# Dawson Committee

# TRADE PRACTICES ACT REVIEW

# Submission
# by the
# National Association of Retail Grocers of Australia

**July 2002**

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# DAWSON COMMITTEE
# TRADE PRACTICES ACT REVIEW

## NARGA SUBMISSION

## EXECUTIVE SUMMARY

NARGA welcomes and fully supports an independent review of the competition provisions of the *Trade Practices Act*. The review is timely and represents a unique opportunity for Australia to implement international best practice in competition law and practice. In reality, Australia is at risk of falling behind its western trading partners in the fight against anti-competitive conduct. Those western trading partners have strengthened or continue to strengthen their competition laws. More importantly, our western trading partners increasingly recognise that globalisation of business requires the globalisation of competition law enforcement. Internationally, anti-competitive conduct is being increasingly targeted with little hesitation in either imposing monetary penalties of up to 10% of an entity's turnover or seeking jail sentences for the worst examples of anti-competitive conduct.

Increasing market concentration must be met with increased scrutiny by competition law and regulators. A failure to do so puts at risk the role of small business in providing a vigorous competitive force and, in turn, acts to the detriment of Australian consumers. NARGA seeks the promotion of vigorous competition. Such competition is promoted where no competitor receives an unfair advantage because of its substantial degree of market power. In this scenario, vigorous competition is to be compared with a boxing match where no blows below the belt are allowed or one of the boxers permitted to fight with one or both hands tied behind its back. All too often, the independent small business sector is the boxer who is punched below the belt or forced to compete with one or both hands tied behind its back.

Faced with an increasingly uneven playing field, NARGA looks to the *Trade Practices Act* to represent international best practice. The identification of new and old types of anti-competitive conduct, together with their eradication by an effective competition regulator, is critical to both the survival of a competitive independent small business sector and securing the best possible competitive outcomes for Australian consumers.

In striving to ensure that Australia has a *Trade Practices Act* representing international best practice, NARGA has been mindful of trying to identify international precedents from western economies of comparable size to that of the Australia. In doing so, NARGA has relied heavily on the Canadian experience. Indeed, as an economy comparable in size to Australia, Canada provides an extremely valuable case study of how a smaller western economy can develop international best practice in competition regulation without jeopardising internationally its competitive position or that of its corporate entities.

In short, NARGA is strongly of the view that if competition reforms proposed in this Submission already work in Canada, there is every reason to think that they would also work in Australia, an economy of comparable size. Given that many of the recommendations made by NARGA in its Submission draw on the Canadian experience, it is readily apparent that smaller western economies can have strong and effective competition laws without in any way jeopardising their international standing or competitiveness.

In addition to drawing on relevant international experience, NARGA has attempted to target or focus its proposals with the clear objective of minimising any business uncertainty that may arise from reforms to the *Trade Practices Act*. In doing so, NARGA has tried to make proposals that spotlight the line between pro-competitive conduct and anti-competitive conduct – a line that must be drawn and enforced for the benefit of Australian consumers. In drawing such a line, NARGA is strongly motivated by the desire to provide as much certainty as possible. By clearly identifying the line between pro-competitive conduct and anti-competitive conduct any possible uncertainty is minimised for the benefit of both business and consumers.

Needless to say, however, any change brings with it a degree of uncertainty. The question, of course, is whether the possibility of some uncertainty should stand in the way of dealing effectively with anti-competitive conduct. Surely, the benefits to Australian consumers from stamping out anti-competitive conduct must clearly outweigh the detriment from some degree of uncertainty – uncertainty that after all can be minimised by carefully drafted legislation.

All too often, the possibility of uncertainty is held up as the reason for forestalling reform. If we as a society chose not to move forward because of uncertainty, then we would risk not benefiting from the rewards that may flow from change. Of course, change should not be pursued for the sake of change. All proposals put forward by NARGA in this submission are clearly intended to promote more vigorous competition – competition that is transparent and undertaken on a more level competitive playing field. In short, NARGA is an avid supporter of vigorous competition in which an independent small business sector provides a strong competitive force against entities having a substantial degree of market power.

Such vigorous competition requires that entities with a substantial degree of market power do not:

- extract from suppliers more favourable prices on the same quantities to prices given by suppliers to competitors of those entities. This is described as the principle of `like terms for like customers' to be embodied in a proposed new prohibition against anti-competitive price discrimination;
- coerce, intimidate or induce suppliers to discriminate against competitors of the entity;
- engage in predatory pricing involving anti-competitive below cost or unreasonably low pricing;
- strategically target a smaller competitor by charging prices in a market in which the entity competes with the smaller competitor that are lower than those charged by the entity in other markets in that State or Territory; or
- undertake anti-competitive creeping acquisitions.

Not only does NARGA view such prohibitions as critical to maintaining a fiercely competitive environment for the benefit of consumers, but NARGA offers such reforms as part of an overall package aimed at ensuring entities with a substantial degree of market power are prevented from stifling or destroying competition. With this in mind, NARGA advocates a number of additional pro-competitive reforms:

- an `effects' test as an alternative test to the purpose test under the existing misuse of market power provision (s 46);
- strengthening the present purpose element under the existing misuse of market power provision (s 46) by including a list of factors to assist in the identification of purpose;
- divestiture for repeated intentional breaches of the misuse of market power provision (s 46);
- Collective bargaining by small businesses as a way of providing a degree of countervailing power against entities with a substantial degree of market power.

NARGA strongly believes that the implementation of these proposals will ensure that the Australian economy will remain competitive and, more importantly, provide clear benefits to all Australian consumers. Indeed, Australian consumers want companies operating in Australia to be vigorously competitive both domestically and internationally. Competitive companies deliver benefits to consumers. Uncompetitive companies deprive consumers of those benefits and should not be protected by Australian Governments. National champions – major Australian corporations that compete globally - must be competitive and operate for the benefit of Australian consumers. National champions must not come at the expense of domestic competition and its benefits to domestic consumers. Where national champions do come at the expense of domestic competition and its benefits for domestic consumers, it is readily apparent that domestic consumers not only lose out on the benefits of vigorous domestic competition, but more importantly would effectively be cross subsidizing overseas consumers. Surely, any suggestion of benefiting overseas consumers at the expense of domestic consumers must be carefully scrutinized by the Committee and, in turn, the Federal Government. It is only through

vigorous competition that all consumers can, irrespective of where they are in the world, be assured of the best competitive result.

NARGA strongly supports not only vigorous competition underpinned by an effective *Trade Practices Act*, but also an effective competition regulator. Effective competition laws require effective competition regulators. Accordingly, NARGA sees no merit in suggestions that the ACCC should be subject to a supervisory or advisory board. In particular, such suggestions appear to be part of a gratuitous and unproductive attack on how the ACCC does its work on behalf of all Australian consumers. Clearly, it is important that all parties accept that the ACCC has been established by the Federal Parliament (with the support of all States and Territories) to independently administer and enforce - without fear or favour - legislation that is in the public interest.

Consumers understand that an effective ACCC is an essential adjunct to an effective Trade Practices Act - one that outlaws anti-competitive conduct. Small businesses equally see an effective ACCC as important to their survival against the predatory onslaught by entities having a substantial degree of market power – entities which often pursue a scorched earth policy aimed at ensuring that only they remain standing in their particular industry sector.

What happens to consumers when entities with a substantial degree of market power abuse that power so as to destroy competitors or undermine the competitive process? In reality, it is only the ACCC that stands in the way of poachers intent on killing off or stifling the competitive game. Any suggestion that intending poachers be placed in charge of the competitive game keepers - the ACCC - must be dismissed for the simple reason that the ACCC is continuously accountable to all its shareholders - Australian consumers. Those shareholders expect results.

The prevention of anti-competitive conduct and access to competitive prices and diversity of choice is foremost in the minds of both consumers and small business. NARGA is strongly of the view that any attempt to muzzle the ACCC gamekeeper by allowing the

poachers to oversee them risks placing Australian small businesses and consumers at the mercy of powerful entities intent on the relentless destruction of the competitive game.

Overall, therefore, NARGA views this independent review as integral to ensuring that Australia has a *Trade Practices Act* and enforcement framework that represents international best practice.

NARGA's submission is divided into the following four parts:

**PART ONE: Introduction**

**PART TWO: Summary of NARGA's key pro-competitive trade practices reforms**

**PART THREE: Summary of NARGA's other pro-competitive trade practices reforms**

**PART FOUR: Summary of NARGA's trade practices administrative reforms**

**DAWSON COMMITTEE**
**TRADE PRACTICES ACT REVIEW**

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# RECOMMENDATIONS

**Recommendation 1:**

**NARGA advocates that a new prohibition against anti-competitive price discrimination be introduced into the *Trade Practices Act* as a way of ensuring that comparable customers buying comparable volumes and providing comparable services are treated in a comparable manner**

**Recommendation 2:**

**NARGA advocates that a new prohibition be inserted into the *Trade Practices Act* preventing entities having a substantial degree of market power from engaging in coercive or intimidating conduct, or conduct inducing a supplier to discriminate against competitors of the entity.**

**Recommendation 3:**

**NARGA proposes that a new prohibition against anti-competitive below cost or unreasonably low pricing be introduced into the *Trade Practices Act.***

**Recommendation 4:**

**NARGA proposes that, subject to certain exceptions, a new prohibition be introduced into the *Trade Practices Act* against entities with a substantial degree of market power strategically targeting smaller competitors by charging lower prices than other markets in the State or Territory.**

**Recommendation 5:**

**NARGA proposes that the misuse of market power provision (s 46) expressly identifies the types of anti-competitive conduct that may give rise to a breach of the provision.**

**Recommendation 6:**

**NARGA proposes that a new prohibition against anti-competitive creeping acquisitions be introduced into the *Trade Practices Act.***

**Recommendation 7:**

**NARGA proposes that the impact of an acquisition or merger on the ability of small business to remain a competitive force in the market be expressly included in the list of factors by which the acquisition or merger is to be assessed under s 50 of the *Trade Practices Act.***

**Recommendation 8:**

**NARGA proposes that express reference be made in the list of factors included in s50(3) of the *Trade Practices Act* to the impact that a proposed acquisition or merger has on rural or regional Australia in assessing the impact of a proposed acquisition or merger.**

**Recommendation 9:**

**NARGA proposes that an `effects' test be inserted into the existing s 46 of the *Trade Practices Act* as an alternative to the purpose element.**

**Recommendation 10:**

**NARGA proposes that the purpose test under the existing s 46 be strengthened by the inclusion of a list of factors regarding the identification of purpose.**

**Recommendation 11:**

**NARGA proposes that a divestiture remedy be available to the Courts for possible use in cases of repeated intentional breaches of the misuse of market power provision of the *Trade Practices Act*.**

**Recommendation 12:**

**NARGA proposes that entities not having a substantial degree of market power be able to enter into a collective bargaining arrangement that, subject to ACCC disallowance, has immediate immunity under the *Trade Practices Act.***

**Recommendation 13:**

**NARGA does not see any merit in the establishment of a supervisory or advisory board to oversee the ACCC.**

**Recommendation 14:**

**NARGA proposes that any concerns with the ACCC's media dealings can be dealt with by an ACCC Code of Conduct for Media Dealings that sets out the ground rules for the ACCC's use of the media in promoting trade practices education and compliance.**

**Recommendation 15:**

**NARGA strongly supports the ACCC's continued involvement in the assessment of merger proposals under s 50 of the *Trade Practices Act.***

**Recommendation 16:**

**NARGA proposes the creation of a specialized ACCC Merger Authorization Taskforce or Unit that can be activated upon the lodgment of a merger authorization application and be used as a fast tracking mechanism in the very small number of merger cases that would otherwise breach s 50 because they substantially lessen competition.**

**Recommendation 17:**

**NARGA proposes that greater transparency be introduced in the s 87B enforceable undertaking process.**

**Recommendation 18:**

**NARGA proposes that monetary penalties under the *Trade Practices Act* be increased to a maximum of 10% of the entity's turnover.**

**Recommendation 19:**

**NARGA proposes that Jail sentences be introduced into the *Trade Practices Act* for intentional collusive conduct by entities having a substantial degree of market power.**

**Recommendation 20:**

**NARGA proposes that the ACCC be given, subject to appropriate safeguards, the power to issue a `Stop for Now' Notice (a cease and desist power) for dealing immediately with particularly detrimental anti-competitive conduct.**

**Recommendation 21:**

**NARGA proposes that a substantial penalty be imposed for destroying or altering information evidencing a possible breach of the *Trade Practices Act*.**

**Recommendation 22:**

**NARGA proposes that the ACCC's leniency policy be prescribed as a regulation under the *Trade Practices Act*.**

**Recommendation 23:**

**NARGA proposes that the statutory protection for whistleblowers who inform the ACCC of breaches of the *Trade Practices Act* be considerably strengthened.**

**Recommendation 24:**

**NARGA proposes that the *Trade Practices Act* be amended to allow for ACCC block authorization of particular categories of conduct.**

**Recommendation 25:**

**NARGA proposes that Australia takes appropriate steps to promote the development of a multi-lateral international competition law and enforcement framework.**

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# PART ONE

## INTRODUCTION



## 1.1 About NARGA

The National Association of Retail Grocers of Australia (NARGA) is a federation of associations representing independent grocery retailers in each Australian State and Territory. They are:

- IGA Retail Network
- Food Retailers Association of New South Wales
- Master Grocers Association of Victoria
- Queensland Retail Traders & Shopkeepers Association
- WA Independent Grocers Association
- Small Retailers Association of South Australia
- Tasmanian Independent Retailers
- Canberra Small Business Council Inc.

NARGA represents more than 4000 independent grocery stores and supermarkets employing more than 50,000 people throughout Australia. NARGA's membership base is national, covering not only the major cities, but also rural and regional Australia, including many towns where the major supermarket chains are not represented. In these towns the local grocery store is the heart of the community providing vital services and employment opportunities. It is therefore vital that these stores are competitive so as to maintain a vibrant local economy where the money and benefits generated remain in and support the community.

NARGA is committed to improving the welfare and viability of its members and, in doing so, does not seek handouts or protection. Rather, NARGA seeks recognition of and a reduction in the compliance costs faced by small business, and the adoption of trade practices and competition policies that enable small business to compete vigorously in the marketplace.

NARGA is concerned to ensure that independents provide a competitive third force within the retail grocery industry to counter the market power of the two major supermarket chains, which already dominate the national grocery market. In order to be such a force, the independent sector must, when buying comparable quantities, be able to acquire its supplies at comparable prices to those obtained by the two major supermarket chains. In addition, independents must not be strategically targeted by below cost pricing or other predatory tactics that may be used by the major supermarket chains. In short, any anti-competitive conduct within the retail grocery industry must be vigorously investigated and stamped out.

Where independents can be a competitive third force, consumers will benefit from more choice, better prices and services than those they may receive when faced with a duopoly comprising the two major supermarket chains. Indeed, a competitive third force within the retail grocery industry will protect consumers from the dangers of a cozy duopoly, where price competition is only within a limited range as determined by the duopolists; where there is a lack of real choice as a result of the duopolists refraining from competing on price or service; and where there is a lack of genuine innovation.

## 1.2 Key Aspects of NARGA's pro-competitive philosophy

NARGA strongly believes that a competitive third force is critical to the maintenance of vigorous competition within the retail grocery industry. The promotion of competition and the prevention of anti-competitive conduct are an integral part of NARGA's philosophy.

The following principles are central to NARGA's pro-competitive philosophy:

- Ensuring that NARGA members are not placed at a competitive disadvantage by regulatory compliance costs (Compliance costs tend to fall disproportionately on smaller compared with larger businesses). Given the cost sensitive, low profit nature of the retail grocery industry, any compliance costs incurred by independents place them at a cost disadvantage when competing with the major supermarket chains;

- NARGA members expect to buy their supplies at the supplier's best price and if a supplier is selling to a competitor at a cost price lower than the cost price offered to NARGA members, NARGA members are entitled to the same cost price where they make comparable purchases. This is embodied in the principle of `like terms for like customers' which translates into comparable customers (by reference to volume and services provided) receiving comparable prices;

- Suppliers that discriminate against comparable customers must be identified and any anti-competitive price discrimination appropriately dealt with under the *Trade Practices Act*. Anti-competitive price discrimination arises where independents do not receive comparable prices to those received by the major supermarket chains and, therefore, cannot compete with those chains. Comparable supply prices translate into competitive pricing for consumers. Without comparable prices to those secured by the two major supermarket chains, the independent sector is not as competitive as it could be for the benefit of consumers. Price discrimination between comparable customers can be used strategically to undermine the ability of independents to compete on price. Where price discrimination is demanded by an entity having a substantial

degree of market power, suppliers may become party to a tactic employed by the entity to secure for itself an obvious price advantage over rivals;

- Anti-competitive below cost pricing and strategically targeting an independent competitor on price in selective locations must both be identified and appropriately dealt with under the *Trade Practices Act*. Pricing products below cost or to strategically target a smaller competitor may give the appearance of being beneficial for consumers, but where adopted as a strategy by the major supermarket chains to undermine the independent sector, consumers will suffer as prices rise once independents have been eliminated or deterred from engaging in competitive conduct.

- The elimination or undermining of the independent sector is not in the consumer's best interest as independents provide a competitive third force to counter the dominance of the two major supermarket chains. An independent third force provides choice and convenience, and keeps the retail grocery industry competitive for the benefit of consumers. Any predatory conduct by the major supermarket chains aimed selectively at undermining the viability of the independent sector must be stamped out and any further acquisitions of independents by the majors must be closely scrutinized to prevent further increases in the level of market concentration to the detriment of competition in that market.

- A national competition policy that focuses on injecting competitive pressures into highly concentrated industries and ensuring the viability of independents when competing with dominant market players.

NARGA views the above as essential ingredients in the promotion of competition within the retail grocery industry for the ultimate benefit of consumers. A competitive third force will mean competitive grocery prices, greater choice in grocery shopping and the prevention of a cozy duopoly between the two major supermarket chains.

## 1.3 Overview of NARGA's trade practices concerns

NARGA's concerns with the growing market dominance of the major supermarket chains remain despite the recent improvement in the position of independents following the break up of the Franklins supermarket chain. Such an improvement will be short lived if the dominance of the two major supermarket chains is allowed to grow unabated. Unless the independent sector is able to be competitive with the two major supermarket chains, it will only be a matter of time before the sector will again face declining market share.

At its simplest, the independent sector can only be competitive with the two major supermarket chains if the sector is:

***Able to buy supplies at a price that is competitive to that obtained by the major supermarket chains***

Unless the independent sector can get comparable prices to those obtained by the major supermarket chains, the sector will not be able to compete on price. As grocery consumers are extremely price sensitive, any pricing advantages that the major supermarket chains are able to secure from suppliers can be used to undercut the independent sector. Without comparable prices from suppliers, the independent sector cannot offer consumers comparable prices to that offered by the two major supermarket chains.

