information asymmetry; the power imbalance extends to financial muscle, access to legal advice, and so on. The first important effect of a highly visible regulator is to give consumers and small business confidence that the markets are more likely to operate fairly. The advantage of the sense that “someone is looking out for them” means that consumers can operate in the market with confidence thus significantly reducing economic transaction costs. In economies where this is not the case, consumer transaction costs are very high since the consumer has to assess the “respectability” and “reliability” of the provider in addition to assessing the price/value proposition of the products or services on offer; the economy suffers as a result. When there is no strong regulatory presence being proactive in asserting consumer rights in the market through education and enforcement, or to help a consumer in enforcing their rights, it’s much more needful not to make a mistake in a purchase. High economic transaction costs for consumers are especially typical of the developing economies and economies in transition, and some markets in the developed economies where disclosure rules are weak.

As an example of where a very visible regulator can keep consumers confident that they are not being ‘ripped off” in a market, the introduction of the GST in Australia could have been attended with the same problems that occurred in other economies. Note the recent problems in Europe in the changeover to the Euro; consumers in some jurisdictions were subjected to price increases of some 300% with no regulator in sight. This is no way to engender public confidence. During the introduction of the GST, the regulator was so high profile, and provided such a focus for easily lodging price-gouging complaints, that a quite suspicious consumer community accepted that the watchdog was on duty, and just moved on. No other country has, in our experience, implemented as large an economy-wide reform with so little abuse of pricing and so much confidence by consumers that things were “okay”.

Cost Effective Compliance
The second important effect of the publicly vigilant regulator is to send a strong signal into the marketplace about business behaviour towards consumers and towards competitors. While probably not as effective a regulatory tool as actual litigation, nevertheless, publicity is an extremely cost effective compliance tool in broadly informing the business community that misbehaviour is not acceptable. It would be far more costly for taxpayers if other compliance mechanisms had to be used – publicity is free.

In the same way that consumers are supportive of a high profile and publicly transparent regulator, the media obviously has strong interests in the work of the ACCC. The matters of competition and consumer protection policy are highly relevant to the public which is why the media covers these issues so extensively. In a very real sense, any important regulator has strong public accountabilities as well as those to the Parliament. This is true, for example, of much less visible regulators such as Customs, AQIS, and so on. The matters dealt with by these regulators are not (with a few specific exceptions) of the same level of public concern as matters dealt with by the ACCC. The fact that Customs stops a individual consumer from coming in with an illegal sausage or stops the import of a shipment of prohibited timbers is not quite as dramatic as the news that a nationwide store been found to be in breach of fair advertising rules. Where the matters being attended to by other regulators do have critical and broad public impact – such as Customs finding a cache of illegal drugs – then the media coverage is very high for that regulator at that point as well. That is appropriate in an open society. Trade practices law is economy wide, so one shouldn't be too surprised that the level of coverage is high.

All regulators investigate and sometimes proceed against firms in relation to alleged law breaking. The ACCC has had a practice of issuing media information when it proceeds to some form of enforcement or where it believes that there are matters of public interest that should be disclosed. The ACA supports this stance.

Some large businesses have argued that this is a detriment to their reputation. This may be true. Businesses that are found to be in breach of the law do not have the right to the protection of their reputation – the public has the right to be aware of what they have done.

Damage, however, can presumably arise simply when a firm is charged – and not yet found to be guilty. While this could be a concern, most people can distinguish between an actual offence – i.e. a conviction – and alleged behaviour. There is always a tension between transparency by regulators and business preference for matters to be handled privately. Our justice system is a transparent one and the ACA would support the overriding societal benefit of that transparency as set against possible detriment to a company's reputation.

Society has vastly changed with the increase in access of mass media, and businesses need to learn that regulatory matters are now conducted with far more openness and transparency than has been the case in the past. This is part of a growing requirement for public accountability in the political process and elsewhere. Some businesses are trying to understand and embrace this, and efforts at triple-bottom line reporting reflect this.

A competition and consumer regulator carries out its job in the public interest, not primarily in the interests of business; in our view, it should do that publicly. Media scrutiny of the regulator is in itself is valuable outcome of such transparency.

Throughout the world, public confidence in regulators has suffered badly. High-profile corporate collapses and apparent widespread dishonesty has undermined consumer and investor confidence in not only corporate governance but also regulatory effectiveness. The ACCC, and Allan Fels as its current Chairman, remind consumers, through public presence and transparency, that appropriate vigilance of a regulator is possible. This is welcome in a society where transparency, openness, and public accountability are increasingly valued.

Mergers, Authorisations - Section 50, Section 87B (Term of Reference 1a, 1b, 1c, 1e)

The ACA does not support proposals, often made under the guise of improved process or improved administration, that attempt to move the consideration of mergers that would substantially lessen competition to the "back room" away from the public eye and out of a system which allows the public and stakeholders to participate in the process of scrutiny of decisions of such magnitude.

Examples of the type of proposal which would weaken s 50 or reduce public scrutiny would include *inter alia:* the addition of "public benefits" considerations into s 50 to allow early consideration of them in a merger; the addition of public benefit considerations to s 87B; extending the list in subsection 50(3) so that business efficiencies are given more weight; and transferring initial decision making about mergers into a quasi-judicial setting such as the Australian Competition Tribunal.

Amending s 50 (and s 87B) to add public benefit considerations

There are two major problems with proposals which would add consideration of public benefit into Section 50 such that this would form part of the initial assessment of the Commission. At the moment, the initial focus of the ACCC is on whether a proposed merger would have the effect of substantially lessening competition.

The ACCC considers a large number of mergers in each year with the great majority of these cases proceeding – some 95%. Only where the Commission finds that the proposed merger substantially lessens competition – in other words, the merger would cause significant detriment to the welfare of consumers – is the merger not permitted to go ahead. In many of the latter cases, firms can undertake either to alter the merger proposal structurally (for example by not acquiring certain parts of the merger target which is creating the substantial lessening of competition problem) or to undertake certain behaviours in the market which then permits the merger to proceed or both.

In the remaining cases, where substantial lessening of competition cannot be addressed through s 87B undertakings, firms still have the option of moving into the authorisation process and to show, in public, how the benefits that will flow from the proposed merger should "trump" the lessening of competition considerations. This two-part process is very fair. In most cases, mergers can go ahead because they don't lessen competition. Where competition is significantly reduced, the proponents of the merger have an opportunity to publicly and transparently argue the case in any event.

The first problem with adding public benefits like business efficiencies to section 50 is not simply that businesses generally confuse economic benefits with narrow business benefits that improve their profitability. The Commission would obviously pick up that sort of claim. But the amended section would allow the creation of a merged and possibly more dominant company in a closed "back room" process where others with a significant interest in the matter – parties such as consumers, suppliers, competitors – would have no knowledge that the merger was being considered. To take a possible example, if a current big bank wanted to take over a regional bank, under an arrangement where section 50 had been modified to include "public benefits" like business efficiencies – and obviously there would be some - the ACCC could make a determination that the supposed efficiencies balanced the lessening of competition effects to a sufficient extent that the merger should proceed.

With all due respect to the talents of the officers of the Commission, we do not believe that, in principle, a matter of such public import should be being considered privately rather than publicly; furthermore, we do not think that the Commission could possibly recreate the complexity of interests in such a matter on its own without the significant input and perspectives of the parties who would be concerned. Its decisions in such circumstances would be less well balanced and the weight of submissions to it would only reflect business perspectives.

By permitting a "closed door" consideration of mergers which have public detriment, the current transparency of our competition law regime would suffer a serious and possibly fatal blow. If anything, transparency in relation to undertakings should be increased. At the moment, the public is often excluded from this process at a point when openness might better serve the public interest.

Authorisation Processes (Term of Reference 1e)

There may be a possibility that despite a lessening of competition, that a merger would accrue such benefits to a society that it should nevertheless be permitted. Australia has an unusual process for considering such situations – called authorisation.

Basically, authorisation allows the ACCC to give permission to business entities to behave in monopolistic ways on the basis that there are balancing benefits for the Australian public interest. Unlike most jurisdictions, firms in Australia have a remarkable opportunity here, formalised in the law, to argue that other benefits of a merger are so substantial that the detriment to consumer welfare should be put aside.

As far as we can determine, those seeking to merge have rarely used the authorisation process, and much less so recently. Some suggest that the authorisation process is unworkable, uncertain, onerous and complex, and so on. This may be true for little businesses certainly, but the process is surely not so onerous as to be beyond the technical, administrative and legal capacity of large businesses. Yet, few big businesses avail themselves of the authorisation process.

In our view is that this is not primarily because of difficulties with the process, or time or uncertainty, though there may be some valid criticism about these issues. The ACA believes that the real reason for the failure to use authorisation is the reluctance of big business to argue their case for offsetting benefits in public. This is partly because some of the claimed benefits do not stand up to the bright and harsh sunshine of public scrutiny.[11] But as well, there is an almost morbid business shyness of publicity which is not controlled by their "spin". Most large firms spend hundreds of thousands of dollars each year trying to stay out of the media, and trying to control the focus of media reporting when publicity is necessary or might be useful. An uncontrollable process defending a merger bid publicly falls under the heading of a public relations nightmare for many of these firms. Unfortunately for firms, a proposal to reduce consumer welfare (lessen competition), by arguing that the offsetting benefits balance the detriment, is something that a society should require be conducted with the fullest of public attention that can be obtained.

Allowing firms proposing mergers the option of proceeding directly to the Australian Competition Tribunal

Amending s. 50 to include "public benefits" would lock out many legitimate participants from input into mergers that substantially lessen competition. Allowing firms the option to taking a merger to the Tribunal doesn't by definition lock out other participants or the public. In practice, however, it does remove the merger proposal into a forum which is inaccessible to many.

By seeking the option of bypassing the Commission and taking a merger directly to the Tribunal, companies would put the full consideration of a major merger into a quasi-judicial forum operating under strict rules. The Tribunal is highly formalised and forbidding for the average person. Companies appearing before the Tribunal are represented by legal counsel as is usual in a court setting. This is not a comfortable situation for most consumer organisations, small businesses (such as a supplier or small competitor) or members of the public.

At the moment, putting a view about a merger is easy – members of the public, consumer organisations, smaller businesses all have an opportunity to comment to the ACCC and be heard when a merger which will lessen competition is being considered. These groups help identify what constitutes legitimate public benefit and whether business claims of public benefits and economic efficiencies stand up to scrutiny. Most, probably all, of these smaller participants would be unable to participate in a process that was handled only in the Tribunal – the formality is too formidable and the costs are prohibitive.