Securing pricing advantages from suppliers places an entity at a competitive advantage. Where that entity has a substantial degree of market power that competitive advantage is magnified across the entity's retail network. That is, any pricing advantages can be used to target areas having an independent rival while giving a higher level of profitability in other less competitive areas. In short, securing better supply prices from suppliers enables the advantaged entity to strategically target or undercut independent rivals without sacrificing profitability. In contrast, the independent rival not only pays a higher price for supplies, but its profitability suffers, as it has to cut margins to compete with the price advantaged entity. While the entity having a substantial degree of market power can maintain profitability and reinvest in

the business, the independent rival cannot reinvest as much as its profit margins have been cut merely to remain competitive.

Without the ability to reinvest in the business, an independent is, in addition to being disadvantaged as a result of paying higher prices for supplies, further disadvantaged as it cannot continually update its offer to customers. Independents need to be competitive not only on price, but also on their offer to customers. Adequate profitability is a key ingredient in being able to reinvest in the business. That profitability and the continued survival of independents is, however, jeopardized where the independent sector does not receive comparable prices on comparable purchases to those of the two major supermarket chains.

Significantly, where an entity having a substantial degree of market power secures supplies at more favourable prices to those offered to independent rivals, it is clear that suppliers will, in order to maintain their own profitability, need to recoup higher prices from those independent rivals. Thus, by securing lower supply prices, the entity having a substantial degree of market power is effectively raising the supply prices offered to independents. Again, this further disadvantages the independent sector as it in practice subsidizes the more favourable prices secured by the entity having a substantial degree of market power.

At its simplest, independents lack market power and therefore are captive purchasers of supplies. Independents can be charged higher prices, while suppliers will find it extremely difficult to resist calls for lower supply prices by entities having a substantial degree of market power. Suppliers often have little practical choice but to agree to lower prices for entities having a substantial degree of market power – either a supplier agrees to the lower prices or it faces losing custom across the entity's retail network. While the impact on suppliers' profitability is obviously eased by being able to charge higher supply prices to independents, price discrimination between comparable customers will distort competitive processes as the independents cannot be as competitive on price as a price advantaged entity having a substantial degree of market power.

NARGA is concerned that anti-competitive price discrimination by suppliers may not be caught under the existing s 46 as a supplier may not be viewed as having the requisite anti-competitive purpose where the supplier, in response to a threat by a major supermarket chain to boycott or delete the supplier, offers that chain a lower price to that offered to independents. While the major supermarket chain may be in breach of s 46 if it can be shown that it has an anti-competitive purpose, the chain is likely to argue that its purpose is simply to get the best possible price from the supplier.

Significantly, the issue of purpose becomes a barrier to consideration of whether or not price discrimination can, in some circumstances, be detrimental to competition. The difficulty in discerning the substantial purpose for the price discrimination effectively prevents any judicial assessment under the present s 46 as to whether or not price differences can, when demanded by an entity having a substantial degree of market power, be used strategically to eliminate an independent rival or deter competitive conduct.

The present s 46 allows far too much scope for entities with a substantial degree of market power to escape scrutiny by simply pointing to some self-serving commercially justifiable purpose for the conduct. Should a self-serving purpose be a sufficient answer to an allegation of anti-competitive conduct or should greater emphasis be placed on objectively determining the impact of the conduct on the level of competition in the market place? These questions are addressed below.

***Not being strategically targeted by anti-competitive below cost or predatory pricing***.

In markets where there is a lack of genuine competition – for example, within monopoly or duopoly situations – an entity having a substantial degree of market power will have little incentive to price below cost. In such markets, the entity has little, if anything, to gain from losing money by pricing below cost. Of course, there may be instances where the nature of the good – for example, its highly perishable nature – may dictate that the good is given away or sold at a nominal price to simply move the good before having to throw it away. Similarly, changes in fashions or

having a stock of slow moving goods may lead an entity to price below cost to simply move the stock. These instances in which an entity may price below cost are ones faced by entities of all sizes – all trading entities may have to move stock in circumstances outlined above.

However, what distinguishes the various instances outlined above is that often the entity has little choice but to the move the stock – either they sell the goods at below cost or they throw or give the goods away. Such circumstances however are the exception rather than the rule. That is, businesses have to sell goods above acquisition or production cost plus normal selling costs, or they will soon go out of business. Very few entities can go against this basic business rule and sustain losses on goods sold. Indeed, only entities having a substantial degree of market power could ever really contemplate selling below cost for any length of time.

In short, the element of choice is what sets an entity having a substantial degree of market power selling below cost apart from those other entities that may sell at a loss from time to time. An entity with a substantial degree of market power can choose to sell below cost because they may see some strategic value in doing so. Such a powerful entity can choose to sell below cost because that may undermine or eliminate a rival in markets where it faces such rivals. The entity with a substantial degree of market power may not even suffer very much in selling below cost in one market because it will inevitably be able to cross-subsidize any losses in that market by profits from those less competitive markets in which it may be involved.

Clearly, an entity that has a substantial degree of market power has every incentive to strategically price below cost in those markets in which it faces an independent rival. The entity would be well aware of the profitability of its operations in less competitive markets, and may decide that the elimination or disciplining of an independent rival may raise the level of profitability in the market in which the independent rival operates to a level comparable to that in less competitive markets. The elimination of independent rivals and raising the level of profitability over time in markets in which the entity faces such independent rivals are obvious incentives for below cost pricing and strategic targeting of such competitors.

The problem would be magnified in those circumstances where an entity having a substantial degree of market power is able to secure more favourable supply prices to those obtained by independent rivals on comparable purchases. By being able to use a price advantage to undercut or undermine the independent rival, the entity having a substantial degree of market power is able to price goods below those of independent rival and still maintain a level of profitability.

In short, the price advantages secured by the entity from suppliers can be used strategically by the entity in those markets in which it faces independent rivals. Where an independent rival is able to withstand the strategic pricing, the entity having a substantial degree of market power may be able to move to the next step and price below cost in the full knowledge that it can subsidize any losses with profits from less competitive markets.

NARGA is concerned that in the circumstances outlined above it may be difficult to rely on the existing s 46 on the simple basis that an entity having a substantial degree of market power may argue that its purpose was pro-competitive. By simply pointing to the lower prices paid by consumers in the market in which the independent rivals operate, the entity having a substantial degree of market is able to submit that competition is healthy and that its pricing strategies are always pro-competitive. In reality, however, the lower prices may only last so long as the independent rival is able to match the prices offered by the entity having a substantial degree of market power. Unless the independent rival is able to secure comparable supply prices to those secured by the entity having a substantial degree of market power or is able to cross subsidize its losses from other profitable markets, the independent rival will go out of business, be bought out by the entity having a substantial degree of market power, or simply be a less vigorous competitor in the future.

Thus, below cost pricing or strategic pricing by entities having a substantial degree of market power in those markets having an independent presence will only produce lower prices for consumers in the short term. Such strategies will only be maintained as long as there is a reason or incentive for doing so. That reason or incentive for

doing so is quite simply the independent presence in the particular market. Once that independent presence has been removed or subdued, there is no reason for the entity having a substantial degree of market power to price below cost or to continue to strategically price in those markets.

NARGA is concerned that the short-term lower prices to consumers diverts attention from the medium to longer term effect of below cost or strategic pricing by an entity having a substantial degree of market power. By focusing on short-term price falls, there is a danger that anti-competitive conduct is going unnoticed. If greater attention was focused on the objective purpose behind the below cost or strategic pricing, then the impact of those strategies on the level of competition beyond the short term could be assessed.

At present, the difficulties with having to show a subjectively anti-competitive purpose makes allegations under the existing s 46 even harder to prove where an entity believes that any behaviour to secure lower prices is pro-competitive. NARGA submits that s 46 should allow the courts to look beyond the mere subjective purpose behind the conduct. As discussed below, this could be done by focusing attention on the conduct's impact on the level of competition in the market beyond the short term or by adopting some objective criteria by which to assess the motives behind the conduct.

***Not being undermined by anti-competitive creeping acquisitions.***

The ability of independents to purchase supplies at prices comparable to those secured by the two major supermarket chains depends on volumes purchased by independents and, to a lesser extent, on the services provided by independents on behalf on suppliers. If volumes purchased by independents fall, they will progressively be unable to secure the best supply prices. As the retail grocery industry is a high volume, low profit business, it is critical that independents are able to maintain and grow their

volumes. While the break-up of the Franklins supermarket chain has improved the volumes accounted for by the independent sector, such an improvement will be short lived if either independents are unable to compete because they are discriminated against on price, or independents are bought out by the two major supermarket chains. While the former has been discussed above, the latter is of additional concern to NARGA members.

As successful independents are acquired there will be a reduction in volumes controlled by the independent sector and in time a reduction in the buying power of the sector. One-off acquisitions of successful independents can be explained by a number of reasons. The independent may simply want to withdraw from the industry. The independent may see the writing on the wall in terms of its inability to counter the strategic targeting or price advantages enjoyed by the two major supermarket chains. Having possibly been in the industry for generations, the independent may see little future in an industry in which it cannot compete on price and still be able to reinvest in the business. Being at a price disadvantage as compared with the two major supermarket chains places the independent on a downward spiral in which growing inability to be competitive on price and offer leads to lower profitability levels, which, in turn, means lower retained earnings with which to grow the business and, in time, translates into an increasingly uncompetitive business.

In view of the numerous competitive disadvantages faced by independents, it is hardly surprising that they may be easy pickings for the two major supermarket chains. If however the independent sector could secure comparable supply prices to those secured by the major supermarket chains and were not strategically targeted, then independents would have every incentive to remain in the industry. After all, many of them have been in the industry for generations.

NARGA is concerned that in addition to independents effectively being forced out of the industry, successful independents are being acquired in such a manner that the

level of competition is reduced in those markets in which those independents previously operated. While the existing s 50 prevents mergers that substantially lessen competition, there is a danger that while major merger proposals are likely (as in the case of the Franklins break-up) to trigger an ACCC investigation, a series of relatively minor or one-off acquisitions are not likely to trigger the same degree of attention. Indeed, although individually these minor or one-off acquisitions may not substantially lessen competition, they may collectively substantially lessen competition to the detriment of consumers.

Where the cumulative effect of acquisitions is to substantially lessen competition, NARGA would submit that s 50 should allow consideration of such a cumulative effect. Not to do so has the potential to undermine the operation of s 50 in those instances where an entity can over time acquire a substantial degree of market power through relatively minor piecemeal or ad-hoc acquisitions.

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## PART TWO

## KEY PRO-COMPETITIVE TRADE PRACTICES REFORMS ADVOCATED BY NARGA

**PART TWO: Summary of NARGA's key pro-competitive trade practices reforms**

**2.1 Prohibiting anti-competitive price discrimination;**

**2.2 Prohibiting entities having a substantial degree of market power from engaging in coercive or intimidating conduct or conduct inducing a supplier to discriminate against competitors of the entity**

**2.3 Prohibiting, subject to certain exceptions, anti-competitive below cost or unreasonably low pricing;**

**2.4 Prohibiting, subject to certain exceptions, entities with a substantial degree of power in a State/Territory or National market from *strategically targeting* a smaller competitor by charging prices in a market in which the entity competes with the smaller competitor that are lower than those charged by the entity in other markets in that State or Territory;**

**2.5 Expressly identifying the types of anti-competitive conduct that may give rise to a breach of the misuse of market power provision (s 46);**

**2.6 Prohibiting anti-competitive creeping acquisitions;**

**2.7 Subjecting potentially anti-competitive creeping acquisitions to ACCC scrutiny; and**

**2.8 Express recognition of small business and rural/regional factors in ACCC assessment of whether or not acquisition or merger breaches s 50.**

# DAWSON COMMITTEE
# TRADE PRACTICES ACT REVIEW

## NARGA SUBMISSION

## PART TWO

## OVERVIEW

NARGA is seeking a number of reforms to the *Trade Practices Act* (the Act) in view of the considerable difficulties currently faced in using s 46 (the existing prohibition against misuses of market power) and s 50 (the existing prohibition against mergers that substantially lessen competition) to counter specific forms of anti-competitive conduct that may be engaged in by dominant corporations. For example, the requirement to prove a predatory intent by an entity having a substantial degree of market power is the clearest difficulty faced under the current s 46. In particular, such entities with a substantial degree of market power may engage in conduct that, despite an absence of evidence of a predatory intent, may from an objective point of view have a detrimental impact on the level of competition in the market.

In the circumstances, the Act should allow this conduct to be assessed objectively to determine whether it has an anti-competitive effect on the market. An `effects' test in s 46 would, as discussed in greater detail in Part 3 of NARGA's submission, permit such an objective assessment. In addition, specific forms of anti-competitive conduct not dealt with under the present Act should be prohibited in new provisions of the Act to foster effective competition between entities with a substantial degree of market power and independent small businesses. The Act needs to evolve to meet the more sophisticated types of potentially anti-competitive conduct that may be engaged in by entities with a substantial degree of market power. This involves fine-tuning existing provisions of the Act where appropriate and introducing new prohibitions where existing provisions do not effectively counter specific forms of anti-competitive conduct.

## 2.1 Anti-competitive price discrimination – The concept of `like terms for like customers' as a guiding pro-competitive principle

NARGA is a strong advocate of the principle of like terms for like customers. This principle requires that comparable customers (having regard to volumes purchased and services provided) receive comparable terms. At its simplest, if customer A purchases 100,000 units and customer B purchases 100,000 units they should receive comparable prices. Price discrimination between comparable customers undermines the competitive process between those customers. Indeed, an uneven competitive playing field is thereby created in which the price advantaged customers can use the price advantages to drive out the price disadvantaged customer to the detriment of Australian consumers.

NARGA is particularly concerned that where comparable customers do not receive comparable prices, those who, in turn, buy from the disadvantaged customer will also be disadvantaged. This distorts competition in the downstream market as the price advantaged customer can offer better prices to its customers, or if it is vertically integrated is able to use the price advantages against customers of its price disadvantaged rival.

NARGA advocates that a new prohibition against anti-competitive price discrimination be introduced into the *Trade Practices Act* as a way of ensuring that comparable customers buying comparable volumes and providing comparable services are treated in a comparable manner.

Australian consumers would benefit from the vigorous competition that would ensue between comparable market participants who can purchase their supplies at comparable prices to one another. If a comparable customer is disadvantaged on the terms that it receives from a supplier, it is unable to sell at prices as competitive as its advantaged rival and over time the disadvantaged customer may go out of business or be unable to maintain the competitive pressure it would have otherwise been able to exert on its rival.

Prohibiting anti-competitive price discrimination would prevent suppliers from discriminating between competitors where they buy the same products in like quantities having regard to the nature of the buyers and the relationship between the buyers and suppliers. Where similar customers are buying at unexplained price differences, the level of competition in the market is distorted by the fact that one customer has a price advantage over another similarly placed customer. In these circumstances, the price-disadvantaged customer, ie the independent small business person, cannot offer the same level of discount to consumers. This acts to the detriment of the independent small businesses, as they cannot match the prices offered by the price advantaged entity, unless they work on a lower trading margin, which in turn, inhibits the extent to which funds can be reinvested into the business to sustain its viability, growth and continued innovation to meet customer expectations. As independent small businesses go out of business, or cannot compete and are acquired one by one by a dominant corporation, consumers suffer as they are faced with less choice and convenience, and with prices dictated by dominant corporations left with no effective competition from the independent small business sector.

### 2.1.1 A prohibition against anti-competitive price discrimination – A summary of NARGA's position

NARGA is a strong supporter of the principle that the treatment of comparable customers in a comparable manner is pro-competitive. In doing so, NARGA does not advocate equal treatment of all customers. Customers are generally speaking different and, accordingly, can be treated differently depending on their negotiating skills (and not blatant abuse of market power), volumes purchased and services provided. Clearly, the bigger the customer, the better the price and terms negotiated by the customer. On a vertical level, customers of varying sizes will receive varying prices. NARGA is not advocating vertical equality. NARGA is not advocating that all customers be treated equally in all instances.

Instead, NARGA seeks to focus attention on the treatment of customers on a horizontal level. That is, like customers on the same level of the distribution chain should, as a

general principle, receive like terms. The emphasis is on like customers rather than on all customers. As advocated by NARGA, the general principle of like terms for like customers focuses attention on how like or comparable customers at the same horizontal level of the distribution chain are treated. Horizontally, comparable customers are competitors and if one of those customers receives a price advantage, then it will have a competitive advantage over its price-disadvantaged rival. In short, it is only where comparable customers at the same level of the distribution chain are treated in a comparable fashion that there can be vigorous and fair competition between them.

NARGA emphasizes that it is concerned with the treatment of customers at a horizontal level on the distribution chain. The comparison of like with like is critical to an understanding of NARGA's position. It is only by comparing the treatment of comparable customers that an assessment can be made as to the existence or otherwise of anti-competitive conduct. Where comparable customers at the same level of the distribution chain are not treated in a comparable manner, the question arises as to the reason behind the discrimination. Can the discrimination be explained in some way? Is it the result of better negotiating skills? Is it a result of larger volumes being purchased and delivered at any one time? Is it a result of a recognition that one customer provides different services on behalf of suppliers? Or is it simply a use of market power to intimidate suppliers into discriminating between comparable customers at the same horizontal level to secure a competitive advantage over rivals?

NARGA views the general principle of like terms for like customers as a benchmark by which to assess the health of competition at a horizontal level of the distribution chain. NARGA acknowledges that while there may be differences in treatment even at a horizontal level, such differences must be capable of rational explanation. Unless differences in treatment can be attributed to superior negotiating skills, differences in volumes delivered in each shipment to a given location, or differences in services provided on behalf of suppliers, the question arises as to whether or not there has been anti-competitive price discrimination by which market power has been abused to extract unjustifiably or disproportionately favourable prices or terms. Is the discrimination a

result of competitive forces or a blatant abuse of market power? The principle of like terms for like customers provides an objective criterion for answering this question.

The general principle of like terms for like customers does not prevent suppliers from taking account of economies of scale when determining what prices to charge their customers. In general, the larger the order, the greater the efficiency benefits associated with fulfilling the order. Clearly, an order of 100,000 units delivered to a single distribution point is more efficient than delivering 10,000 units to 10 separate and, perhaps, geographically widespread distribution points. The principle of like terms for like customers advocated by NARGA simply provides that, in general, two different customers each acquiring 100,000 units into a single distribution point should receive comparable terms and prices to that received by the other. The price may not be exactly the same, for example, due to one party's superior negotiating skills, but the prices and terms should be comparable.

For example, in the grocery industry, the major chains operate their own large scale distribution centres in each state into which they take deliveries from suppliers of food and grocery products for redistribution to their company owned stores. The major grocery wholesalers which service independent retailers also operate comparable large scale distribution centres into which they take deliveries from the same suppliers for redistribution to their independent customers. The major wholesalers, like the major chains, receive shipments from suppliers in the most cost efficient configuration as specified by the supplier, e.g., a full truckload into a single location.

In raw terms, overall volumes purchased by either Woolworths or Coles may be greater than the volumes purchased by the major wholesalers on behalf of independent stores, but, in the case of Woolworths or Coles, these volumes are not delivered in a single block to a single distribution centre. Rather, these volumes are broken up into shipments to individual distribution centres in each state. The size of each of these shipments to these distribution centres is the same as those to the wholesaler distribution centres. In these circumstances, the economies of scale benefits are the same for both the independent

sector and the major chains. This is because the economies of scale benefits relate, not to overall volumes, but to the delivery of goods to a single location in the most cost efficient manner. It must be stressed that economies of scale arguments and their relevance in explaining differences in the treatment of comparable customers must be considered by reference to customers at the same level of the distribution chain.

NARGA's support of the principle of like terms for like customers represents a starting point in objectively assessing whether or not discriminatory treatment of customers at the same level of the distribution chain is pro or anti-competitive. The principle does not exclude the possibility of different prices being charged if they are attributable to economies of scale (as objectively measured in the way discussed above) or superior negotiating skills (rather than blatant abuse of market power). Unless there is an economically justifiable reason for differences in treatment, discriminatory treatment of comparable customers distorts competition, preventing the disadvantaged customer being as vigorous as it could be in the absence of the discrimination. The overall distortion of competition will be greater the higher up in the distribution chain the discrimination occurs. For example, where wholesalers are placed at a competitive disadvantage as a result of the discriminatory conduct it follows that retailers supplied by those wholesalers would be equally (if not more) disadvantaged by the discrimination that occurs at the wholesale level (as the wholesaler applies a nominal percentage service fee to the cost price from the manufacturer to cover the cost of redistribution to the retailer).

A prohibition against anti-competitive price discrimination and the recognition of the principle of like terms for like customers that that prohibition encapsulates, is consistent with the promotion of consumer welfare, the very goal that underpins the *Trade Practices Act*. The prohibition is not a mechanism for market control. Rather, it is benchmark for ensuring vigorous competition. Where comparable customers receive comparable terms, those customers will be on a more level playing field in a competitive sense. They will compete vigorously, with each jockeying for market share and consumers reaping the benefits of that vigorous competition. In contrast, where a customer receives a price advantage over a comparable rival, the favoured customer can use the advantage to

undermine its rival. While in the short term consumers may appear to benefit from the undermining, over time the undermining of the disadvantaged rival means that it cannot remain competitive and may go out of business or be acquired by the advantaged competitor. Once the disadvantaged rival is eliminated, there is little, if any, competitive restraint on the customer receiving favourable prices from suppliers. Consumers face higher prices, along with less choice and convenience, once rivals are eliminated by the discriminatory conduct. Accordingly, consumers benefit from comparable customers receiving comparable terms that can be used to vigorously compete with like rivals.

Importantly, the principle of like terms for like customers encapsulates its own built-in limiting mechanism, ensuring that the principle remains pro-competitive in nature. That is, it must be remembered that the principle focuses attention on like customers. Unless customers can be considered to be like customers, the second part of the principle – like terms – has no application. It is only by reference to comparable customers that an assessment can be made as to whether or not comparable terms are justifiably pro-competitive. Comparable customers means just that – customers at the same level of the distribution chain that acquire comparable volumes, offer comparable distribution efficiencies and provide comparable services to the next level of the distribution chain. The principle of like terms for like customers does not mean and has never meant all customers receiving the same terms – only that comparable customers receive comparable treatment from suppliers for the ultimate benefit of consumers.

Price discrimination was previously dealt with under s 49 of the Trade Practices Act. This specific provision was abolished following the Hilmer Review on the premise that such breaches would be picked up under s 46. The existing s 46 has been ineffective in this regard and a specific provision to deal with anti-competitive price discrimination should be introduced to protect consumers and competition, particularly in highly concentrated industry sectors.

The principle of `like terms for like customers' has been recognised in overseas jurisdictions (see Part 2.1.3 of NARGA Submission). In relation to Australia, NARGA notes that the principle has received the unanimous support of the Joint Select Committee

on the Retailing Sector (the Baird Committee Report – August 1999) and while not having been adopted in the Federal Government's response to that report, the Prime Minister has in a letter to NARGA dated 9 November 2001 committed his Government to considering the implementation of the principle during its current term.

### 2.1.2 Anti-competitive price discrimination: Key issues

NARGA's position regarding anti-competitive price discrimination stem from concerns expressed by NARGA members that the independent grocery sector is a victim of anti-competitive price discrimination by suppliers. NARGA and its members have long been concerned that the independent sector's inability to compete with the major supermarket chains is directly linked to the sector's inability to secure competitive prices from suppliers. Unless the sector is able to secure such competitive prices from its suppliers, independent retailers will not be able to match the retail prices offered by the major supermarket chains. If the independent sector cannot secure competitive prices, then it will not be able to be a viable third force and consumers will not get the benefit of choice and genuine competition between the major supermarket chains and independents.

***The need for vigorous competition***

NARGA and its members fully support vigorous competition in the retail grocery sector. Vigorous competition means competition where the independent sector is able to compete head on with the major supermarket chains. Vigorous competition can only be guaranteed where the independent sector is able to match prices offered to consumers by the major supermarket chains. Unless the independent sector can match prices offered by the major supermarket chains, the sector will be priced out of the market, as consumers are generally price sensitive on grocery items.

***The importance of being competitive***

The independent sector must be in a position to offer competitive prices. Where, however, the independent sector faces a price disadvantage from suppliers, they are immediately placed at a competitive disadvantage with the major supermarket chains. If the major supermarket chains are given a price advantage by suppliers, then the independent sector is priced out of the market even before grocery items hit their store shelves. In other words, the old retail adage that "you must buy right in order to sell right" applies. By being at a competitive disadvantage from the outset, the independent sector cannot compete as vigorously as they could if it was not under a price disadvantage.

Where price-disadvantaged retailers can only compete by cutting into their already very low profit margin, they will be unable to generate the funds needed to reinvest in their businesses. Reinvestment is a key to remaining competitive in terms of the store's offer to its consumers. Retailers who are unable to reinvest in their business are more vulnerable to offers to sell out to the major supermarket chains, or are eventually forced out of business. Clearly, the better the prices at which the independent sector can obtain their supplies, the better the price that the sector can offer all consumers, including those in rural and regional Australia. The better the prices the independent sector can offer consumers, the more vigorous will be the competition in grocery retailing.

***The importance of not being discriminated against***

Vigorous competition is undoubtedly linked to competitors in a comparable position being able to offer comparable prices to consumers. A better deal for consumers, both in the short and long term, must be the measure of vigorous competition. Where the major supermarket chains compete only with one another, there is a danger that they will price their products at a higher level than they would in the presence of a truly independent third force. As demonstrated by the Australian airline industry in the duopoly days, duopolists will price to match one another only within a limited self-serving range rather

than engage in true competition by which they aggressively undercut one another on price.

The prospect of a national duopoly in Australian grocery retailing has increased following the break-up of the Franklins' chain, with Woolworths and Coles/Bi Lo approaching 80% of the national packaged dry grocery food market.

***The dangers of a duopoly***

In a duopoly, there is very little (if any) incentive to compete aggressively on price. Since only the consumer would benefit from lower prices in a duopoly, duopolists will do all that they can to resist any self-defeating urge to compete on price. It was only when truly independent airlines entered the market that the duopolists were forced to compete on price. After years of matching each other on price, to maximize profits, the duopolists were forced to exercise management skill in setting prices. Unfortunately, the management skill within the duopolists may be lacking as the absence of real competition in the duopoly days may have had the effect of management not being sufficiently nimble to price competitively.

A vigorous independent grocery sector ensures that the major supermarket chains remain price competitive. In the absence of a viable third force, the major supermarket chains could become a lazy duopoly with little (if any) incentive to compete on price.

***The need for a competitive third force***

Unless the independent grocery sector is able to price competitively, there will not be a viable, sufficiently competitive third force to keep the major supermarket chains honest. If the independent sector is unable to provide a viable competitive third force, then the major supermarket chains will (and in some places have already) become duopolists, competing with one another only in a limited self-serving manner.

***The dangers of not having a competitive third force***

More importantly, if the independent sector is not able to be price competitive, then independent grocery retailers may be forced out of the industry. Either the independent retailer is driven out of business because it cannot match the lower prices that may be offered by the major supermarket chain outlets, or the retailer, not being able to compete on price because the sector receives unfavourable prices from suppliers, agrees to be bought out by the major supermarket chains.

An independent retailer that is able to be price competitive with a major supermarket chain outlet is able to remain in business, without fear of the chains being able to undercut it as a result of nothing more than a price advantage the chains may receive from suppliers. The competitiveness or otherwise of an independent retailer depends directly on the price at which the wholesaler from which it obtains its supplies is able to secure from suppliers. If a grocery wholesaler is unable to secure a competitive price from suppliers, then this has an impact on the price at which the wholesaler can re-supply products to its retailers.

***Like customers to be judged at the wholesale level – NOT the retail outlet or corner store level***

Unlike the vertically integrated major supermarket chains, independent retailers are generally supplied by wholesalers who take on the distribution of products to independent retailers wherever they may be located. Wholesalers will, like the major supermarket chains, receive supplies into central distribution warehouses. These supplies are, in turn, divided into smaller lots depending on the requirements of the particular retail outlet supplied. While the retail outlets (whether they be chain-owned or independent) will vary in size, these central distribution warehouses are of comparable size irrespective of whether they are chain-owned or independently operated.

***Independent wholesalers not to be placed at competitive disadvantage***

It is the price at which these central distribution warehouses purchase their supplies that is critical to the assessment of whether or not the independent sector is price-competitive. If these warehouses do not get a competitive price from suppliers, this will have a follow on effect on all retail customers supplied by that warehouse. The more competitive the prices received by the wholesaler through the central distribution warehouses, the better prices it can offer to those retailers it supplies. The less favourable prices offered to wholesalers by suppliers, the less competitive will be the independent retailers supplied by that wholesaler.

***The importance of independent wholesalers being offered competitive prices***

Competitive prices offered to wholesalers will be passed on to those retailers supplied by the wholesaler. Unless competitive prices are passed on, independent retailers will not be able to compete with the nearest major supermarket chain outlets. Unless independent retailers are able to compete with those chain outlets, the independent retailers will either go out of business or be bought out and the wholesaler will lose its customers – a state of affairs not in the interests of the wholesaler. Clearly, it is in the interests of the wholesalers to pass on the most competitive prices to those independent retailers they supply. Wholesalers and their retail customers are interdependent. They have a symbiotic relationship. The adage that *"you cannot have successful independent retailers without a successful wholesaler and vice versa"* applies.

***Price competitive wholesalers means price competitive retailers***

Wholesalers must pass on the most competitive prices that they can, and they must ensure that they are as efficient as they can be in their operations. The distribution of products from and the operation of the central distribution warehouses come at a necessary cost. While chain operated or independent warehouses alike will incur many of those costs, there are additional costs only faced by independent wholesalers– costs to be borne by the independent wholesaler but of direct or indirect benefit to suppliers. These include the

provision of credit to independent retailers, the carrying of bad debts, the cost of invoicing and running accounts payable, the costs of servicing a diverse and geographically widespread independent retailer customer base and accepting claims for short delivery or stock damage from retail customers. These costs would need to be borne by the manufacturer or supplier and passed on to the retailer if there were no wholesalers to provide this service.

***A level playing field at the wholesale level***

If, however, the independent wholesalers were offered prices as competitive as those offered to the supermarket chains, wholesalers would be on an equal footing with the chains. Where the wholesaler can offer competitive prices to independent retailers, those retailers can compete more effectively with the chain outlets. Where a wholesaler is unable to do so, the independent sector will lose critical mass, effectively leaving a duopoly to dictate prices to both suppliers and consumers.

***Keeping the medium to long term in mind***

In the short term, a shrinking or uncompetitive independent sector cannot provide a competitive third force to the major supermarket chains. Without that competitive third force, there is very little to prevent the major supermarket chains from becoming or entrenching their positions as duopolists. The appearance of competitive pricing by the major supermarket chains today will, over time, almost certainly give way to the reality that powerful duopolists are not necessarily interested in acting in the best interests of consumers.

***Importance of promoting new entry, innovation and consumer choice***

Price discrimination by suppliers can be used to create barriers to entry and discourage new entrants, stifle innovation and reduce consumer choice. Faced with the possibility of not being able to acquire supplies at competitive prices from suppliers, new entrants may be discouraged from entering the sector. At a local level, new entrants are likely to turn to

independent wholesalers for their supplies. Where the independent wholesalers are unable to be price competitive, potential new entrants may be discouraged as they in turn may not be able to be price competitive with major supermarket chain outlets. Nationally, new entrants will be discouraged by the favourable prices that the major supermarket chains may extract from suppliers.

By discouraging new entrants into the retail grocery sector, price discrimination acts as a barrier to entry. Without a competitive third force (or the possibility of new entry), the major supermarket chains will have very little, if any, incentive to innovate. As a duopoly is created or entrenched, consumer choice will be further reduced or totally at the mercy of the major supermarket chains.

***The impact of any such price differences on competition in the relevant markets – at the national level***

In considering the relevant markets in the retail grocery sector, it is clear that the major supermarket chains and independent wholesalers compete both on a national level and on a local or regional level. At a national level, independent wholesalers will negotiate with suppliers for that wholesaler's national supply needs. Similarly, the major supermarket chains are increasingly negotiating with suppliers for their national requirements. In both cases, however, the total national supply needs are delivered in smaller lots to the requested central distribution warehouse. These central distribution warehouses, by their very nature, are of comparable sizes whether they are operated by the major supermarket chains or the independent wholesalers.

As the central distribution warehouses are of comparable sizes, they deal in comparable volumes. By dealing in comparable sizes, the central distribution warehouses are effectively comparable customers. That these central distribution warehouses are effectively comparable customers is demonstrated by the fact that these warehouses are also comparable in terms of efficiencies they generate along the distribution chain. Efficient central distribution warehouses mean savings on distribution costs, savings that can be passed on.

Given that central distribution warehouses are very cost efficient operations, whether they be chain operated or independently operated, any differences in prices that may be offered by suppliers to the major supermarket chains and independent wholesalers cannot simply be attributed to differences in volume. As noted above, national requirements/volumes are not delivered to one distribution point, but rather are divided up by both the chains and independent wholesalers into a number of central distribution warehouses. National volumes are only one point of reference, and more importantly need to be assessed in context, having regard to the fact that national volumes do not represent one block but rather a collection of smaller blocks delivered to various central distribution warehouses.

The question arises at a national level as to why there should be any differences in the prices at which products are supplied to central distribution warehouses of comparable size. Unlike national requirements/ volumes, prices at which products are supplied into central distribution warehouses provide a more appropriate benchmark for assessing potential price discrimination by suppliers. Volumes are comparable at the central distribution warehouse level. Having identified price differences at this wholesale level, an assessment can be made as to why such price differences exist.

While the central distribution warehouse or wholesale level provides a better reference point on price comparisons than do simple market shares of the major supermarket chains and wholesalers, market shares are certainly relevant to the existence or otherwise of market power. For example, were price differences to exist at the central distribution warehouse or wholesale level, one explanation could be that market power has been used to extract favourable prices from suppliers. With the growing market share of the major supermarket chains, suppliers will find it increasingly difficult to counter the increasing market power that comes with that growing market share. In turn, as the independent sector shrinks or is bought out because of its price disadvantage and consequent inability to compete vigorously, the market share and power of major supermarket chains will grow to the point where the suppliers will effectively only have two major buyers for their products.

At a national level, unless the prices of supplies to the central distribution warehouses are comparable between the major supermarket chains and the independent wholesalers, a price disadvantage faced by an independent wholesaler will be equally (if not to a greater extent) faced by the independent retailers supplied by that wholesaler. Unless independent wholesalers are price competitive with the major supermarket chains, the independent retailers supplied by those independent wholesalers will not be as price competitive as they could otherwise have been with major supermarket chain outlets.

Where there are price differences between the equally efficient central distribution warehouses of supermarket chains and independent wholesalers, the question arises as to whether there has been an exercise of market power. In an environment where all central distribution warehouses are efficient in their operations, are of comparable size and provide comparable services (or even more services in the case of independent wholesalers), then price differences at this level will have an adverse impact on competition at both wholesale level and at local or regional level.

Where independent wholesalers are price disadvantaged, then independent retailers supplied by those independent wholesalers will also be price disadvantaged. While the price offered to individual retailers might vary depending on the size of their order and other services provided, a key determinant of the supply price to independents will be the price at which goods are supplied into the independent wholesaler.

Importantly, while the size of individual independent retailer outlets can range from smaller express outlets to outlets of comparable size to the biggest major supermarket chain outlets, the size of central distribution warehouses varies little between those of independent wholesalers and those of the major supermarket chains. Where independent wholesalers receive comparable prices to those offered to the major supermarket chains, the benefits of those prices can be passed onto the independent retailers. The better the prices that can be offered to those independent retailers by the wholesaler, the better the prices the independent retailer can offer consumers.

A key determinant of competition at the local or regional level is the existence of a competitive third force at that level. Where the major supermarket chains operate as a duopoly, there is a temptation not to engage in price competition at all or price competition only within a narrow targeted and self-serving range. Where there is price competition that may be aimed at some short-term objective such as promoting a new or refurbished outlet.

Where there is a competitive third force with outlets of comparable size to the major supermarket chains (or there is the possibility of new independently supplied outlets) in that local or regional area, the level of price competition will depend on the third force's ability to be price competitive. Unless the third force can match the price competition by a chain-outlet of comparable size, it is unlikely to remain viable in the medium to long term. Where the independent retailer is unable to remain viable it may go out of business or be bought out by the major supermarket chains. For example, given the scarcity of good sites and the desire of the major supermarket chains to increase their market shares, an independent retailer outlet may be attractive to a major supermarket chain because it represents a good site or because it has been an obstacle to expansion by the major supermarket chains.

***Whether such price differences are or could be in breach of the existing s 46 of the Trade Practices Act***

Proven examples of price discrimination would only be a breach of the existing s 46 where that price discrimination was the result of a entity with a substantial degree of market power using that power for one of the purposes prohibited under the section. In relation to price discrimination, it is clear that an issue to be resolved is who in fact is engaging in the conduct. For example, suppliers may have on their own initiative decided to discriminate between comparable customers simply because they can `get away with it.' Alternatively, a customer may be extremely aggressive in its negotiations with suppliers. In these circumstances, the favourable price received by that customer may be the result of tough negotiations.