It is likely that this proposal, being made by large businesses, is an option favoured by companies like the big banks and big oil companies which have long expressed the desire to be allowed to merge into much bigger banks and bigger oil companies without having to run the gauntlet of the ACCC and the public authorisation process. They would obviously have grave difficulty in making a convincing case that the public benefits to the society outweigh the detriment of such mergers. Bypassing the Commission, and taking a merger bid to the unappealable decision of the Tribunal, which has much less expertise than the Commission, is clearly a very attractive option to the big business

[11] International studies (which have included Australia) have found, for example, that efficiency gains from financial sector consolidation have been limited. See: Group of 10 – Report on Consolidation in the Financial Sector, 2001 (www.imf.org/external/np/g10/2001/01/eng/pdf/file1.pdf)

community. In this setting, it is much easier for corporations, with their resources, to gather evidence, than it is for other affected groups. As well, legal bodies generally do not undertake research (if they are constrained by formal rules of evidence they cannot). As such, tribunal processes are not the most appropriate ones to handle the complex issues of investigation and research into the benefits and costs of a proposed merger.

The present ACCC process allows for independent research and wide community input. It would not be a good outcome for the Australian economy, or a good process for the society, if wide public participation in decisions about mergers that substantially lessen competition were effectively denied.

Specific Improvements to the Act

Effective competition laws and vigorous enforcement are necessary both to the welfare of Australian consumers and to the development of the Australian economy. The empirical evidence also suggests that strong competition law is important for the development of successful global competitors.

The following sections of the submission deal specifically with elements of Act where improvements to the law can be made.   Eight amendments are proposed.

1. Effects Test - Section 46 (Term of Reference 1b, 1c, 1e, 2)

The ACA supports the introduction of an **effects test** into section 46 in relation to the misuse of market power.

It seems clear to us that the point of s. 46 is to prevent a firm with substantial market power from using that power in an unfair way against a competitor. Where a regulator has to prove in each case that the firm behaving in such a manner had the **purpose** of competing unfairly, it is not surprising that this creates a great difficulty in effective enforcement. An effects test would enable the ACCC to proceed on the basis that the effect of the conduct was damaging without having to find a document that shows that this was the stated purpose – such incriminating documents being rather rare. The ACA does not believe that the ability of the competition regulator to deal with a company which is misusing its market power against another business should be largely dependant on the vagaries of whether a "whistleblower" decides to leak some evidence.

Without an effects test, and given the practical problems of proving purpose, it is clear that no competitors in Australia or potential market entrants can feel completelyl secure that they will be able to compete on a fair basis against firms with significant market power; this is especially true for smaller competitors. At the moment, there is probably conduct taking place in the Australian market that would be deemed to be unfair, if it was not placed outside the reach of law by the inability of either the Commission or a competitor to show evidence of actual anti-competitive purpose. This is not an acceptable or desirable state of affairs in terms of the competitive health of the economy. On the assumption that illegitimate conduct is occurring, which is not an unreasonable assumption in the circumstances, consumer welfare is being reduced since competition is being reduced. The original section of the Act was amended in 1977, at the behest of large business, to include a purpose test; there is a prima facie case for its restoration, and a strong case in any event given the subsequent experience with the difficulty in demonstrating purpose.

A critical concern of businesses in relation to the introduction of an effects test is that legitimate competitive conduct will be trapped by such a test – that companies will be more hesitant to compete energetically as a result.

The ACA, obviously, does not want to see any diminution of competition or in fact the elimination of the harm that may be done to companies as part of a normally competitive business environment. Most competition is currently not an issue for s. 46, and will continue not to be an issue for s. 46 with an effects test. This is because s. 46 relates only to companies which have a substantial degree of market power – a relatively small subset of the group of companies in the Australian business landscape.

Furthermore, s. 46 is not relevant unless the harm done to a competitor by a company with substantial market power is a result of unfair trading behaviour. Thus, a company which has attained significant market power through providing a good or service at a better price, or provides a product or service at a level of quality which has won it substantial consumer support, is at no risk of an action under s. 46 by continuing to innovate or being economically efficient. Such a firm is just being a smarter competitor. If its value proposition to consumers is especially good, it could conceivably put many other firms in its market out of business – it could become a company with a substantial degree of market power. The fact that the company has had this effect would not in itself draw the particular attention of a competition regulator – and would presumably be applauded by market "watchers" from shareholders to consumers. The only relevant question is whether a company behaved fairly in creating its successful competitive strategy and whether it continues to behave fairly towards existing and potential competitors having achieved market power.

> **Submission: That s 46 be amended to include an additional phrase such that corporations with substantial market power cannot take advantage of their power for the purpose *or effect* of damaging competitors or potential competitors.**

Penalties, Deterrence, Compensation, Disgorgement

For breach of the Trade Practices Act, the penalties available to the courts should allow for the ability to punish individuals by gaol sentence or through fines, fines at a level that act as a significant deterrent in the benefit/risk analysis of a company contemplating illegitimate behaviour,l and also for opportunity to seek to compensate wronged parties and ensure that firms do not retain ill-gotten gains even where the class of consumers harmed by the breach of the Act is dispersed.