Either way, the existing s 46 requires a careful assessment to be made of who is engaging in potentially anti-competitive conduct and for what purpose the conduct is engaged in by that person. If a supplier is engaging in the conduct, the immediate issue is whether that supplier has a substantial degree of market power. As suppliers will vary in size, it is clear that the extent of their market power will also vary. In relation to some suppliers, a strong case could be mounted to show that they possess a substantial degree of market power.

Where a supplier has a substantial degree of market power, attention could be focused on whether or not they discriminate between comparable customers and, if so, for what purpose. If, for example, it could be demonstrated that such a supplier charges higher prices to different comparable customers to deter those customers from engaging in competitive conduct, then the existing s 46 would be relevant. Importantly, it would be easier for a supplier with a substantial degree of market power to discriminate between comparable customers simply because its customers may have limited or no ability to turn to alternative suppliers.

Alternatively, if a supplier without a substantial degree of market power discriminates between comparable customers because of pressure or bullying tactics by one of those customers, then the question arises as to whether or not that supplier has been the victim of unconscionable commercial conduct as prohibited by s 51AC or a victim of coercive or intimidating conduct.

Where a customer uses a substantial degree of market power to secure favourable prices, the issue arises as to the purpose for which the conduct is engaged in by the customer. If the purpose were simply to obtain the `best' price that the customer can get, then the customer would argue that it did not have a purpose prohibited by s 46. Suggestions, however, that the customer is simply wanting the `best' price that it can get must be carefully assessed. Of course, every customer wants the `best' price. If that customer, however, is one that has a substantial degree of market power then it may want to use that market power to ensure that it gets a price that is better than its competitors. Where, therefore, a customer with a substantial degree of market power uses that power to

require a supplier to give it a price that is better than other customers, there is an issue as to whether the customer's purpose is to deter or prevent competitive conduct by rivals.

**Do price differences substantially lessen competition?**

In determining whether or not price differences substantially lessen competition it is first necessary to identify the relevant market. Within this context, NARGA submits that the relevant market needs to be identified by reference to comparable customers. One such market could be identified at a national level by reference to central distribution warehouses. The impact that favourable prices have on competition can be more readily assessed at this national level – with `apples being compared to apples.' At this level, favourable prices to one customer give that customer a price advantage over a comparable rival. While that enables the favoured customer to undercut a rival, that will be done so long as there is a rival. If the favourable prices are used to eliminate the rival, then the price advantaged customer will simply pocket a higher margin – once the rival has been eliminated or subdued, the favoured customer would have no incentive to compete on price or offer consumers competitive prices.

In short, if the rival is continually undercut, then it will not be able to provide the same level of competitive pressure as it could have done if it had received comparable prices. At worst, the rival may go out of business. Either way, the level of competition where one competitor is given favourable prices will not be as vigorous as it would be if comparable customers were given comparable prices.

Not giving comparable prices to comparable customers at a national central distribution warehouse level, also impacts negatively on competition at a local or regional level. If competitive prices are not offered at the national wholesale level, then competitive prices cannot be offered to retail outlets to meet favourable prices offered by retail outlets of a rival receiving favourable prices from suppliers. Once again, the level of competition at the local or regional level is not as vigorous as it could have been if comparable customers at the national level had received comparable prices from competitors.

***Whether there is public benefit in the existence of such price differences***

A comparison of the level of competition that exists where there are price difference with the level of price competition that would exist were comparable customers offered comparable prices is a ready measure of whether or not there is a public benefit in the existence of price differences. Given that a competitor receiving favourable prices from suppliers will be able to undercut a disadvantaged rival, the level of competition will be dictated by the advantaged competitor. More importantly, the price-advantaged competitor can use the price advantage to rid itself of the price-disadvantaged rival. Once the rival is removed or subdued, there would be little incentive for the favoured competitor to offer competitive prices to final consumers. This lack of incentive would apply irrespective of the favoured competitor becoming a monopolist or a duopolist with a similarly favoured competitor.

Ultimately, the question of whether or not there is a public benefit in the existence of price differences in the price of supplies depends very much on whether there is a public benefit in the existence of vigorous competition between the major supermarket chains and the independent sector, or whether consumers are better off if the grocery industry is left with a duopoly between the major supermarket chains.

***Is there a case for a specific prohibition against anti-competitive price discrimination?***

If existing provisions of the *Trade Practices Act* cannot adequately deal with the anti-competitive impact of price discrimination, then there would be a case for a specific prohibition against anti-competitive price discrimination. Where a gap is shown to exist in the existing Act, then that gap needs to be filled lest the Act, and in turn the ACCC, are considered impotent in dealing with anti-competitive conduct.

***Can the present self-regulatory Retail Grocery Industry Code of Conduct have a role in promoting transparency in the pricing structures of both suppliers and the major supermarket chains?***

Given that the Retail Grocery industry Code of Conduct (the Code) is confined under Clause 3.1 of the Code to vertical relationships between industry participants, there is no scope under the present Code to consider horizontal issues which are fundamental to NARGA's concerns as expressed in this Submission. As a voluntary Code, it is clear that the Code cannot be contravene Part IV of the *Trade Practices Act* and, accordingly, there are clear limitations in a voluntary code dealing with horizontal issues in the absence of an authorization.

***Is there a need to distinguish between public and private benefits associated with discriminatory/non-discriminatory pricing?***

A clear distinction needs to be made between public and private benefits associated with discriminatory/non discriminatory pricing. For example, if favourable, discriminatory prices received from suppliers were not passed onto the final consumer, then those favourable discriminatory prices would represent a private benefit to the favoured operator. Those favourable discriminatory prices would only be in the public interest if there was some mechanism for guaranteeing that they were always passed on to the final consumer. There would only be a guarantee that favourable discriminatory prices would always be passed onto to final consumer where there was sufficient competitive pressure on the favoured operator to pass on the favourable prices. However, rivals can only apply competitive pressure if those rivals can match the prices at which the favoured operator sold to final consumers. Since the rival is discriminated against in terms of price, the rival cannot by definition apply the required competitive pressure to ensure that the favoured operator always passes on the favourable prices received from suppliers.

In an environment where independents ensured genuine unmanaged competition, comparable prices to comparable customers would always be a guarantee that the final consumer would receive the most competitive price. On a level playing field in terms of comparable prices for comparable customers, independent wholesalers and their retailers

would provide vigorous competition ensuring that the retail grocery sector would always be as competitive as it could. In these circumstances, non-discriminatory pricing by suppliers would be in the public interest as there would be true competition rather than distorted or managed competition as would possibly be the case where one rival receives favourable prices as compared to a comparable rival.

***Would discriminatory pricing between like customers be in the public interest?***

Discriminatory pricing between comparable customers is not in the public interest as price differences place the price disadvantaged customer at a competitive disadvantage limiting the ability of that customer to act as a counter weight to the favoured customer. If the price-disadvantaged customer is unable to compete it is likely to lose business to the favoured rival. The price-disadvantaged customer may go out of business to the detriment of final consumers, especially as the remaining previously favoured customer no longer needs to worry about rivals.

In the short term, final consumers may benefit from the favoured customer undercutting its price- disadvantaged rival, but it is critical to note that the final consumer will only continue to get the same price benefits so long as there is some competitive pressure on the price-advantaged customer.

***Would non-discriminatory pricing between like customers to be in the public interest?***

Non-discriminatory pricing between comparable customers is in the public interest as it ensures a level playing field in which the comparable customers act as competitive counter weights to one another. In a truly competitive environment, the comparable customers would compete vigorously with another. This would be especially true in the retail grocery sector, a sector where final consumers are price sensitive.

***Does discriminatory pricing between like customers confer a private benefit?***

Discriminatory pricing between comparable customers confers a private benefit if the favourable pricing is not passed onto the final consumer. Unless there is competitive pressure to pass on the favourable pricing, there is no guarantee that it will in fact be passed on. In a duopoly there would be little incentive to compete on price, and in turn there may be little, if any ongoing incentive to pass on favourable pricing. Where there are truly independent players at a national level, there is competitive pressure on all operators to compete. Of course, there is the possibility of collusion between the players on pricing, but that is prohibited under the *Trade Practices Act*.

In the absence of collusion, the presence of independent players promotes vigorous competition. Similarly, the presence of independent retail outlets promotes vigorous competition at a local or regional level. Without competitive independent retail outlets, there would be the temptation for the major supermarket outlets to compete on price only within a limited range.

***Does non-discriminatory pricing confer a private benefit?***

Non-discriminatory pricing would mean that those who were discriminated against previously would receive better pricing from suppliers. In an uncompetitive market, a party receiving a better price could be tempted to retain the better price and not pass it onto retailers (in the case of wholesalers) or the final consumer (in the case of major supermarket chains). In a truly competitive market, however, a party receiving a better price would be compelled to pass it on or lose business to rivals. The retail grocery sector is at its most competitive when suppliers offer the best price to comparable customers.

If suppliers offer the best price to the major supermarket chains, then the chains have a price advantage over independents that they will use against them to gain market share at their expense. Where independent wholesalers are price disadvantaged, they cannot offer competitive prices to their retailers. In turn, wholesalers supplied independent retailers are also price disadvantaged and may go out of business or be bought out by the major

supermarket chains. Losing their independent retailers is not in the interests of the independent wholesalers who need volume to maintain their buying power and distribution efficiencies.

Where independent wholesalers are offered the same prices as those offered to the major supermarket chains, wholesalers are able to offer competitive prices to their retailers who, in turn, can be more competitive with chain outlets. It is in the interests of wholesalers to pass on non-discriminatory prices they receive from suppliers. Retaining the benefit of better prices is not in the interests of independent wholesalers. Accordingly, non-discriminatory prices cannot confer a private benefit in a market where it is in the interests of all players to offer the most competitive price to customers (whether they be wholesaler-supplied independent retailers or final consumers).

***Who are `like customers'?***

Like customers are those customers that are in a comparable position along the distribution chain. At a wholesale level – the point at which supplies are acquired by grocery operators for resale - these `like customers' will be in a comparable position in terms of volumes dealt with at central distribution warehouses or services performed by those warehouses in getting supplies to retail outlets. While there are comparable customers at retail level, comparison between these retail customers becomes difficult, as such a comparison would necessarily be tainted by the prices at which the wholesale level is supplied.

***What would be seen as `like terms'?***

Like terms means comparable prices for supplies. Prices offered by suppliers to the wholesale level – the point at which supplies are acquired by grocery operators for resale – must reflect comparable volumes into the central distribution warehouses and comparable services performed to get the supplies to the retail outlet.

Just as the major supermarket chains need to distribute to and service their individual retail outlets, independent wholesalers also need to distribute to and service their retail outlets. Where the major supermarket chains are given favourable prices from suppliers for undertaking those services, the independent wholesalers should also be given prices that reflect the services that they undertake effectively on behalf of suppliers. In the case of independent wholesalers, the wholesaler carries the risk of payment for the supplies from individual retailers. While the supplier will be paid by the wholesaler, there is a risk that the wholesaler will not be paid by the individual retailer. If the supplier had been supplying directly to the retailer, then the supplier would have carried the risk of non-payment. Similarly, if the suppliers serviced individual retailers directly they would face the cost of distributing to a diverse and geographically widespread customer base.

In practice, independent wholesalers relieve suppliers from the need to provide credit to independent retailers, carrying bad debts, invoicing and running accounts payable for a diverse customer base, servicing a diverse independent retailer customer base and to accept claims for short delivery or stock damage from retail customers. In the absence of independent grocery wholesalers and retailers, suppliers would effectively have only two major customers for their supplies. Unless suppliers offer comparable terms to comparable customers buying comparable quantities and providing comparable services on supplier's behalf, competition within the retail grocery will be reduced at both a national and local/regional level.

***Is the retail grocery sector as competitive in terms of price?***

Given that the retail grocery industry operates on very low margins, the ability to compete on price largely depends on the price at which supplies are obtained from suppliers and the cost of operation at the particular level of the distribution chain being considered. In view of the very low margins, considerable effort has been devoted to ensuring that operational costs are kept as low as possible. Substantial efficiencies have been secured along the distribution chain, particularly at the central distribution warehouse level. At the retail level, while operational costs are generally comparable between major supermarket chains and independent retailers, rent may be an issue where

the major supermarket chains are able to extract favourable rental treatment from landlords.

Overall, the pricing of supplies is a critical issue at all levels of the distribution chain, with differences in pricing at one level potentially having a disproportionate impact at other levels of the distribution chain.

***Is the retail grocery sector as competitive in terms of service?***

The level of services offered by the major supermarket chains and the independent sector is comparable at different levels of the distribution chain. Central distribution warehouses offer comparable services as do individual retail outlets of comparable size.

***Could the retail grocery sector be made more competitive in terms of price?***

As pricing is clearly linked to the costs of supplies and of doing business, being more competitive in pricing means lower costs of supplies or of doing business. With the costs of doing business being directly within the control of the wholesaler and retailers and given the very low margin nature of the industry, there is considerable pressure to operate the business as efficiently as possible so as to keep the costs of business as low as possible. The cost of supplies is not so directly controllable, and as a result offers the greatest opportunity or scope for being able to offer more competitive prices.

***Are vertically integrated major supermarket chains necessarily more `efficient' than traditional wholesaler/retailer relationship?***

While there may be efficiency advantages in a vertically integrated structure, such advantages can be replicated within a traditional wholesaler/retailer relationship. Where there is a highly efficient operation, the traditional wholesaler/retailer relationship can be a seamless and cost effective structure for ensuring the timely delivery of supplies to a diverse range of individual retailers. If the wholesaler is highly efficient in its operations,

they can service individual retailers of varying sizes more cost effectively than suppliers themselves doing so directly.

An efficient wholesale distribution operation is the key to efficient, cost effective distribution of supplies. Within this context, the major supermarket chains themselves can be viewed as de-facto wholesalers also servicing a diverse range of individual retail outlets.

***Should sales performance be the key criterion in determining prices offered by suppliers?***

Considerable caution should be exercised in using notions of sales performance as a key criterion for determining price offered by supplier. From the outset, a notion of sales performance should be carefully defined. If sales performance simply means market share, then it just becomes a facade for unquestionably accepting that the greater market share of the major supermarket chains should equate to better prices. This would be quite an unsophisticated and obvious attempt to present market share as a surrogate for pricing decisions. In practice, pricing decisions may also reflect responses to a use of market power – not alienating the major supermarket chains can become a key factor in pricing decisions, or more fundamentally may reflect distribution and associated costs. Pricing decisions are not or should not be based only on national volumes. Pricing decisions are often much more sophisticated, reflecting a variety of factors where volume is only one such factor.

If sales performance means sales figures at wholesale or retail level, then it is readily apparent that care needs to be taken in recognizing that differences in prices at which supplies are sold will impact on sales figures. In particular, the better prices offered at the wholesale level (and in turn the retail level), the more competitive will be the wholesaler and retailer. The more price competitive the wholesaler or retailer, the better the sales figures.

Sales performance may mean different things to different industry players and unless carefully defined, taking into account a range of relevant factors impacting on sales, the notion should not be used to overly simplify how pricing decisions are or should be made by suppliers. Nor should `sale performance' be used as a cloak to hide the possibility that pricing decisions may also reflect uses of market power to extract more favourable supply prices.

***Are there are differences in supply efficiencies between different customers?***

While as a general statement the larger the customer, the better the supply efficiencies associated with those customers, this general statement needs to be qualified depending on the level of the distribution chain. For example, while the major supermarket chains will because of their greater market share have larger total volumes than the independent wholesalers, those larger volumes are by physical necessity broken down into smaller volumes to be delivered to the central distribution warehouses. Once the larger total national volumes are divided into smaller lots distributed to the central distribution warehouses, the supply efficiencies associated with those larger national volumes are reduced or eliminated. This reduction in supply efficiencies should also have an impact on price, as the division of a large total volume into smaller lots must increase distribution and associated costs.

The larger national volumes will give the major supermarket chains considerable market power which could be used to extract better prices that may be justified simply by reference to the price and supply efficiencies. Given that the retail grocery industry is a very low margin business, any price advantage extracted by the major supermarket chains allows them to undercut the independent sector without adversely affecting the chains' margins. The substantial degree of market power by the major supermarket chains places them in a position where they could, by simply applying pressure on suppliers, extract favourable supply prices to undercut any independent competitor and still maintain healthy margins.

Finally, once the supplies are received into the central distribution warehouses, the supplies have to be divided into smaller lots depending on the requirements of the individual retail outlets to be supplied. The division of the total warehouse volumes into smaller lots again reduces supply efficiencies and in turn impacts on price efficiencies.

***Are there differences in the volume and distribution efficiencies of retail chains and wholesalers?***

At the central distribution warehouse level, the major supermarket chains and the independent wholesalers face comparable volume and distribution efficiencies. The warehouses are of comparable sizes and, in turn, have a comparable range of retail outlets that are supplied. These retail outlets range from `express' sized outlets to full-scale supermarkets. Both the major supermarket chains and the independent wholesaler face the cost of servicing a diverse range of retail outlets. Accordingly, the major supermarket chains and the independent wholesalers face comparable supply efficiencies and, in turn, distribution costs from the central distribution warehouse to the individual retail outlet.

If the efficiencies and distribution costs from the central distribution warehouse level to the individual retail level are comparable between the major supermarket chains and the independent wholesalers, then differences in prices between chain outlets and independently supplied retailers must reflect a difference in the price at which the warehouse level is supplied.

### 2.1.3 International precedents – The United States, United Kingdom and Canada

The prohibition against anti-competitive price discrimination advocated by NARGA is not novel. Indeed, it has long been part of United States antitrust law. Indeed, the American jurisprudence has long recognised that price concessions extracted by customers abusing their market power can be anti-competitive and not in the consumer interest.

The United States prohibition against anti-competitive price discrimination between comparable customers is found at 15 USC 13 and is more popularly known as part of the

Robinson-Patman Antidiscrimination Act and also as the Robinson-Patman Price Discrimination Act enacted in 1936:

"Sec. 13. - Discrimination in price, services, or facilities

(a) Price; selection of customers

It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: Provided, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: Provided, however, That the Federal Trade Commission may, after due investigation and hearing to all interested parties, fix and establish quantity limits, and revise the same as it finds necessary, as to particular commodities or classes of commodities, where it finds that available purchasers in greater quantities are so few as to render differentials on account thereof unjustly discriminatory or promotive of monopoly in any line of commerce; and the foregoing shall then not be construed to permit differentials based on differences in quantities greater than those so fixed and established: And provided further, That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade: And

provided further, That nothing herein contained shall prevent price changes from time to time where in response to changing conditions affecting the market for or the marketability of the goods concerned, such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned.

(b) Burden of rebutting prima-facie case of discrimination

Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: Provided, however, That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.

(c) Payment or acceptance of commission, brokerage, or other compensation

It shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid.

(d) Payment for services or facilities for processing or sale

It shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities.

(e) Furnishing services or facilities for processing, handling, etc.

It shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale, with or without processing, by contracting to furnish or furnishing, or by contributing to the furnishing of, any services or facilities connected with the processing, handling, sale, or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms.

(f) Knowingly inducing or receiving discriminatory price

It shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section."

The United Kingdom anti-competitive price discrimination can be dealt with under s 18 of the *Competition Act 1998(UK)*:

"18. - (1) Subject to section 19, any conduct on the part of one or more undertakings which amounts to the abuse of a dominant position in a market is prohibited if it may affect trade within the United Kingdom.

(2) Conduct may, in particular, constitute such an abuse if it consists in-

(a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;

…

(c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

…

(3) In this section-

"dominant position" means a dominant position within the United Kingdom; and

"the United Kingdom" means the United Kingdom or any part of it.

(4) The prohibition imposed by subsection (1) is referred to in this Act as "the Chapter II prohibition".

In Canada, anti-competitive price discrimination is dealt with in s 50(1)(a) of the Canadian *Competition Act*

“50. (1) Every one engaged in a business who

(a) is a party or privy to, or assists in, any sale that discriminates to his knowledge, directly or indirectly, against competitors of a purchaser of articles from him in that any discount, rebate, allowance, price concession or other advantage is granted to the purchaser over and above any discount, rebate, allowance, price concession or other advantage that, at the time the articles are sold to the purchaser, is available to the competitors in respect of a sale of articles of like quality and quantity,

…

is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.”

When considered together these international precedents offer recognition of the importance of competition laws dealing with anti-competitive price discrimination. It is apparent from these international precedents that Australia is out of step with other modern market economies in not having laws that specifically address anti-competitive price discrimination. Indeed, on this issue Australia is out of step with even Canada, an economy of comparable size to that of Australia. The introduction of a new prohibition to address the gap in Australia's *Trade Practices Act* left by the repeal of the former s 49 should be seen as a key pro-competitive reform in a market place which is becoming increasingly concentrated.

**Recommendation 1:**

**NARGA advocates that a new prohibition against anti-competitive price discrimination be introduced into the *Trade Practices* as a way of ensuring that comparable customers buying comparable volumes and providing comparable services are treated in a comparable manner**

## 2.2 Prohibiting entities having a substantial degree of market power from engaging in coercive or intimidating conduct or conduct inducing a supplier to discriminate against competitors of the entity

NARGA is concerned that while a supplier may, independently of any outside pressure, choose to discriminate between like customers, there is an increasing risk that suppliers may be approached by particular customers with a view to extracting price advantages over rivals or, seeking to ensure that its rivals are not given a better price.

Again, while the supplier may choose to ignore such approaches, such a position becomes increasingly difficult to maintain where the customer seeking the price advantage has a substantial degree of market power. In these circumstances, the supplier may have little choice but to give the entity with a substantial degree of market power a price advantage over rivals, even though rivals may buy comparable volumes or provide comparable services to the price advantaged rival.

At worst, suppliers are coerced or intimidated by the entity having a substantial degree of market power into giving the entity a price advantage or a commitment not to offer discounts to the entity's rivals. Alternatively, the entity could induce the supplier into discriminating between comparable customers. In each case, NARGA strongly contends that competition is stifled to the ultimate detriment of Australian consumers. Not only is the rival price disadvantaged and not able to be competitive with the entity having a substantial degree of market power, but consumers are denied the discounts that the rival may have received from suppliers in the absence of coercion, intimidation or inducements by the entity having a substantial degree of market power.

NARGA advocates that a new prohibition be inserted into the *Trade Practices Act* preventing entities having a substantial degree of market power from engaging in coercive or intimidating conduct, or conduct inducing a supplier to discriminate against competitors of the entity.

NARGA is concerned that as corporations become more dominant and industries become more concentrated, they are more likely to behave in a coercive or intimidating manner towards those with which they deal. This is a particular issue where the dominant corporation is a substantial customer of a smaller, or even large, supplier. Suppliers may be coerced or intimidated into doing things that they would not have otherwise done. For example, suppliers may be coerced or intimidated into withdrawing discounts offered to customers other than the dominant corporation. Withdrawal of such discounts following approaches by a dominant corporation is anti-competitive as it deprives consumers of those discounts.

Similarly, a supplier may be coerced or intimidated by a dominant corporation into treating the dominant corporation more favourably than other customers of the supplier. By being coerced or intimidated into discriminating against other customers, suppliers are being forced to tilt the competitive playing field in favour of the dominant corporation. The disadvantaged customers are not able to be as competitive as they could have been in the absence of discrimination and, therefore, consumers are deprived of the benefits of having an independent small business sector that can compete vigorously with a dominant corporation.

Accordingly, NARGA advocates that a new prohibition be inserted into the *Trade Practices Act* preventing entities having a substantial degree of market power from engaging in coercive or intimidating conduct or conduct inducing a supplier to discriminate against competitors of the entity. Such a prohibition would differ from the existing prohibition in s 51AC of the *Trade Practices Act* as the focus of the inquiry under the NARGA proposal would be the impact of the conduct on third parties (namely, rivals of the entity having a substantial degree of market power), rather than the impact of the conduct on the supplier itself (which would generally be the focus of the inquiry under s 51AC).

### 2.2.1 International precedent – The United States

NARGA draws the Committee's attention to that part of the Robinson-Patman Antidiscrimination Act and also as the Robinson-Patman Price Discrimination Act enacted in 1936 that makes it unlawful to knowingly induce or receive a discriminatory price:

> "Sec. 13. - Discrimination in price, services, or facilities
> …
>
> (f) Knowingly inducing or receiving discriminatory price
>
> It shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section."

Significantly, this international precedent recognises the importance of not only targeting anti-competitive price discrimination, but also targeting conduct directed at causing or inducing such anti-competitive price discrimination.

**Recommendation 2:**

**NARGA advocates that a new prohibition be inserted into the *Trade Practices Act* preventing entities having a substantial degree of market power from engaging in coercive or intimidating conduct, or conduct inducing a supplier to discriminate against competitors of the entity.**

## 2.3 Prohibiting, subject to certain exceptions, anti-competitive below cost or unreasonably low pricing

NARGA proposes that a new prohibition against anti-competitive below cost or unreasonably low pricing be introduced into the *Trade Practices Act*.

This new prohibition would address the failure of the existing s 46 in effectively dealing with anti-competitive below cost or unreasonably low pricing. The existing s 46 is a provision of general application that may not always be readily adaptable to specific types of anti-competitive conduct. Judicial precedents are slow in developing a provision of general application so as to deal with specific types of anti-competitive conduct.

A new prohibition against anti-competitive below cost or unreasonable low pricing could be included as a specific example of a type of conduct that may give rise to a breach of the misuse of market power provision (s 46) or be inserted as a new provision in Part IV of the *Trade Practices Act*.

NARGA proposes that the new prohibition would ideally identify the circumstances in which below cost or unreasonably low pricing is anti-competitive.

NARGA also proposes that the new prohibition would be subject to a number of exceptions allowing the entity to reduce prices to match a competitor, to clear items which are perishable or have a limited shelf life, or get rid of discontinued product lines.

Anti-competitive below cost or unreasonably low pricing is one example of conduct that, where engaged in strategically by an entity having a substantial degree of market power, would undermine competition in a market where independent small businesses could not match or sustain prices set by a dominant corporation. The problem would be magnified in those circumstances where a supplier engages in anti-competitive price discrimination whereby a dominant corporation receives better prices or trading terms than the

independent small business sector, even though the latter buys comparable quantities of products and provides the supplier with comparable services. Being sold products at prices higher than those offered to dominant corporations places the independent small business sector at a clear price disadvantage and prevents the sector from being competitive with dominant corporations. Being at a competitive disadvantage forces independent small business to go out of business or sell out to the dominant corporations. Simply stated, if the independent small business sector was not at a price disadvantage they would be in a better position to provide effective competition to the dominant corporations to the benefit of consumers.

Prohibiting anti-competitive below cost or unreasonably low pricing would ensure that dominant corporations would not price goods below their acquisition cost plus normal selling costs as a way of destroying the independent small business sector. Since a dominant corporation could sustain below cost or unreasonably low prices for longer periods of time, it is critical that no below cost or unreasonably low pricing strategy is implemented (unless, for example, it is implemented to match a competitor's price or there is a genuine commercial reason for sustaining losses on a particular product, e.g where it is highly perishable or the product is a discontinued line).

### 2.3.1 International precedent - Canada

In Canada, unreasonably low pricing is dealt with in s 50(1)(c) of their *Competition Act*:

> "50. (1) Every one engaged in a business who
>
> …
>
> (c) engages in a policy of selling products at prices unreasonably low, having the effect or tendency of substantially lessening competition or eliminating a competitor, or designed to have that effect,

> is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years."

Importantly, this international precedent recognizes the potentially anti-competitive impact of unreasonably low pricing and deals with it in the strongest terms, with provision for imprisonment. In contrast, NARGA's prohibition will only give rise to civil remedies under the *Trade Practices Act*. Nonetheless, the possibility of imprisonment in the Canadian provisions is clear evidence of the importance attached in that jurisdiction to dealing with such anti-competitive conduct. Indeed, it is particularly noteworthy that this has occurred in Canada, a jurisdiction having an economy comparable in size to that of Australia.

**Recommendation 3:**

**NARGA proposes that a new prohibition against anti-competitive below cost or unreasonably low pricing be introduced into the *Trade Practices Act.***

## 2.4 Prohibiting, subject to certain exceptions, entities with a substantial degree of market power in a State/Territory or National market from *strategically targeting* a smaller competitor by charging prices in a market in which the entity competes with the smaller competitor that are lower than those charged by the entity in other markets in that State or Territory

NARGA proposes that, subject to certain exceptions, a new prohibition be introduced into the *Trade Practices Act* against entities with a substantial degree of market power strategically targeting smaller competitors by charging lower prices than other markets in the State or Territory.

By charging lower prices against smaller competitors in particular markets, an entity having a substantial degree of market power can strategically undermine the ability of smaller competitors to be a competitive force in the market. The entity having a substantial degree of market power can easily subsidize any losses or lower margins in markets in which it strategically targets smaller competitors from profits made in less competitive markets within the State or Territory. Given the smaller competitors limited or lack of ability to cross subsidize the losses or limited returns in the market strategically targeted by an entity having a substantial degree of market power, it is a matter of time until the smaller competitor is subdued, or even driven from the market or forced to sell out. Once the smaller competitor is driven out of the market or forced to sell out, consumers in that market will be deprived of the benefits of competitive outcomes generated by presence of a smaller, but vigorous competitor.

NARGA proposes that the new prohibition against strategic targeting by an entity having a substantial degree of market power would be subject to a number of exceptions allowing the entity to reduce prices to match a competitor, to clear items of a perishable or limited shelf life, or get rid of discontinued product lines.

NARGA's proposal could be implemented as either a new provision in Part IV of the *Trade Practices Act* or as part of a reformed s 46.

The issue of predatory pricing is particularly problematic from a competition point of view in those instances where an entity with a substantial degree of market power uses their market power to charge lower prices in those markets in which it faces competition from the independent sector and cross subsidize any losses or cuts to its profit margin in those markets from other markets in which it does not face vigorous competition from the independent sector.

Surely there is some point where such conduct by an entity having a substantial degree of market is so detrimental to the existing and future level of competition, that despite protestations to the contrary the entity must have known that its conduct could eliminate a competitor, or at the very least warn off or discipline a competitor or supplier. Indeed, the question arises as to why an entity having a substantial degree of market power decides to sell key products below cost in a market where there is a successful independent player, while refraining from selling at below cost in those markets in which the entity has no competition or only that competition provided by a fellow duopolist. What motivates the entity from selling below cost or at unreasonably low prices only in those markets with independent players? To gain market share from the independent sector or even to eliminate it over time? To warn the independent that if it competes too vigorously then it would be targeted by the entity having a substantial degree of market power? To benefit consumers?

Needless to say, if the entity sold at below cost or at unreasonably low prices across all markets it may soon be losing considerable sums of money. Why only target those markets with an independent presence? Simply because the entity doesn’t have to do it in other markets. In short, there is no incentive to sell below its prices in other markets lacking an independent presence or markets characterised by a duopoly (where the entity faces a comparable entity). Indeed, in a duopoly situation, the duopolists will only compete within a narrow price band and certainly have no incentive to benefit consumers through a price war.

In markets having an independent presence, is it pro-competitive to allow an entity having a substantial degree of market power to strategically target the independent? In the

short term, consumers get the benefit of a price war. Of course, those consumer benefits last only as long as the price war continues. But what happens if the entity having a substantial degree of market power can use all its advantages (cheaper supply prices, rent and the ability to cross-subsidize its losses with profits from other less competitive markets to name a few) to out survive the independent. What happens to consumers when the independent is eliminated or disciplined into not competing vigorously because they have been strategically targeted? There is no doubt that prices will rise to those levels found in less competitive markets. Thus the question arises - what would be the objective purpose of strategically targeting an independent? Quite simply as a strategy to undermine the independent with the ultimate desire to be rid of the independent or at the very least send a signal that price competition should be kept within a limited range. If correct, then strategic targeting can not, beyond the very short term, be in the consumer interest.

Within this context, NARGA proposes that, subject to a number of exceptions, a new prohibition be introduced into the *Trade Practices* Act preventing an entity having a substantial degree of market power from strategic targeting a smaller competitor by charging prices in a market in which the entity competes with the smaller competitor that are lower than those charged by the entity in other markets in that State or Territory. Such a new prohibition would not prevent the entity having a substantial degree of market power from reducing prices to match a competitor, to clear items of a perishable or limited shelf life, or get rid of discontinued product lines.

A new prohibition against an entity having a substantial degree of market power could be introduced as a new provision in Part IV or as part of a reformed s 46.

### 2.4.1 International precedent - Canada

In Canada, strategic targeting of competitors is dealt with in s 50(1)(b) of their *Competition Act*:

> "50. (1) Every one engaged in a business who

…

(b) engages in a policy of selling products in any area of Canada at prices lower than those exacted by him elsewhere in Canada, having the effect or tendency of substantially lessening competition or eliminating a competitor in that part of Canada, or designed to have that effect, or

…

is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years."

Again, Canadian competition law offers important insights into how a comparable economy to that of Australia has developed its competition law.

**Recommendation 4:**

**NARGA proposes that, subject to certain exceptions, a new prohibition be introduced into the *Trade Practices Act* against entities with a substantial degree of market power strategically targeting smaller competitors by charging lower prices than other markets in the State or Territory.**

## 2.5 Expressly identifying the types of anti-competitive conduct that may give rise to a breach of the misuse of market power provision (s 46)

NARGA proposes that the misuse of market power provision (s 46) expressly identifies the types of anti-competitive conduct that may give rise to a breach of provision

While NARGA proposes in Part Three of this submission that an `effects' test be inserted into the present s 46 as an alternative to the existing purpose test, NARGA's proposal to expressly identify the types of anti-competitive conduct that may give rise to a breach of provision can be implemented irrespective of whether s 46 remains in its existing form (with its focus on purpose) or s 46 is modified to include an `effects' test.

NARGA offers this proposal as an alternative to prohibiting, as separate provisions of Part IV of the *Trade Practices* Act, the types of anti-competitive conduct identified above by NARGA.

Given that s 46 in its present form is a provision of general application, its ability to deal with specific types of anti-competitive conduct depends on the emergence of judicial precedents – precedents that may take time to emerge. Any uncertainty as to s 46's potential application to specific types of anti-competitive conduct can be removed by expressly listing examples of anti-competitive conduct that may be caught by the provision.

From a business certainty point of view there would be considerable merit in a misuse of market power provision expressly identifying particular examples of anti-competitive conduct that may give rise to a misuse of market power.

NARGA proposes that the types of anti-competitive conduct that may give rise to a breach of the provision include the following:

- anti-competitive price discrimination
- coercive or intimidating conduct or conduct inducing suppliers to discriminate between competitors;
- predatory pricing involving anti-competitive below cost pricing or unreasonably low pricing; and
- strategically targeting of smaller competitors.

Under the NARGA proposal the existing s 46(1) could be amended to read (proposed changes in bold italics):

> "46(1) A corporation that has a substantial degree of power in a market shall not take advantage of that power for the purpose ***or in a way that has the effect or would have the likely effect*** of:
>
> (a) eliminating or substantially damaging a competitor of the corporation or of a body corporate that is related to the corporation in that or any other market;
>
> (b) preventing the entry of a person into that or any other market; or
>
> (c) deterring or preventing a person from engaging in competitive conduct in that or any other market.
>
> ***(d) discriminating between comparable customers in relation to price, terms or conditions offered on the sale of goods or services;***
>
> ***(e) coercing, intimidating or inducing a supplier to discriminate between competitors;***
>
> ***(f) anti-competitively pricing of goods or services below cost or at unreasonably low prices; or***
>
> ***(g) strategically targeting of small competitors by charging prices in a market in which the entity competes with the smaller competitor that are lower than those charged by the entity in other markets in that State or Territory.***"

In relation, to the proposed new s 46(1)(d), NARGA would also propose the insertion in a new s 46(1A)(c) of guidelines on determining who are `comparable customers' (proposed changes in bold italics). Similarly, in relation to the proposed new s 46(1)(f), NARGA would also propose the insertion of a definition for `anti-competitively below cost or unreasonably low pricing' in a new s 46(1A)(d) (proposed changes in bold italics):

"(1A)For the purposes of subsection (1):

(a) the reference in paragraph (1)(a) to a competitor includes a reference to competitors generally, or to a particular class or classes of competitors; and

(b) the reference in paragraphs (1)(b) and (c) to a person includes a reference to persons generally, or to a particular class or classes of persons***: and***

***(c) comparable customers in paragraph (1)(d) are to be determined having regard to both (i) volumes purchased from the corporation and delivered to a central distribution point, and(ii) services provided on behalf of or for the benefit of the corporation;***

***(d) the reference in paragraph (1)(f) to anti-competitively below cost or unreasonably low pricing means pricing that is below the cost of acquiring, producing or manufacturing the good or service plus all costs usually associated with the selling and promotion of the good or service.***"

NARGA offers the express identification in an amended s 46 of the types of anti-competitive conduct that may give rise to a breach of the misuse of market power provision as an alternative to dealing with these types of conduct in separate new provisions of Part IV of the *Trade Practices Act*.