2. Criminal sanctions for "hard-core" cartel behaviour (Term of Reference 1b, 1c, 2)

The financial gains for those choosing to deliberately break the competition laws are so very substantial, on the basis of past cases in this area, that it is clear the penalties need to be very substantial in order to help deter illegitimate behaviour. In almost all countries which have had a reasonable length of history in enforcement of competition law, penalties have increased significantly to take into account the need for more deterrence against the now massive gains which misbehaviour can deliver; as well, the tolerance of societies for this type of crime appears to be diminishing, and stronger sanctions reflect the growing repugnance with which such behaviour is viewed.

For serious - or what is internationally called hard-core – collusion, the ACA is of the view that criminal penalties should be introduced. The international enforcement community has taken hard-core horizontal restraints on trade to be price fixing, arrangements to share a market, bid rigging, and agreements to restrict output.

Hard-core collusion is, in our view, a form of theft in that it is the fraudulent transfer of property from one member of a society to another; thus, hard-core collusion – or hold-up by briefcase as it is sometimes called – is akin to fraud and to other behaviours that attract the possibility of criminal sanction.

We see two important reasons for adding a new section to the Trade Practices Act that introduces criminal penalties. First, such penalties will add to the deterrence effect when those contemplating collusion are weighing up the benefit/risk of their behaviour. There is reasonable evidence, from jurisdictions such as the United States, that the prospect of a jail sentence is a far more effective deterrent for an individual than the prospect of facing a fine.

More importantly, however, the ACA also strongly believes that it is appropriate to add the possibility of a jail term to the range of sanctions for punishing such serious illegal behaviour. It is a strange anomaly of our legal system that allows executives engaged in theft to be immune from criminal prosecution while other thieves face the prospect of incarceration. This inconsistency appears to be totally unjust. Immunity of this kind is normally accorded only to children or, in some cases, to those who are mentally incompetent. We can find no rationale why business executives should be the beneficiaries of such tenderness from their societies. It is extremely important in this period of gross disillusion with many of our society's institutions that an apparent (and real) problem of a dual system of justice be corrected. Modern developed economies are based on the rule of law and we believe it is important to correct such inconsistencies in order to retain the good opinion and respect of the citizenry for our system of justice.

In terms of the question of which body should investigate and prosecute, the ACA would submit that the ACCC is the only competent body to investigate this type of cartel behaviour. The police, appropriately, have other priorities. The UK Office of Fair Trading just recently made decisions about who should be the investigating body in relation to their new criminal sanctions; the police, not surprisingly, felt that they did not have the competence for this work, nor were they likely to put such work on a high priority. The situation would be similar in Australia we believe. The prosecution of alleged offenders should be by the DPP, and those being prosecuted can have the comfort of knowing that juries need to be unanimous in their decision before a business criminal will face the possibility of incarceration.

We have noted the ACCC's proposal to apply criminal sanctions for hard-core collusion only in relation to quite sizeable businesses. While we understand the rationale behind this proposal it does create a problem at the margins (the business executives of a company just below the proposed thresholds would be subject to a much less severe sanction). A threshold may also create a perception that the law deals differently with illegal behaviour as between businesses of different sizes. Hard-core collusion is hard-core collusion irrespective of the size of firm that engages in it. It would perhaps be better to eliminate the introduction of any size parameter into the Act while noting, in practical terms, that there will be few instances of what could be called significant hard-core cartel behaviour with large harm to consumers that will be capable of being effected by smaller businesses. Appropriate flexibility in decision making, which includes an aspect the financial harm suffered in the market, could then be exercised by the ACCC in deciding whether to pursue civil or criminal proceedings.

> **Submission: That a new section be inserted into the Trade Practices Act to provide for criminal sanction for serious or "hard-core" cartel behaviour.**

3. Civil Penalties for Part V

It is a curious feature of the Trade Practices Act that while Part IV (restrictive trade practices) has no criminal penalties, the reverse situation occurs in Part V, which has no civil penalties. It is possible for the Commission to get criminal penalties in the form of fines (but not jail sentences) for Part V offences, but not civil penalties. It is not appropriate or conducive of fairness in the enforcement system, for businesses to always face criminal penalties for breaches of Part V. As well, there are many examples of companies breaching Part V, where the conduct is serious, the harm widespread and when a pecuniary penalty would be appropriate, but also when the conduct does not justify criminal action. Civil penalties for contraventions of Part V would help to provide a deterrent to offences against the Act, would allow more fairness in the enforcement of that part of the Act, and would also enable justice to be carried out promptly and at lower cost.

> **Submission: That a new section for contraventions of Part V be introduced into the Trade Practices Act providing for civil penalties.**

4. Level of Fines (Term of Reference 1b, 1c, 2)

Although the level of pecuniary penalties has been increased in the past decade, clearly it has not been sufficiently effective to deter some business executives from taking on the risk, especially as the benefits of cartel behaviour may well outweigh the existing maximum penalty of $10 million. In the United States, research has estimated that the risk of detection of cartel behaviour is only about 13% - 17%, which undoubtedly contributes to the willingness to break the law.

Certainly some deterrence will have occurred in Australia due to the current level of our penalties, but it does not appear to us that the officers of the ACCC lack for work at the moment. As a result, in addition to introducing criminal penalties, the ACA recommends that the level of pecuniary penalties be increased such that the courts can ensure that companies are not only required to disgorge their ill-gotten gains, but which serves them with a sharp financial penalty as well. The system of fines which allows a penalty to be set as a percentage of turnover or a multiple of the wrongly derived gain is probably the fairest and allows the court the discretion of nominating very high penalties should it so choose in any particular instance. At minimum, the pecuniary penalties should be administered to ensure that the company is put at a competitive disadvantage in the market. That will ensure that shareholders, and their representatives, take a larger interest in the behaviour of firms where their funds may face an additional risk.