### 2.5.1 International precedent - Canada

The Canadian *Competition Act* provides an example of where a jurisdiction has expressly identified in the legislation itself conduct that is considered to be anti-competitive:

> "78. (1) For the purposes of section 79, "anti-competitive act", without restricting the generality of the term, includes any of the following acts:
>
> (a) squeezing, by a vertically integrated supplier, of the margin available to an unintegrated customer who competes with the supplier, for the purpose of impeding or preventing the customer's entry into, or expansion in, a market;
>
> (b) acquisition by a supplier of a customer who would otherwise be available to a competitor of the supplier, or acquisition by a customer of a supplier who would otherwise be available to a competitor of the customer, for the purpose of impeding or preventing the competitor's entry into, or eliminating the competitor from, a market;
>
> (c) freight equalization on the plant of a competitor for the purpose of impeding or preventing the competitor's entry into, or eliminating the competitor from, a market;
>
> (d) use of fighting brands introduced selectively on a temporary basis to discipline or eliminate a competitor;
>
> (e) pre-emption of scarce facilities or resources required by a competitor for the operation of a business, with the object of withholding the facilities or resources from a market;
>
> (f) buying up of products to prevent the erosion of existing price levels;

(g) adoption of product specifications that are incompatible with products produced by any other person and are designed to prevent his entry into, or to eliminate him from, a market;

(h) requiring or inducing a supplier to sell only or primarily to certain customers, or to refrain from selling to a competitor, with the object of preventing a competitor's entry into, or expansion in, a market;

(i) selling articles at a price lower than the acquisition cost for the purpose of disciplining or eliminating a competitor;

(j) acts or conduct of a person operating a domestic service, as defined in subsection 55(1) of the Canada Transportation Act, that are specified under paragraph (2)(a); and

(k) the denial by a person operating a domestic service, as defined in subsection 55(1) of the Canada Transportation Act, of access on reasonable commercial terms to facilities or services that are essential to the operation in a market of an air service, as defined in that subsection, or refusal by such a person to supply such facilities or services on such terms."

As is readily apparent the Canadian statutory list of anti-competitive conduct is much more extensive than that proposed by NARGA. NARGA commends the Canadian approach to the Committee as an example of where the express identification of anti-competitive conduct has been undertaken by a jurisdiction. NARGA would also commend the approach to the Committee as a way of providing certainty as to what conduct is considered to be anti-competitive.

**Recommendation 5:**

**NARGA proposes that the misuse of market power provision (s 46) expressly identifies the types of anti-competitive conduct that may give rise to a breach of the provision.**

## 2.6 Anti-competitive creeping acquisitions

NARGA proposes that a new prohibition against anti-competitive creeping acquisitions be introduced into the *Trade Practices Act*.

Under the existing s 50 only acquisitions that substantially lessen competition are prohibited. A problem arises where an entity already having a substantial market share embarks on a program of small scale strategic acquisitions which individually may not substantially lessen competition, but when considered together have the cumulative effect of substantially lessening competition in a market over time.

NARGA proposes that in assessing the anti-competitive impact of a proposed acquisition regard must be given to the cumulative impact of previous acquisitions by the same entity on the level of competition in the market.

A new specific prohibition against anti-competitive creeping acquisitions is called for in view of the difficulties faced by the ACCC under the current s 50 in assessing a proposed acquisition by an entity by reference to previous small acquisitions by that entity in the particular market. While a large acquisition by an entity can, as in the case of the Franklins break-up, be subject to close scrutiny by the ACCC, a series of minor acquisitions that together would substantially lessen competition are less likely to be subject to the same scrutiny. Where in fact scrutinised, the ACCC faces considerable limitations on its ability to assess the cumulative effect of the creeping acquisitions on the level of competition.

Prohibiting anti-competitive creeping acquisitions would prevent further anti-competitive concentration in already highly concentrated industries. With entities having a substantial degree of market power already controlling key industry sectors and s 50's inability to deal with small, yet cumulatively anti-competitive acquisitions, all further acquisitions by such entities should be placed under the competitive microscope to assess their impact on

competition in the relevant market. Where a proposed new acquisition would, when taken together with previous acquisitions in the market, substantially lessen competition in the market, that acquisition should not be allowed. Given the importance of preventing anti-competitive creeping acquisitions, it is imperative that the ACCC be notified of such proposed acquisitions by dominant corporations.

### 2.6.1 Additional reforms for dealing with anti-competitive creeping acquisitions

Where markets are highly concentrated, consumers do not get the benefits that ordinarily flow from vigorous competition. In those circumstances, there is a danger that what little competition is present in the market may be removed through the acquisition of independent small business rivals by entities having a substantial degree of market power. The removal of independent rivals merely acts to further concentrate the market to the detriment of consumers. Backed by their considerable market power, entities having a substantial degree of market power can simply undermine an independent small business rival or acquire it. Indeed, a process of undermining an independent small business rival in a highly concentrated market can be part of an obvious strategy of lowering the value of the independent's business with a view to acquiring it subsequently at a reduced price. Over time, an entity having a substantial degree of market power can simply cherry pick independent small businesses at leisure to the detriment of consumers. Often these independents may feel they have little choice other than to sell out as they are unable to remain competitive as a result of the unlevel playing field favouring dominant corporations.

NARGA is concerned that the continuing concentration of industry sectors not only undermines the independent small business sector, but more importantly is highly detrimental to consumers. There must be a point at which a market is too highly concentrated and any further acquisitions need to be carefully reviewed. Without a divestiture power for intentional breaches of s46, more attention needs to be focused on

ensuring that no further anti-competitive concentration occurs, through acquisition, in those markets already viewed as too highly concentrated.

One proposal for identifying highly concentrated markets and ensuring that no further concentration occurs without appropriate scrutiny involves giving the ACCC the power to issue what NARGA describes as a `concentrated market notice.

### 2.6.2 Anti-competitive creeping acquisitions – The role of a Concentrated Market Notice

A concentrated market notice would be issued after the ACCC has formed the view that an identified market is highly concentrated by reference to pre-determined criteria. NARGA would submit that a highly concentrated market is one in which four or less market participants control 75% or more of the market. Given that four or less market participants control 75% or more of the market, it is quite likely that a majority of those participants already have a substantial degree of market power. In such circumstances, acquisitions by such participants can only increase their level of market power and more than likely to the detriment of consumers.

With the danger of further concentration continuing to impact negatively on the level of competition, it is important that further acquisitions in concentrated markets are placed under the spotlight. Thus, while a concentrated market notice is in place, no acquisitions in the market identified by the notice can take place unless authorised under the Act or allowed by the ACCC subject to an appropriate s 87B undertaking.

Such a concentrated market notice would not prevent further acquisitions, but rather would ensure that if any such acquisitions were to take place their impact on competition is carefully assessed. The clear advantage of a concentrated market notice is its transparency. That is, once a notice is issued, market participants are well aware that any further acquisitions need to be justified on public benefit grounds or a trade off needs to

be made by which the acquirer undertakes to divest existing assets or operations to offset the increase in market concentration arising from the proposed acquisition.

An alternative to a concentrated market notice would be to give the ACCC the power to issue, on a case by case basis, what NARGA describes as an `anti-competitive acquisition notice'.

### 2.6.3 Anti-competitive creeping acquisitions - An Anti-Competitive Acquisition Notice as an alternative

Rather than identify concentrated markets beforehand and deal with further acquisitions in a pre-emptive, yet transparent manner, the ACCC could be put into a position to respond to particular acquisitions that, when taken together with previous acquisitions, substantially lessen competition in a market. By taking each acquisition on its merits, the ACCC could carefully weigh up whether or not a particular acquisition, when taken together with previous acquisitions, substantially lessens competition. If the ACCC forms the view that it does, then it could issue an anti-competitive acquisition notice. Once such a notice is issued the acquirer must divest itself of the acquisition or not proceed with it unless it has been authorised or subject to a s 87B undertaking accepted by the ACCC. In these circumstances, an anti-competitive acquisition notice has the advantage of allowing the ACCC to consider each acquisition on a case by case basis and to act only where it forms the view that the acquisition is detrimental to competition and consumers.

**Recommendation 6:**

**NARGA proposes that a new prohibition against anti-competitive creeping acquisitions be introduced into the *Trade Practices Act*.**

## 2.7 Express recognition of small business and rural/regional factors in the ACCC's assessment of whether or not a merger breaches the existing s 50

NARGA proposes that the impact of an acquisition or merger on the ability of small business to remain a competitive force in the market be expressly included in the list of factors by which the acquisition or merger is to be assessed under s 50 of the *Trade Practices Act*.

Small business often provides the only independent competition to entities having a substantial market share or degree of market power. If an acquisition or merger removes a key supplier or vigorous smaller competitor from the market, the independent small business sector is disadvantaged by not being able to secure supplies from alternative sources or on competitive terms, particularly as the sector may struggle to maintain its volume and critical mass where vigorous small business competitors are knocked out of the market.

NARGA also proposes that express reference be made in the list of factors included in s 50 of the *Trade Practices Act* to the impact that a proposed acquisition or merger has on rural or regional Australia in assessing the impact of a proposed acquisition or merger. Rural and regional communities are a vital part of Australian society and, accordingly, where an acquisition or merger would have the effect of denying rural and regional Australia the opportunity of buying goods or services at competitive prices this should be a matter of concern.

At present, s 50 prohibits acquisitions (mergers) that substantially lessen competition:

> "(1)A corporation must not directly or indirectly:
>
> (a) acquire shares in the capital of a body corporate; or
>
> (b) acquire any assets of a person;

if the acquisition would have the effect, or be likely to have the effect, of substantially lessening competition in a market.

(2)A person must not directly or indirectly:

(a)acquire shares in the capital of a corporation; or

(b)acquire any assets of a corporation;

if the acquisition would have the effect, or be likely to have the effect, of substantially lessening competition in a market."

In assessing whether the acquisition substantially lessens competition a number of factors (listed in s 50(3)) must be taken into account by the ACCC and the Courts. These factors at present do not include reference to the impact of the acquisition (merger) on small business or rural and regional Australia:

"(3)Without limiting the matters that may be taken into account for the purposes of subsections (1) and (2) in determining whether the acquisition would have the effect, or be likely to have the effect, of substantially lessening competition in a market, the following matters must be taken into account:

(a) the actual and potential level of import competition in the market;
(b) the height of barriers to entry to the market;
(c) the level of concentration in the market;
(d) the degree of countervailing power in the market;
(e) the likelihood that the acquisition would result in the acquirer being able to significantly and sustainably increase prices or profit margins;
(f) the extent to which substitutes are available in the market or are likely to be available in the market;
(g) the dynamic characteristics of the market, including growth, innovation and product differentiation;
(h) the likelihood that the acquisition would result in the removal from the market of a vigorous and effective competitor;
(i) the nature and extent of vertical integration in the market."

NARGA strongly advocates the insertion of a new paragraph (j) in s 50(3) in terms requiring that the ACCC and the Courts must also take into account the impact of the acquisition (merger) on the viability and competitive position of small business.

Also, in view of:

- the key role played by small business in being both a competitive force and providing consumer choice in rural and regional Australia, and
- the typically disproportionate negative impact of acquisition (mergers) on rural and regional Australia,

NARGA also strongly advocates the insertion of a new paragraph (k) in s 50(3) requiring that the ACCC and the Courts must also take into account the impact of the acquisition (merger) on the level of competition and consumer choice and services in rural and regional Australia.

**Recommendation 7:**

**NARGA proposes that the impact of an acquisition or merger on the ability of small business to remain a competitive force in the market be expressly included in the list of factors by which the acquisition or merger is to be assessed under s 50 of the *Trade Practices Act*.**

**Recommendation 8:**

**NARGA proposes that express reference be made in the list of factors included in s 50(3) of the *Trade Practices Act* to the impact that a proposed acquisition or merger has on rural or regional Australia in assessing the impact of a proposed acquisition or merger.**

# DAWSON COMMITTEE
# TRADE PRACTICES ACT REVIEW

## NARGA SUBMISSION

## PART THREE

## OTHER PRO-COMPETITIVE TRADE PRACTICES REFORMS ADVOCATED BY NARGA

**PART THREE: Summary of NARGA's other pro-competitive trade practices reforms**

**3.1 Introduce an `effects' test as an alternative test to the purpose test under the existing misuse of market power provision (s 46);**

**3.2 Strengthening the existing purpose test under the existing misuse of market power provision (s 46) by including a list of factors to assist in the identification of purpose;**

**3.3 Divestiture for repeated intentional breaches of the misuse of market power provision (s 46);**

**3.4 Collective bargaining by small businesses as a way of providing a degree of countervailing power against entities with a substantial degree of market power.**

# DAWSON COMMITTEE
# TRADE PRACTICES ACT REVIEW

## NARGA SUBMISSION

## PART THREE

## OVERVIEW

As a strong supporter of vigorous competition, NARGA is concerned that the existing s 46 needs to be strengthened by not only introducing an objective element as an alternative to the purpose (subjective) element, but that the purpose element also be strengthened by providing guidance as to the identification of the true purpose behind the conduct.

NARGA accordingly advocates that an `effects' element be either inserted into the existing s 46 (thereby making it consistent with other provisions of Part IV of the *Trade Practices Act*), or adding a new additional misuse of market power provision based on objective assessment of the conduct. Either way, NARGA views the objective assessment of conduct under an appropriately drafted misuse of market power provision as critical to dealing effectively with abuses of market power by entities having a substantial degree of market power.

NARGA also strongly supports the retention of the purpose element of the existing s 46 and proposes that a list of factors be inserted into the existing provision to assist in the identification of the purpose under the existing s 46. Such a list focuses attention on trying to identify the true motivation behind the entity's conduct. In particular, the list of factors aim to spotlight whether the conduct is truly intended to be pro-competitive or whether there is some hidden, more sinister purpose behind the conduct.

NARGA also proposes that divestiture be available to the Courts in cases of repeated intentional breaches of the misuse use of market power provision. Such a proposal is

made having regard to the increasingly real possibility that as Australian markets become more highly concentrated the break up of dominant entities becomes a very powerful deterrent to abuses of market power.

Similarly, as Australian markets become more concentrated, there is less scope for small businesses to provide any degree of countervailing power against entities having a substantial degree of market power. In such cases, collective bargaining by small businesses becomes a vehicle for providing some degree of countervailing power. Within this context, NARGA proposes that the existing authorization process is streamlined to more effectively facilitate collective bargaining by small businesses.

## 3.1 An `effects' test under s 46 of the *Trade Practices Act* as an alternative to the purpose test

NARGA proposes that an `effects' test be inserted into the existing s 46 of the *Trade Practices Act* as an alternative to purpose element. An `effects' element would enable an objective assessment to be made of the competitive impact of the conduct by the entity having a substantial degree of market power. Under the purpose element of the existing s 46 considerable attention is focused on the subjective motivations of the entity engaging in the conduct.

Courts are left to second guess the subjective motivations behind the conduct. In doing so, they rely heavily on the evidence given by the entity's representatives. These representatives may honestly believe that their conduct is pro-competitive or may have been advised of the importance of being able to point to some pro-competitive purpose when justifying their conduct. Either way, the subjective belief that the conduct is pro-competitive may not reflect the economic reality in which the competitive process may have been damaged or destroyed as a result of the conduct.

NARGA notes that the existing s 46 is out of step with other provisions in Part IV of the *Trade Practices Act*. These other provisions enable an assessment of either the purpose behind or the effect of the conduct. Inserting an `effects' element into the existing s 46 would simply bring the provision into line with other Part IV provisions.

In putting forward an `effects' test, NARGA is mindful of the need to minimize any possible uncertainty that such a reform may bring. Within this context, NARGA has provided below:

- alternative possible formulations of an `effects' test; and
- a list of factors to assist in the use of an `effects' test.

Finally, NARGA would like to emphasize that it proposes that an `effects' test be inserted as an alternative to (and not a substitute for) the existing purpose test. NARGA advocates that the existing purpose test would remain, subject to the possibility discussed below of introducing a list of factors that can be used in identifying the true purpose behind the conduct.

NARGA's concerns with the existing s 46 of the *Trade Practices Act* - stem from the difficulties faced by the ACCC and others relying on the provision in pursuing abuses of market power by entities having a substantial degree of market power. In particular, the existing s 46 prohibition against the misuse of market power has had limited impact in view of the need to demonstrate a particular purpose (as outlined in the existing s 46) for the conduct. While `purpose' can (and often, can only) be demonstrated by inference, the current prohibition does not enable an objective assessment of the conduct's impact on competition in the relevant market to be undertaken. By amending the current prohibition in s 46 to incorporate an `effects' test an objective assessment of the conduct on the level of competition can be made to reveal whether or not the conduct of dominant corporations operates as a deterrent or hindrance to competitive conduct in the relevant industry sector.

More importantly, this objective element would bring s 46 into line with the other provisions of Part IV of the Act. Indeed, given that key provisions of Part IV (the Part of the Act in which s 46 is found) enable the conduct in question to be assessed by reference to either purpose and likely effect on competition, it is appropriate from a consistency standpoint that the purpose and effect of the conduct should also be relevant considerations under s 46. In short, allowing conduct under s 46 to be tested by reference to either purpose, effect or likely effect would bring s 46 into line with provisions such as sections 45, s 45A, 47, and 50. Clearly, s 46 as presently drafted stands apart from the majority of the anti-competitive provisions of the *Trade Practices Act*.

In such circumstances, conduct under s 46 may, unlike other provisions of Part IV, escape scrutiny where an entity with a substantial degree of market power can show it was

motivated by some pro-competitive purpose, no matter how self-serving that purpose may have been in the circumstances. This is so even though the conduct may, from an objective point of view, be very effective in removing a rival, discouraging entry into the relevant market or deterring competitive conduct

Once again, a so-called commercial purpose can, for the purposes of s 46, be used to mask conduct that has a significant anti-competitive impact. In the circumstances, s 46 can be strengthened by allowing an objective assessment to be made of the conduct in question. If such an objective assessment or `effects' test is opposed because it may lead to `commercial uncertainty' – that is, an entity with a substantial degree of market power not knowing what they can get away with – then the following approaches could be taken:

- allowing only the ACCC to institute proceedings under a s 46 that incorporates an `effects' test. As opposed to a private litigant, the ACCC has the expertise and resources to make an arms length, objective assessment of the impact of conduct on the level of competition within a particular market; and/or
- the authorization procedures of the Act could be made available in relation to s 46. The availability of the authorization procedures in relation to s 46 would again be appropriate from a consistency standpoint, as those procedures are already available in the case of other provisions of Part IV of the Act.