We have noted the recent comments that perhaps the ACCC should refrain from negotiating the size of penalties with companies which are the subject of litigation and recommending these amounts to the court to “rubber stamp”. We agree with some aspects of the criticism; there is no reason for the ACCC to adopt a posture of granting this type of certainty to a company found in breach of the law. In our view the ACCC may wish to assist the court by providing information on past penalties and proposals for the level of penalties in a particular case, and let the Court do its job in deciding them. In that regard, either party can, after all, appeal the level of the fine.

> **Submission: That the Trade Practices Act be amended to allow for the appropriate pecuniary sanction of companies such that the company can be fined as a percentage of its gross turnover or as a multiple of the ill-gotten gain from which it has benefited.**

5. Cy Pres Solutions

A fair number of breaches of the trade practices law have dispersed effects on consumers. For example, a set of firms could collude on prices that only affect each individual consumer by a small amount on each purchase. So a price-fixing cartel of ice cream producers which has the effect of increasing the retail price of an ice cream cone by 25 cents has only a small effect on an individual consumer, but a potentially large effect on consumers in the aggregate.

Not surprisingly, for consumers to take legal action – even as part of a representative action – the financial damage to the individual consumer must be substantial enough to warrant the emotional and financial cost of going to court. While the perpetrators of collusion are fined by the Australian courts for their actions, it has not been usual for the courts to seek to ensure that the ill-gotten gains of a company are disgorged – and returned to consumers in some form - in situations where large numbers of people have been affected, but each by only small amounts.

The doctrine of cy-pres provides not only for the compensation of consumers who have been wronged financially by an illegitimate business practice and who can be identified, but also for the disgorgement of gains derived from consumers back to consumers through a distribution of funds to be used for their benefit broadly. Cy-pres solutions can serve many ends: compensating wronged parties, disgorgement, and deterrence through demonstrating that wrongdoers will be prevented from retaining illegal profits.

The Consumer Law Centre Victoria is one of a few instances of a cy-pres solution in Australia. A finance company, which was engaging in dishonest and unfair selling practices, was required to compensate consumers at large by paying $2.25 million to a fund establishing the Centre. The outcome is a consumer advocacy group which can represent the interests of consumers in a manner which ultimately assists in reducing consumer detriment and improves the protection of consumer interests broadly.

Attached in Annex 1 to ACA's submission is a paper on the use of the cy-pres doctrine – a study prepared for this Review. *The Equitable Doctrine of Cy-Pres and Consumer Protection* canvasses the use of cy-pres solutions both in Australia and elsewhere.

At the moment, the Act is silent in providing direction to the Courts on how penalties might be distributed. The ACA submits that consumer welfare could be enhanced through more use of the cy-pres doctrine.

> **Submission: That provisions be introduced into the Trade Practices Act 1974 (with mirror provisions in the ASIC Act) formulating cy-pres solutions in Australian consumer protection law.**

6. Regulatory Intervention in Unfair Contracts (Term of Reference 1b, 1c, 2, 3)

Most of the Terms of Reference of the Committee suggest that primary consideration be given to matters relating to "supply side" competition issues. However, "demand side" issues are equally important in determining whether the market operates efficiently to promote competitive trading which benefits consumers and provides an appropriate balance of power between competing businesses with unequal market power.

Most contracts between businesses and consumers are 'take-it-or-leave-it' contracts drawn up by the business or its advisors. Many, if not most, of such contracts include standard pro forma terms some of which are abrasively unfair or one-sided. Terms in these contracts include: unilateral change clauses, tendentious default provisions, clauses that confer a particular evidentiary value upon certificates or other documents issued or held by a business or third parties, onerous obligations on the customer, apparent attempts to contract out of "fit for purpose" warranties under the Act, and onerous terms in "clickwrap" contacts for e-commerce services.

One-sided standard terms are also a feature of many agreements used by big business in its dealings with small business consumers and suppliers. Such 'small print' terms impose onerous obligations on consumer parties[12], or attempt to limit consumers' rights, while seeking to maximise the corresponding rights and minimise the obligations of the trader/ supplier[13].

When either a small business or a consumer is the subject of unfair terms in a contract, the result does not enhance the welfare of the smaller party and may be a factor in limiting competition.

Over the past ten years, consumer organisations have noted that there appears to be a significant increase in the use of onerous or unjust contract terms. Experience would suggest that industry areas where unjust contract terms are being used include mobile phones, home improvements, vehicle hire, software sales, package holidays, airline use/ticket conditions, and financial services; the list is not exhaustive. Appendix II contains examples of some contemporary standard contracts from mainstream lenders, in telecommunications and in e-commerce to illustrate the use of types of terms that we would contend are unjust; Appendix II-a is a proposed list of "black and white" terms – consumer-unfriendly and consumer-friendly terms - in telecommunications contracts which is being drawn up by workers in the consumer movement. In many other countries, such a list would be prepared by an active regulator in consultation with

[12] In this section, "consumer" should be taken to include "business consumer" and "small business supplier", as these terms are used in s51AC, *TPA*, unless the context indicates a more limited use of the term.
[13] We are concerned here not with 'core' contractual terms - terms going to the price of the goods or services or what is being purchased (model, features etc) – but with a range of other non-core or subsidiary terms: colloquially, the "small print".

industry and consumers, and the weaker parties (the consumers) would not be left to the "mercies" of an uncompetitive and uncontested area of the market.

Why regulate unfair terms?

In our view, there is a clear case for regulatory intervention to limit the use of "small print" unfair terms in consumer contracts.

Unlike core terms (in most situations), subsidiary terms are generally not subject to the kinds of market pressure that might be expected to produce a reasonable balance between the interests of the business and those of the consumer party: they are not 'contested' by the market. Typically, consumers do not bargain or shop-around in the area of non-core terms and traders do not compete. In the case of most non-business consumer transactions, consideration of standard terms will generally not form part of the decision-making process at all[14].

Even if consumers do attempt to understand standard agreements before contracting, their understanding will not necessarily be of much assistance to them. Standard form agreements are generally offered on a non-negotiable, 'take-it-or-leave-it' basis only. In theory, consumers can go elsewhere if they don't like a particular trader's terms (assuming they are aware of them). However, given the absence of competition in the area of subsidiary terms, there is no guarantee that the competitor's equivalent term will be any less abrasive. Quite often, indeed, there will be a standard industry approach, with near identical terms in the competitor's contract.

In short, the area of non-core standard terms is one characterised by market failure, often leading to quasi-monopolistic practices. It is generally recognised that regulatory intervention is appropriate in such circumstances.

In addition, unfair standard terms have the potential to *mislead* consumers when they do have occasion to consider them. This will occur, typically, when a dispute arises with a trader and the consumer's attention is directed to a widely framed, one-sided clause to establish that the consumer has no choice but to accept the trader's position, however apparently unreasonable. In practice, many abrasive terms would not be enforced (or not enforced in full), in particular circumstances, if a matter were litigated; this is discussed further in the next section. However, consumers will not necessarily be aware of, or feel confident in asserting, their rights, when confronted by the terms of the contract 'in black and white'. The potential, then, of some kinds of unfair terms (terms relating to the adjudication of disputes for example) to encourage consumer and small business parties to think their rights are more limited than they in fact are is another reason why such terms should be effectively regulated[15]. Furthermore, these situations tend to

[14] This will not always be the case, of course. For example, most consumers will probably seek advice about home purchase and loan agreements.

[15] It should be noted, however, that s. 52 [misleading and deceptive conduct] and s.53 (g) [which prohibits, inter alia, false or misleading representations concerning any right] are applicable to representations made in contract terms.

discriminate against the weakest consumers – those who lack the capacity or the confidence to negotiate.

The limits of existing laws in controlling the use of unfair terms

As noted, courts will not always enforce harsh terms. In particular cases, the consumer party may be able to rely on statutory protections like *Part IVA – Unconscionable Conduct*, *TPA*, in addition to certain common law principles, to limit the operation of such terms. Importantly, in determining whether a firm's conduct is unconscionable under the *TPA* provisions, a Court may have regard to whether, inter alia:

> As a result of conduct engaged in by the corporation, the consumer was required to comply with conditions that were not reasonably necessary for the protection of the legitimate interests of the corporation[16].

While the case law on Part IVA unconscionable conduct and similar statutory regimes[17] has generally focussed on procedural rather than substantive conduct, there have been a number of decisions in favour of consumers where the substantive harshness of a standard term on which the trader sought to rely was a major factor, or the major factor, in the Court's decision[18]. In such cases, the impugned terms were found not to be reasonably necessary to protect the trader's legitimate interests.

Clearly, then, these provisions have considerable potential in assisting individual consumers to resist the effects of harsh contractual terms – as long as those consumers receive appropriate advice and assistance. What is much less clear, however, is whether legal action in reliance on the unconscionable conduct prohibition is likely to have more than a marginal impact on the continuing, *general* use of unfair terms. As a leading academic authority has noted:

> [the *TPA* and similar regimes] may have limited effect in providing control in the interests of consumers generally. This is partly because of cost and other factors, increasingly discussed in public debate in Australia on 'access to justice' problems, making resort to the courts to resolve their disputes quite beyond the reach of most individuals. Moreover, even in those relatively rare cases which are brought to court, the decision in any individual case directly binds only the parties to the

[16] See s51AB (2)(b), s.51AC (3)(b) and (4)(b)
[17] Including Part 2, Div. 2, Subdivision C, *ASIC Act* (which regulates financial services) and the equivalent provisions of State Fair Trading Acts. The NSW *Contracts Review Act*, which prohibits unjust contracts, contains an equivalent provision to s51AB (2)(b).
[18] eg *ACCC v Black on White & Ors [2001 FCA 372 (4 April 2001)* (Clause purporting to make students enrolling in College course liable for the full tuition fee whether the student commenced the course or not); *John Dorahy's Fitness Centre P/L v Buchannan (94040386), CA, NSW (16 December 1996)* (Exclusion clause purporting to exclude gym members from making personal injuries claim against gym in any circumstances; Contracts Review Act decision). There have also been a number of decisions where courts have refused to give full effect to very broadly framed "all monies" clauses in mortgages on the basis that they were not reasonably necessary to protect the lenders legitimate interests: see The Law of Banker and Customer, Weaver & Craigie, LBC service, at pp. 11,204 ff and cases cited therein.