Given the difficulties in establishing the existence of the requisite anti-competitive purpose under the existing s 46, the availability of an effects test under s 46 in cases brought by the ACCC would offer the advantage of simplifying what has been a problematic aspect of the existing provision. Indeed, it needs to be remembered that the lack of evidence of an anti-competitive purpose does not necessarily mean that no anti-competitive purpose existed. It appears that the present s 46 will only be breached where the anti-competitive purpose is so blatant that it is admitted or readily apparent from `a smoking gun.' Where the intent behind the conduct is not so blatantly anti-competitive, there is a general tendency towards the view that if there is any possibility of a competitive motivation, even an obviously self-serving one, the conduct will escape the

purview of present s 46. This apparently higher evidentiary burden imposed when assessing purpose under s 46 has made the present section a difficult one to litigate.

Clearly, the search for purpose is a difficult one at the best of times, especially when Courts take a cautious view of purpose under the present s 46. That search, however, is made so much more difficult where an entity is so convinced that doing something to protect its market dominance will always be pro-competitive, when in reality the entity may have lost sight of the fact that its substantial degree of market power may allow it to engage in conduct that is objectively detrimental to the level of competition in the market. Indeed, given that the present s 46 allows far too much scope for entities with a substantial degree of market power to escape scrutiny by simply pointing to some self serving commercially justifiable purpose for the conduct, NARGA is concerned that at times the search for purpose under the present s 46 prevents an objective assessment of the conduct's impact on competition.

Limiting the effects test to cases bought by the ACCC, while placing the ACCC at an advantage as compared to other litigants under s 46, would clearly limit the instances in which the effects test would come into play. Given the checks and balances built into the ACCC's internal processes for deciding which proceedings it will institute, it is apparent that the ACCC will not, unlike private litigants, bring cases simply in the hope of securing a victory.

Also, the ACCC is, again unlike a private litigant, ultimately accountable to Parliament in the way in which it performs its roles and exercises its powers. Any perceived abuses of the advantages enjoyed by the ACCC will soon be raised in such forums as the House of Representatives Standing Committee on Economics, Finance and Public Administration. Indeed, critics of the ACCC have readily raised issues of accountability with that Committee and there is no reason why that readiness will not continue. In short, the ACCC's accountability in relation to the way in which it uses its powers provides clear safeguards against the possible misuse of the advantages offered by an effects test.

Within this context, NARGA advocates that the existing s 46(1) be amended to read (proposed changes in bold italics):

> "46(1) A corporation that has a substantial degree of power in a market shall not take advantage of that power for the purpose ***or in a way that has the effect or would have the likely effect*** of:
>
> (a) eliminating or substantially damaging a competitor of the corporation or of a body corporate that is related to the corporation in that or any other market;
> (b) preventing the entry of a person into that or any other market; or
> (c) deterring or preventing a person from engaging in competitive conduct in that or any other market."

This change would leave the existing purpose (or essentially subjective) element, and add an objective element allowing an assessment of the impact of the conduct on competition. The new objective element would allow the Court to determine whether or not there was a causal link between the conduct and at least one of the paragraphs under s 46(1).

### 3.1.1 Alternative formulations of the `effects' test

If there are concerns with simply inserting an `effects' test into the existing s 46 NARGA would propose alternative formulation of an `effects' test for assessing the conduct of an entity having a substantial degree of market power. One alternative formulation would be embodied in a new s 46(1B) of the *Trade Practices Act*, leaving the existing s 46(1) unchanged (proposed change in bold italics):

> "46(1) A corporation that has a substantial degree of power in a market shall not take advantage of that power for the purpose of:

(a) eliminating or substantially damaging a competitor of the corporation or of a body corporate that is related to the corporation in that or any other market;

(b) preventing the entry of a person into that or any other market; or

(c) deterring or preventing a person from engaging in competitive conduct in that or any other market."

…

***"46(1B) A corporation that has a substantial degree of power in a market shall not take advantage of that power in a way that, in the opinion of a reasonable person, is strategically targeted or likely to be strategically targeted at:***

***(a) eliminating or substantially damaging a competitor of the corporation or of a body corporate that is related to the corporation in that or any other market***

***(b) preventing the entry of a person into that or any other market; or***

***(c) deterring or preventing a person from engaging in competitive conduct in that or any other market***."

This alternative formulation emphasizes that NARGA is concerned with ensuring that misuses of market power are tested objectively. It is the objective impact of the conduct on the competitive process that is the focus of the inquiry, rather than any attempt to guarantee the survival of any particular competitor. All competitors must be subject to vigorous competition. It is only where particular competitors are strategically targeted as a way of removing the competitive tension they provide against entities having a substantial degree of market power that the conduct should come under scrutiny from a competition law point of view. As noted, the existing s 46(1) would remain unchanged.

Under this formulation, NARGA takes the view that competitors are integral to the competitive process and their destruction is tantamount to destroying the competitive process. If, however, there is a concern that an `effects' test would somehow be used to guarantee the survival of all competitors, NARGA would offer the following alternative

formulation of an `effects' test, again leaving the existing s 46(1) unchanged (proposed change in bold italics):

> "46(1) A corporation that has a substantial degree of power in a market shall not take advantage of that power for the purpose of:
>
> (a) eliminating or substantially damaging a competitor of the corporation or of a body corporate that is related to the corporation in that or any other market;
> (b) preventing the entry of a person into that or any other market; or
> (c) deterring or preventing a person from engaging in competitive conduct in that or any other market."
>
> …
>
> ***"46(1B) A corporation that has a substantial degree of power in a market shall not take advantage of that power in a way that has the effect or likely effect of:***
>
> ***(a) substantially lessening competition in that or any other market;***
> ***(b) preventing the entry of a person into that or any other market; or***
> ***(c) deterring or preventing a person from engaging in competitive conduct in that or any other market***."

This formulation, which would be inserted as a new s 46(1B) in the existing s 46, is based on the existing s 46(1), but substitutes (i) an effects element for the purposes element, and (ii) a new paragraph (a) that removes the reference to competitors and replaces it with consideration of the conduct's impact on the level of competition in the relevant market. Most importantly, the existing s 46(1) would remain unchanged.

### 3.1.2 List of factors that could be used to assess an entity's conduct under an `effects' test

Given that NARGA views the insertion of an `effects' test as critical to enabling an objective assessment of the conduct and to bring about consistency with other provisions of Part IV of the *Trade Practices Act*, NARGA is mindful of the importance of providing as much guidance as possible on the workings of an `effects' test.

With this in mind, NARGA proposes that the insertion of an `effects' test be accompanied by the insertion of the following questions as a way of focusing attention on what should be considered when applying an `effects' test:

- Did the entity's market power facilitate or make it easier for the entity to engage in the conduct?
- Did the entity increase the supply of goods or services, or its capacity to produce or supply goods or services in an uneconomic manner in those markets in which it faces a smaller competitor?
- Did the entity reduce prices of goods or services in an uneconomic manner in those markets in which it faces a smaller competitor?
- Did the entity only engage in the conduct in those markets in which it faces a smaller competitor?
- What was the level of profitability attained by the entity having a substantial degree of market power in the market in which it engaged in the conduct as compared to its level of profitability in those markets in which it did not engage in the conduct?

These factors seek to provide an objective framework in which to assess the impact or effect of the conduct and, accordingly, may assist in the implementation of a much needed `effects' test under the *Trade Practices Act*.

**Recommendation 9:**

**NARGA proposes that an `effects' test be inserted into the existing s 46 of the *Trade Practices Act* as an alternative to the purpose element.**

## 3.2 Strengthening the existing purpose test in s 46 – the inclusion of a list of factors to assist in the identification of purpose

NARGA proposes that that the purpose test under the existing s 46 be strengthened by the inclusion of a list of factors regarding the identification of purpose. Such a list of factors would focus close attention on trying to identify the true purpose behind the conduct rather than simply undertake, as appears to be case with the existing purpose test under s 46, an assessment of the subjective intentions behind the conduct, no matter how self serving those intentions may be in the circumstances.

All too often, entities having a substantial degree of market power will typically seek advice as to how, having regard to the *Trade Practices Act*, they should characterize conduct they may engage in from time to time. Such advice would undoubtedly suggest that the entity should take particular care to identity and emphasize any pro-competitive aspects of the conduct. Clearly, such emphasis on identifying any pro-competitive aspects of the conduct is self-serving as it may be aimed at deflecting attention from what may truly be intended by the entity.

More importantly, any advice to an entity having a substantial degree of market power for it to focus on any pro-competitive aspects of the conduct is no doubt also intending to minimize the risk of legal proceedings under the purpose test under the existing s 46. Within this context, NARGA views the proposed list of factors as critical to a better understanding of the true motivations behind the conduct

While NARGA strongly supports the retention of the purpose element under s 46, NARGA is mindful of ensuring that the present difficulties in proving the `purpose' element are dealt with by the inclusion of a list of factors that guides the Court in determining what has motivated the conduct in question. Such factors could focus attention on whether the conduct was truly intended to be pro-competitive – that is, in the best interests of consumers, or whether the conduct was intended to punish, eliminate or

send a signal (for example, to a rival not to compete vigorously or for a supplier not to offer comparable or better deals to competitors). The factors are intended to provide some objective benchmark or framework for assessing the conduct in question. The existence or otherwise of the listed factors is not, of itself, conclusive evidence of a breach, but rather a mechanism for better understanding what has motivated the conduct in question.

The factors, which could be included in a new s 46(8), include:

- Whether the conduct was part of a policy adopted by the entity or whether it was an isolated occurrence;

If the conduct was part of a policy adopted by the entity;

- how was the policy developed and who was involved in its development;
- were there clear lines of authority in the implementation of the policy;
- was the policy publicly known;
- what was the stated intention of the policy;
- were there discrepancies between the stated intention of the policy and the behaviour of those giving effect to the policy;
- did the policy only target those markets in which the entity faced vigorous competition from a competitor;
- did the entity adhere to the terms of the policy;
- was the policy uniformly applied or only applied on an ad hoc basis;
- did the policy involve the entity selling goods or services at unreasonably low prices or below the cost of acquisition or production, plus normal selling costs;
- did the policy involve the entity requiring or encouraging another party to discriminate between comparable customers;
- was the policy used in an intimidating or coercive manner;
- was the policy in place since the entity's inception or was it formulated or implemented after the entity attained a substantial degree of market power;
- does the policy place the entity at a competitive advantage with respect to its rivals;
- what was the impact (or would be the likely impact) of the policy on the level of competition in any market in which the entity is a participant; and

- was the entity aware or in a position to be aware of this impact.

If the conduct involved an isolated occurrence:

- did the conduct occur only in those markets in which the entity faced vigorous competition from a competitor;
- did the entity sell goods or services at unreasonably low prices or below the cost of acquisition or production, plus normal selling costs;
- did the conduct involve requiring or encouraging another party to discriminate between comparable customers;
- was the conduct part of a pattern of conduct;
- how did the entity behave in similar circumstances in the past;
- was the conduct intimidating or coercive in nature;
- was the conduct engaged in since the entity's inception or was it engaged in after the entity attained a substantial degree of market power;
- did the conduct place the entity at a competitive advantage with respect to its rival;
- what was the impact (or would be the likely impact) of the conduct on the level of competition in any market in which the entity is a participant; and
- was the entity aware, or in a position to be aware, of this impact.

In short, the inclusion of a list of factors would be an attempt to introduce a level of objectivity in what has been a difficult issue.

**Recommendation 10:**

**NARGA proposes that that the purpose test under the existing s 46 be strengthened by the inclusion of a list of factors regarding the identification of purpose.**

## 3.3 Divestiture for repeated intentional breaches of the misuse of market power provision

NARGA notes the increasing concentration of Australian markets and is concerned that entities may become so large and powerful that the possibility of divestiture may become the only effective deterrence against repeated intentional abuses of market power. Even with the possibility of substantial monetary penalties or jail sentences, the time is fast approaching where a limited number of powerful entities may come to control large parts of the Australian economy. Faced with an entity that has no or very limited competitive constraints, it becomes essential to have a mechanism whereby the entity is broken up into competing parts.

NARGA proposes that a divestiture remedy be available to the Courts for possible use in cases of repeated intentional breaches of the misuse of market power provision of the *Trade Practices Act*. To ally any fears regarding the availability of such a remedy, NARGA proposes that the remedy be available only in those cases successfully brought by the ACCC for repeated intentional breaches of the misuse of market power provisions.

Given that the present s 46 focuses on intentional anti-competitive conduct by an entity having a substantial degree of market power, it is readily apparent that the present s 46 deals with unilateral abuses of market power. That is, the entity has such market power that it can use that power to eliminate competitors, deter entry into a market or deter competitive conduct. By aiming to achieve such purposes, the entity is clearly trying to lock in or cement its market dominance. If that entity will do anything to prevent threats to its market dominance, then there is no guarantee that it will behave in a pro-competitive manner towards customers. Consumers face the risk of higher prices and less service as the entity destroys competitors, prevents entry of new competitors or deters competitive conduct by competitors.

In short, if an entity with a substantial degree of market power cannot be constrained by competitive pressure from rivals or the possibility of new entrants, then it would be in the public interest for some other mechanism to be available to undo the anti-competitive effect of a highly concentrated market. There will be a point at which a market is so concentrated that the only way to deal with repeat perpetrators of anti-competitive conduct is to consider their break up. While clearly a dramatic remedy, it is for the court to determine where that point lies. At present, the courts do not have that opportunity and, accordingly, entities having a substantial degree of market power are only constrained by industry specific regulation or monetary penalties - penalties that, while appearing to be significant, pale into insignificance if the entity faces no competitive constraints.

While a divestiture power for breaches of s 46 may never be used, that in itself is no reason for not adding it as a remedy under the Trade Practices Act. Indeed, its mere addition as a remedy would send a clear signal to entities having a substantial degree of market power that it might come unstuck if it goes too far. Ideally, that should inject a degree of self-restraint that is presently missing in relation to possible breaches of s 46.

NARGA's proposal to give the ACCC the power to seek divestiture for repeated intentional breaches of s 46 focuses attention on the increasing levels of market concentration within Australia. Indeed, the *Trade Practices Act* relies on s 50 to prevent mergers that substantially lessen competition rather than providing a mechanism by which the Courts can review the level of market concentration and its impact on competition and consumers. Thus, at present the only real opportunity for considering the level of market concentration arises where a merger that has the potential to substantially lessening competition is proposed. It is at that point that the ACCC can take a broader look at market concentration and decide whether or not to oppose the merger. In doing so, the ACCC is presented with an opportunity to prevent further market concentration by disallowing the merger, or allowing it as part of a s 87B undertaking that requires divestiture of assets the ACCC considers would remove the merger's potential lessening of competition.

Apart from these merger opportunities, there are few other opportunities for dealing with market concentration issues. Even where those opportunities arise, for example in cases where an entity having a substantial degree of market power misuses that power, there is still no mechanism for dealing with a situation where markets have become too highly concentrated. Indeed, even with breaches of s 46 involving an entity that has come to dominate its market to such an extent that competitors offer no real constraint on its conduct, there is no mechanism by which a court can consider whether the entity's break up is the only effective way of reining in the entity. There may be instances, as accepted in the United States, where the break up of the entity is the only effective way of dealing with entities that have become so large that they have no regard to normal competitive constraints. The level of market concentration may be so great that consumers are forever denied the benefits of a vigorously competitive market place.

Given such a denial of consumer benefits, it would be in the public interest to consider whether or not there should be a mechanism by which the level of market concentration is placed under the spotlight from time to time. Where there is no public detriment from the existing or foreseeable level of market concentration, then nothing would need to be done. Where however there is public detriment from the existing or foreseeable level of market concentration, then mechanisms should be available to deal with or remove that detriment. Clearly, the level of public benefit or detriment should be the key criteria by which to evaluate any proposal to give the ACCC a power to seek divestiture for repeated intentional breaches of s 46.

**Recommendation 11:**

**NARGA proposes that a divestiture remedy be available to the Courts for possible use in cases of repeated intentional breaches of the misuse of market power provision of the *Trade Practices Act*.**

## 3.4 Collective bargaining by small businesses as a way of providing a degree of countervailing power against entities with a substantial degree of market power

NARGA proposes that a streamlined authorization process be implemented in relation to a collective bargaining arrangement involving entities not having a substantial degree of market power. Under NARGA's proposal such collective bargaining arrangement would, subject to ACCC disallowance within 21 days, have the immediate benefit of the immunity offered by an authorization. This immunity, unless withdrawn by the ACCC, would continue until overturned on appeal to the Australian Competition Tribunal.

NARGA's proposal is similar in nature to the existing notification procedures available in relation to exclusive dealing arrangements under s 47 of the *Trade Practices Act*. Those procedures enable, subject to ACCC disallowance, immediate immunity from legal proceedings under the *Trade Practices Act*. Under NARGA's proposal small businesses involved in collective bargaining arrangements would typically have immediate immunity, in turn, enabling them to offer some degree of countervailing power against entities having a substantial degree of market power.

NARGA's proposal is not a licence for small business to abuse the immediate immunity it would receive as the proposal makes clear provision for ACCC disallowance of the immediate protection.

Given that the independent small business sector is fragmented and, unable, because of the operation of the Act, to collectively bargain with dominant corporations who acquire their goods or services, or from whom they acquire goods or services, NARGA is a strong supporter of an authorization process that is user friendly and offers timely immunity from the Act for collective bargaining arrangements.

At present, a person or entity seeking an authorization does not gain immunity until such time as the ACCC grants the authorization. There may be a considerable period of time between the lodgment of the authorization application and the final grant of the authorization by the ACCC. In more recent times, there have been an increasing number of authorizations granted by the ACCC in relation to collective bargaining arrangements. Given that in many of these applications the ACCC has recognized the public benefit in allowing economically weak individual small business parties to collectively negotiate, NARGA's proposal to make immunity for collective bargaining arrangements immediately available upon application simply acknowledges the value, from a competitive point of view, of enabling small businesses to provide some semblance of countervailing power against entities having a substantial degree of market power. More importantly, such immunity should, subject to ACCC disallowance, be available sooner than is the case under the existing authorization process.

Having regard to the existing time consuming nature of the authorization process, NARGA is a strong advocate of an authorization process that allows entities without a substantial degree of market power (namely small businesses) to have, in relation to collective bargaining arrangements and subject to ACCC disallowance within 21 days, the immediate benefit of the immunity offered by the grant of an authorization by the ACCC. Under this model – very much like the existing notification procedures available in relation to s 47 of the *Trade Practices Act* - small businesses (entities not having a substantial degree of market power) applying for an authorization of a collective bargaining arrangement would upon application have immediate protection, subject only to the ACCC's ability to withdraw the protection within 21 days on the basis that the arrangement is of such an anti-competitive nature that a more thorough assessment is required as to whether or not the arrangement is sufficiently in the public interest. This more thorough assessment, where invoked by the ACCC, would take place as part of the ordinary course of an authorization application.