> contract being sued on. The mere fact that a particular provision is likely to be held to be ineffective if litigation does arise does not necessarily deter enterprises from continuing to use such provisions in their contracts[19].

Within the context of the current *TPA* regime, it may be possible for some degree of general control over unfair terms to be achieved through the use of the injunction remedy under s80, TPA[20]. Under s80, the Commission – and, indeed, any other party – can seek an injunction to restrain contraventions of the *Act*. An injunction might therefore be sought to restrain continuing use of an abrasive term in a trader's standard contract on the basis that such use would constitute unconscionable conduct. If granted, an injunction of this kind would obviously have a general impact.

As far as we are aware, however, the injunctive remedy has not been used in this way to date; further, it is unclear whether an application along the lines proposed would succeed. Arguably, establishing unconscionable conduct inevitably requires that some evidence be offered of particular wrongful or unfair conduct towards those on whose behalf relief is sought. Significantly, in those cases referred to above[21] where the substantive harshness of a particular term was the major factor in the decision to grant relief, context-specific, procedural issues – for example, that the trader did not draw the particular consumer's attention to the impugned term, and the consumer was not aware of its existence or significance – were still critical.

In our view, the issue of abrasive standard terms needs to be addressed more directly than it is under the current consumer protection provisions of the *TPA*. It also needs to be addressed in a way that facilitates action by the regulator to deal with unfair terms at a general or systemic level.

This problem of unfair terms is not unique to Australia but is being more actively dealt with in other countries. In canvassing the work of overseas countries, we believe that the UK *Unfair Terms in Consumer Contracts Regulations* (1999) [the *UK Regulations*], and related administrative arrangements developed by the UK Office of Fair Trading, provide a credible model in moving forward on this issue.

The UK Unfair Terms in Consumer Contracts Regulations (1999) [the Regulations][22]

The *UK Regulations* were originally enacted in 1994, pursuant to a European Community Directive[23]. In essence, the *Regulations* subject the terms of consumer contracts to a

[19] Harland, D. & Carter, Contract Law in Australia, Butterworths, 2002, at p. 549
[20] This possibility is raised by Harland & Carter, ibid, at p. 550
[21] See at footnote 3 above
[22] SI 1999 No. 2083. A link to the *Regulations* is available at www.oft.gov.uk under *Unfair Terms in Consumer Contracts* **-** *Guidance*
[23] Council Directive 93/13/EE. Link at www.oft.gov.uk under *Unfair Terms in Consumer Contracts* **-** *Guidance*

broad test of fairness; terms that fail the test are not binding on the consumer[24]. A term is regarded as unfair if "contrary to the requirements of good faith, it causes a significant imbalance in the parties' rights and obligations, to the detriment of the consumer"[25]. A Schedule to the *Regulations* sets out an indicative, non-exhaustive list of terms that may be regarded as unfair[26]. It would appear that the existence of this "grey list" has been instrumental in prompting awareness of, and giving guidance in relation to, unfair terms.

Although the *Regulations* are broad in scope, there are a number of limitations on the range of contract terms to which they apply. For one thing, not surprisingly, they do not apply to terms implied by law[27]. Secondly, they only apply to terms that have *not* been individually negotiated[28]. However, a term will always be regarded as not having been individually negotiated "where it has been drafted in advance and the consumer has therefore not been able to influence the substance of the term"[29]. In other words, all standard contract terms are regarded as not negotiated. There is also a so-called "core provisions" limitation on the scope of the *Regulations*. This provides that the assessment of fairness of a term shall not relate to either the definition of the main subject matter of the contract, or the adequacy of the price or remuneration, as long as these elements are indicated in "plain, intelligible language"[30].

As well as giving individual consumers a statutory basis for avoiding the effects of harsh or unfair terms, the UK *Regulations* set out an administrative process designed to discourage the use of such terms generally. A duty is imposed on the regulator, the Director of Fair Trading, to consider complaints in relation to unfair terms[31]. Going with this, the Director is empowered to accept undertakings regarding the continuing use of such terms, as well as to seek injunctions to prevent their further use[32]. The *Regulations* also list a range of other "qualifying" bodies that can consider complaints about unfair terms and, with the Director's consent, seek injunctions to prevent their further use[33]. In addition to various statutory entities, the UK Consumers' Association is one of the qualifying bodies[34].

Since the initial enactment of the *Unfair Terms Regulations*, the UK Office of Fair Trading has taken a highly pro-active approach in relation to unfair terms. Its Unfair Contract Terms Unit has investigated several thousand terms, leading to a significant number of provisions being altered or abandoned. In February 2001, the Unit issued detailed Guidance on the *Regulations*, including an extensive directory of specimen

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[24] *Regs*. 8 (1) states: An unfair term in a contract concluded with a consumer by a seller or supplier shall not be binding on the consumer. 8(2) states that: the contract shall continue to bind the parties if it is capable of continuing in existence without the unfair term.
[25] *Regs*. 5(1)
[26] *Regs*, Schedule 2
[27] *Regs.* 4(2)
[28] *Regs*. 5
[29] ibid
[30] *Regs.* 6
[31] *Regs.* 10
[32] *Regs*. 10(2), (3), 12
[33] *Regs*. 12
[34] *Regs*, Schedule One

unfair terms based on the enforceable undertakings it had obtained from traders[35] To date, the OFT has been able to implement the policy behind the legislation almost entirely by administrative means; and there has been only one case where the Director has had to take legal action to obtain an injunction against a trader's use of an unfair term[36].

Submissions:

- **That a new *Part IVB – Unfair Terms* be inserted into the *TPA*;**
- **That this new Part be modelled on the key features of the UK *Unfair Terms in Consumer Contracts Regulations 1999*, appropriately adjusted to fit within the TPA framework;**
- **That, consistently with the UK *Regulations*, the new Division:**
    - **declare that unfair contract terms, as defined, are not binding on consumer parties;**
    - **impose a positive duty on the ACCC, as regulator, to consider complaints about unfair terms; and**
    - **give the ACCC (and, perhaps, other specified bodies) the power to seek both enforceable undertakings and injunctions to restrain the continuing use of unfair terms.**
- **That mirror provisions dealing with contracts in relation to financial services be inserted as a new Subdivision within Part 2, Division 2 of the *ASIC Act*, and**
- **That additional resources be provided to both ACCC and ASIC to ensure that the new legislative responsibilities proposed are effectively and actively administered.**

Further, the ACA considers that extensive work needs to be carried out on the magnitude and nature of unfair contract terms in the marketplace and recommends that as a priority the three key regulators – Australian Competition and Consumer Commission, Australian Securities and Investments Commission and Australian Communications Authority - jointly undertake a wide-ranging study into the matter, consider what terms should be "black listed", and report on their findings.

[35] Available at www.oft.gov.uk under *Unfair Terms in Consumer Contracts - Guidance*
[36] DGFT v First National Bank [2000] 2 WLR 1353

Small Business Issues (Term of Reference 1b, 1c, 1f)

There are a number of issues on which small business organisations have asked the ACA to consider whether it would support their position for changes to the Act.

We have considered these very carefully since there is potential for detriment to consumers in some of these proposals. The Act is clear that the purpose of competition in a free market is to benefit consumers. Despite this, there are two areas in which we believe it is reasonable for consumers to support the small business position that changes to the Act are needed in order to ensure that fairness operates in the market.

7. Cease and Desist Orders

After due consideration, the ACA sees no significant impediment to supporting the small business sector in its views that the ACCC should have a “cease and desist” power which allows the Commission to take immediate action on behalf of a small business which appears to be the object of misuse of market power by a large business entity. It has certainly been the case that by the time the Commission has been able to act, small businesses may well have been “driven to the wall”. This is neither fair, nor ultimately, to the advantage of competition in the market. A cease and desist power will provide a short span of “breathing space” during which evidence, enabling the regulator to seek an injunction for such behaviour, can be collected.

8. Collective bargaining by Small Business

The more difficult for the ACA was the suggestion that small business should be allowed to engage in collective bargaining arrangements without recourse to the authorisation provisions of the Act. We are admittedly nervous about this proposal which could, if misused, lead to unnecessarily increased prices for consumers through an inappropriate restriction on competition. There is little reason to believe that small businesses are any less likely than large businesses to engage in anti-competitive conduct given the opportunity. But our society has generally attempted to achieve a balance in a number of arenas between those with substantial and those with less power; the consumer protection provisions of the Act are an explicit attempt to protect more vulnerable parties in commerce – consumers – from detrimental behaviours by businesses large and small. While not wishing to support changes that would send any message to small businesses that they are less subject to the Trade Practices Act than other businesses, we can support a process which seeks to balance the power of parties in a commercial negotiation provided such an arrangement is implemented with careful protections.

The organisations representing small businesses have indicated that the authorisation processes are too onerous for them to use easily. Certainly, there does not appear to be any evidence of the unwillingness of the ACCC to authorise such conduct in appropriate circumstances and there may be an incorrect perception in some business groups (such as medical practitioners) that reasonable authorisation is difficult to obtain. Rather, the problem seems to be one of cost and also the timelines that attend the authorisation process. We believe it is possible to create a process which reduces both the administrative and cost burdens on smaller businesses while still maintaining competitive outcomes for the economy.

Three issues are of particular importance to us. The first is to ensure that the process for approval of a collective bargaining arrangement is not an exemption from the law and is not automatic; the ACCC needs to continue its oversight of each instance. We do not believe that the regulator can be less vigilant in this circumstance simply because the parties are small rather than large businesses. Thus, it is important that the Commission be made aware of proposed arrangements and that it is a requirement of the law that the Commission be notified.

Secondly, it is necessary that the Commission be able to intervene to redirect any proposal which appears to be one requiring the fuller public scrutiny of the authorisation process. Thus, the Commission needs to have the power to invalidate a notice of intention by small businesses to bargain collectively and to require that the parties proceed to seek authorisation if they wish to obtain immunity from prosecution. This will help ensure that any collective bargaining matter that could significantly harm competition is dealt with in the public arena of the authorisation process.

The third arm of protection is to ensure that smaller businesses do not use this mechanism to create a powerful negotiating group which in itself uses its market power to the detriment of competition. Thus, the simplified process for authorising collective bargaining for small business should be available only in relation to dealing with larger businesses which have some significant power in the market. Precisely when a business has significant market power would need to be the subject of some consideration by the Commission in its scrutiny of proposals under the streamlined process.

With these protections in place, the ACA is supportive of a process which enables smaller businesses to more easily organise themselves to bargain collectively with larger businesses when that is appropriate in the circumstances.