The model advocated by NARGA in relation to collective bargaining authorizations does not remove the ACCC's ability to protect the public interest, but rather to streamline the process and ensure timely immunity for collective bargaining arrangements under the

*Trade Practices Act*. Once the collective arrangement is protected by the authorization, NARGA strongly advocates that the protection remain in place until such time as it may be overturned on appeal by the Australian Competition Tribunal.

**Recommendation 12:**

**NARGA proposes that entities not having a substantial degree of market power be able to enter into a collective bargaining arrangement that, subject to ACCC disallowance, has immediate immunity under the *Trade Practices Act*.**

# DAWSON COMMITTEE
# TRADE PRACTICES ACT REVIEW

## NARGA SUBMISSION

## PART FOUR

## TRADE PRACTICES ADMINISTRATIVE REFORMS ADVOCATED BY NARGA

**PART FOUR: Summary of NARGA's trade practices administrative reforms**

**4.1 No need for a supervisory or advisory board to oversee the ACCC, but scope for ACCC Code of Conduct for Media Dealings;**

**4.2 Maintain current ACCC role in merger assessment, but fast track authorization process in merger cases;**

**4.3 Greater transparency in s 87B enforceable undertaking process;**

**4.4 Increased monetary penalties for anti-competitive conduct provisions;**

**4.5 Availability of jail sentences for intentional collusive conduct by entities having a substantial degree of market power;**

**4.6 Availability of a `Stop for Now' Notice (a cease and desist power) for dealing immediately with particularly detrimental anti-competitive conduct;**

**4.7 Provision for a substantial penalty for destroying or altering information evidencing a possible breach of the *Trade Practices Act*;**

**4.8 ACCC leniency policy to be prescribed as a regulation under the *Trade Practices Act*;**

**4.9 Strengthening of statutory protection for whistleblowers who inform ACCC of breaches of the *Trade Practices Act*;**

**4.10 ACCC to have the power to grant Block Authorizations for particular categories of conduct;**

**4.11 Globalisation of competition law enforcement**

# DAWSON COMMITTEE
# TRADE PRACTICES ACT REVIEW

## NARGA SUBMISSION

## PART FOUR

## OVERVIEW

In dealing with trade practices administrative reforms, NARGA is mindful of the critical role played by the ACCC in the enforcement of Part IV of the *Trade Practices Act*. NARGA fully supports an effective competition regulator and strongly opposes any attempt to muzzle or in any other way undermine the independence and effectiveness of the ACCC. Any concerns with the ACCC's use of the media can be dealt with by an ACCC Code of Conduct for Media Dealings and through Parliamentary oversight already in place through the House of Representatives Standing Committee on Economics, Finance and Public Administration. An ACCC Code of Conduct for Media Dealings, together with Court and Parliamentary oversight, would provide more than sufficient mechanisms for ACCC accountability and any suggestion of a supervisory or advisory board must be immediately questioned as an obvious attempt to put the poachers in charge of the gamekeeper.

Similarly, NARGA sees no need to change the ACCC's existing role in relation to mergers, but would support express recognition of small business, and rural and regional factors, in any assessment of the impact of a merger proposal. Importantly, the continued relevance of the authorization process in relation to mergers could be achieved through the streamlining of the authorization process in such cases and, in particular with the establishment of a dedicated ACCC Merger Authorization Taskforce or Unit.

Compliance with and enforcement of Part IV of the *Trade Practices* Act can be greatly assisted by increasing monetary penalties to emphasize turnover as a measure of an entity's capacity to pay. NARGA also views the availability of criminal penalties for

collusive conduct by entities having a substantial degree of market power, and clearer and stronger protection for whistleblowers, as integral to the ACCC's ability to stamping out anti-competitive conduct.

Finally, in a business world increasingly tending towards globalization, NARGA would strongly advocate that Australia take a leading role in promoting the globalization of competition law enforcement.

## 4.1 No need for a supervisory or advisory board to oversee the ACCC, but scope for ACCC Code of Conduct for Media Dealings

NARGA does not see any merit in the establishment of a supervisory or advisory board to oversee the ACCC. The ACCC has been established by the Federal Government (with the support of all States and Territories) as the independent enforcer of the *Trade Practices Act*.

There can be no doubt that the ACCC was established as an independent commission to eliminate the possibility of political or outside interference with its enforcement role. This independence is also intended to remove the risk of regulatory capture whereby the regulator is `captured' or influenced in the performance of its functions by those it was established to regulate. To establish a supervisory or advisory board over a currently independent enforcer runs the clear risk of introducing the possibility of political interference or regulatory capture.

Of course, no unelected body should escape scrutiny and the ACCC is no exception. It is only a question of the suitability of the type of accountability that is sought to be introduced. The ACCC is already accountable to the Parliament through parliamentary committees and Parliament's ability to give a direction under s 29 of the *Trade Practices Act*.

The ACCC is also accountable to the Federal Government (and the States and Territories) through the ability to appoint Commissioners. Commissioners already oversee the work done by the Commission through its staff and, within this context, it is important to note the different roles undertaken by Commissioners and Commission Staff.

Further, the ACCC is accountable to the Courts in all enforcement proceedings and, in appropriate circumstances, the Australian Competition Tribunal.

Where there are concerns with the ACCC's media dealings, then an ACCC Code of Conduct for Media Dealings can be formulated and made publicly available. This ACCC Code of Conduct for Media Dealings would set out the ground rules for the ACCC's use of the media in promoting trade practices education and compliance.

NARGA would strongly oppose proposals for the establishment of a supervisory or advisory board for the simple reason that such a board would amount to placing the poachers in charge of the gamekeeper. The gamekeeper (the ACCC) has been given a specific role by Federal Parliament to enforce, in the public interest, prohibitions against anti-competitive conduct (poaching). In these circumstances, any suggestion of putting the poachers (those who engage in anti-competitive conduct) in a supervisory or advisory position defeats the purpose of having an independent regulatory body (already accountable to the Courts and Federal Parliament) enforcing the Trade Practices Act without fear or favour.

Given that the ACCC is already accountable to the Courts in every legal proceeding that it launches and Federal Parliament (especially the House of Representatives Standing Committee on Economics, Finance and Public Administration), NARGA would be strongly opposed to any form of supervisory or advisory board.

Such accountability is strengthened through s 29 of the *Trade Practices Act* which already allows the relevant Federal Minister and the Parliament to direct the ACCC to furnish to the Parliament information regarding the ACCC's functions. That section provides:

> "29 Commission to comply with directions of Minister and requirements of the Parliament
>
> (1)The Minister may give the Commission directions connected with the performance of its functions or the exercise of its powers under this Act.

(1A)The Minister must not give directions under subsection (1) relating to:

(a)Part IIIA, IV,VII, X, XIB or XIC; or
(b)section 65J, 65K, 65M or 65N in relation to individual cases.

(1B)The Commission must comply with a direction.

(2)Any direction given to the Commission under subsection (1) shall be in writing and the Minister shall cause a copy of the direction to be published in the Gazette as soon as practicable after the direction is given.

(3) If either House of the Parliament or a Committee of either House, or of both Houses, of the Parliament requires the Commission to furnish to that House or Committee any information concerning the performance of the functions of the Commission under this Act, the Commission shall comply with the requirement."

With all the already available mechanisms for ensuring the accountability of the ACCC (including the oversight role the ACCC Commissioners themselves play over Commission staff) NARGA would see no merit in establishing a supervisory or advisory board. As a law enforcement body, the ACCC should be permitted to enforce the law without fear or favour and certainly free from any real or perceived outside influence. Surely, the very people that may be prosecuted by the ACCC must not be allowed any possible scope through a supervisory or advisory board to influence the direction of the ACCC's enforcement strategy.

Furthermore, on matters of ACCC policy such a supervisory or advisory board would not serve any additional functions to those already served by consultative committees having already been put in place by the ACCC to seek out business community feedback. These consultative committees meet regularly and already provide an extremely valuable forum for dialogue between the ACCC and the business community on policy issues.

### 4.1.1 ACCC Code of Conduct for Media Dealings

Where there are any concerns with the use of the Media by the ACCC, NARGA is confident that the existing accountability to Federal Parliament provides an appropriate mechanism for dealing with such concerns. NARGA is also confident that future concerns can be minimized by the ACCC making publicly available in one document the ground rules by which it adheres to in dealings with the media. This document could encapsulate a Code of Conduct for Media Dealings, setting out how the ACCC deals with the media. Any concerns with ACCC adherence to the Code of Conduct for Media Dealings could be raised with the House of Representatives Standing Committee on Economics, Finance and Public Administration.

The ACCC Code of Conduct for Media Dealings would, as a minimum, provide that the ACCC:

- would not generally publicize that a particular company or person is under investigation;
- where a particular company or person being investigated themselves publicly state that an ACCC investigation is taking place, the ACCC can, if asked by the media, choose to confirm or deny (as the case may be) that fact;
- where a company or person other than the company or person being investigated publicly states that they have lodged a complaint with the ACCC about that other company or person, the ACCC can, if asked by the media, choose to confirm or deny (as the case may be) that a complaint has been lodged;
- would generally only publicize a particular matter if legal proceedings in the matter have been launched or the matter has been settled; and
- would publicize the result of all legal proceedings irrespective of whether the ACCC wins or loses the matter in Court or Tribunal and publicize the result of all appeals in which the ACCC is involved.

This ACCC Code of Conduct for Media Dealings would provide for mediation (by a mediator agreeable to both parties) of any concerns that a company or person may have regarding the ACCC's adherence to the Code in any media dealings in relation to them. Both the ACCC and the particular company or person would refrain from any further public comment during the course of the mediation and, where the company or person remains dissatisfied with the ACCC media dealings, the company or person may bring the matter to the attention of the House of Representatives Standing Committee on Economics, Finance and Public Administration.

**Recommendation 13:**

**NARGA does not see any merit in the establishment of a supervisory or advisory board to oversee the ACCC.**

**Recommendation 14:**

**NARGA proposes that any concerns with the ACCC's media dealings can be dealt with by an ACCC Code of Conduct for Media Dealings that sets out the ground rules for the ACCC's use of the media in promoting trade practices education and compliance.**

## 4.2 Maintain current ACCC role in merger assessment, but fast track process in merger cases

NARGA strongly supports the ACCC's existing involvement in the assessment of merger proposals. The ACCC, as an independent expert body, is very well placed to make an assessment of whether or not the merger substantially lessens competition. Such involvement by the ACCC has worked extremely well in the past with the vast majority of merger proposals either not being a problem under the existing s 50 or the ACCC has accepted an enforceable undertaking from the merging parties enabling the merger to proceed. NARGA emphasizes that only a very small number of merger proposals have raised issues under the existing s 50. Within this context, NARGA is concerned that a very small percentage of so-called `problem' merger proposals have taken up so much of the discussion surrounding the reform of the *Trade Practices Act*. It must be remembered that these `problem' mergers are problems simply because the ACCC, as an independent expert body, considers that they may substantially lessen competition.

Given that these small numbers of mergers may be anti-competitive is an issue that is either overlooked or understated. The fact is that they may be in breach of a law enacted by the Australian Parliament. Even then, the law provides for the possible authorization of the merger. More importantly, the merging parties are able to have their day in Court if they feel the merger does not substantially lessen competition. Indeed, the ACCC is ultimately accountable to the Courts for its position on mergers. That the merging parties in a `problem' merger do not challenge the ACCC is arguably more a reflection of their recognition that the merger may be considered by a Court to substantially lessen competition. Once it is accepted that only a small number of mergers are prevented by the existing s 50 because they substantially lessen competition, it is readily apparent that attention in such a limited number of cases should focus on fast-tracking the authorization process in relation to mergers. The authorization process as an open and transparent process is the appropriate forum to first assess the public interest. The ACCC as an independent expert body is the appropriate body to first assess the public interest.

Accordingly, NARGA proposes the creation of a specialized ACCC merger authorization taskforce or unit that can be activated upon the lodgment of a merger authorization application. The ACCC Merger Authorization Taskforce or Unit would be available as a fast tracking mechanism in the very small number of merger cases that would otherwise breach s 50 because they substantially lessen competition. This fast tracking mechanism would provide a timely and transparent process in which any possible benefits to Australian consumers from an otherwise anti-competitive merger can be quickly identified and assessed.

The ACCC is currently responsible at first instance for assessing whether or not an acquisition (merger) substantially lessens competition. That role is vital for enabling an independent assessment to be made of the competitive impact of the acquisition (merger). In a vast majority of merger cases there is either no breach of the present s 50 or the ACCC accepts an undertaking under s 87B of the Act allowing an acquisition (merger) to proceed. Given that the vast majority of acquisitions (mergers) are not prevented by the present s 50, any suggestion that s 50 stands in the way of acquisitions (mergers) must be dismissed. Apart from the suggestion by NARGA that s 50 should be amended to deal with anti-competitive acquisitions and acknowledge the importance of small business and rural and regional issues, NARGA strongly supports the present role of the ACCC in merger cases.

In those very small number of cases in which s 50 prevents the acquisition (merger) because it substantially lessens competition, NARGA advocates the creation or the availability of an ACCC unit dedicated solely to assessing authorization requests in merger cases. This ACCC Merger Authorization Taskforce or Unit would be dedicated solely to assessing the public interest and be available to work towards a preliminary publicly available assessment of the public interest within 14 days of the lodgment of the merger authorization application, with a final grant or denial of an authorization within 21 days of the date of the application (unless the applicant seeks an extension).

The right of appeal to the Australian Competition Tribunal would remain unchanged except for a requirement that any application for review in merger cases be lodged within 7 days of the grant or denial of an authorization decision. NARGA would also propose that thought be given to placing a time restriction on the making of a decision by the Australian Competition Tribunal.

**Recommendation 15:**

**NARGA strongly supports the ACCC's continued involvement in the assessment of merger proposals under s 50 of the *Trade Practices Act*.**

**Recommendation 16:**

**NARGA proposes the creation of a specialized ACCC Merger Authorization Taskforce or Unit that can be activated upon the lodgment of a merger authorization application and be used as a fast tracking mechanism in the very small number of merger cases that would otherwise breach s 50 because they substantially lessen competition.**

## 4.3 Greater transparency in s 87B enforceable undertaking process

NARGA proposes that greater transparency be introduced into the s 87B enforceable undertaking process. At present, the s 87B undertaking process does not require that third parties be consulted, and while the ACCC will typically approach interested third parties there is no legislative timeframe provided for such consultation. This is particularly an issue in relation to merger proposals as the merging parties will try to place considerable time pressures on the ACCC's deliberations as to whether or not to accept the s 87B undertaking. In these circumstances, there is a real danger that the ACCC may truncate the consultation process with third parties.

This, of course, assumes that third parties will, when consulted by the ACCC, be in a position to provide an informed view on the proposed undertaking. Again, in a merger context the merging parties will impose confidentiality limitations on the material that can be viewed by third parties and, accordingly, third parties are often denied the opportunity to comment on any drafts of a proposed s 87B undertaking. While recognizing any legitimate claims to confidentiality, NARGA strongly believes that, subject to appropriate safeguards, third parties should have an opportunity to comment to the ACCC on the proposed s 87B undertaking. Such comment may be extremely valuable in assisting the ACCC in considering whether or not the proposed s 87B undertaking adequately deals with its competition concerns in relation to the proposed merger.

From the outset, NARGA commends the ACCC on the use of s 87B undertakings as a way of settling enforcement proceedings and for dealing with competition concerns in relation to proposed conduct or mergers. Clearly, s 87B undertakings have become a very important mechanism for promoting and enforcing the anti-competitive provisions of the *Trade Practices Act*. As a compliance tool, s 87B undertakings have been used quite effectively by the ACCC.

While acknowledging the usefulness of the s 87B undertakings, NARGA is mindful of those situations where third parties may have their interests affected by the proposed s 87B undertaking or may usefully comment on their content. In particular, NARGA points to the increasing use of s 87B undertakings in merger cases as an area that may benefit from third party consultation and comment. While at present such third party consultation may happen informally, the ACCC does not have a legislative mandate under s 87B to consult such affected or interested third parties. In the absence of such a mandate, there may be understandable reluctance on the part of the ACCC to formally engage in third party consultation.

NARGA proposes that the benefits of greater transparency and formal consultation with affected or interested third parties be recognized through appropriate amendments to s 87B requiring third party consultations in proposed s 87B undertakings, particularly in merger cases, and that sufficient time be allowed for such consultation. Of course, appropriate safeguards should also be introduced to deal with confidentiality issues.

**Recommendation 17:**

**NARGA proposes that greater transparency be introduced in the s 87B enforceable undertaking process.**

## 4.4 Increased monetary penalties for anti-competitive conduct provisions

NARGA proposes that monetary penalties under the *Trade Practices Act* be increased to a maximum of 10% of the entity's turnover. While the existing monetary penalties for a body corporate breaching Part IV of the *Trade Practices* Act are set at a maximum of $10 million per offence, it is apparent that they have not been an effective deterrent against continued breaches of the Part IV provisions. In practice, such a monetary penalty may pale into insignificance given the possibility of non-detection and the considerable sums of money potentially to be made from engaging in anti-competitive conduct.

Clearly, monetary penalties must provide sufficient deterrence against even the very largest entities. With such entities at times having turnovers in the billions of dollars range, it would not be surprising to find penalties in the millions of dollars range being scoffed at by our largest entities. Only penalties linked to an entity's capacity to pay can offer effective deterrence. Within a corporate context, capacity to pay may best be judged having regard to the entity's turnover

Given that there continue to be breaches of the prohibitions against anti-competitive conduct, it is readily apparent that existing monetary penalties under the Act do not provide sufficient deterrence against possible breaches of the Act. In these circumstances, NARGA is a strong advocate of setting monetary penalties by reference to a percentage of a corporation's group turnover. This percentage may be set at 10%, in line with the EU, and provides considerable deterrence to any corporation contemplating breaches of the Act or not taking adequate steps towards implementing an appropriate trade practices compliance program. It is particularly noteworthy that the setting of a penalty on a turnover basis is consistent with international practice. Clearly, Australia is currently out of step with international efforts to stamp out anti-competitive conduct.

### 4.4.1 International Precedent – United Kingdom

The United Kingdom *Competition Act* provides an example of where a maximum 10% turnover penalty has been imposed. The relevant provision is found in s 36 of the United Kingdom legislation and relevantly provides:

> "36. - (1) On making a decision that an agreement has infringed the Chapter I prohibition, the Director may require an undertaking which is a party to the agreement to pay him a penalty in respect of the infringement.
>
> (2) On making a decision that conduct has infringed the Chapter II prohibition, the Director may require the undertaking concerned to pay him a penalty in respect of the infringement.
>
> (3) The Director may impose a penalty on an undertaking under subsection (1) or (2) only if he is satisfied that the infringement has been committed intentionally or negligently by the undertaking.
> ...
>
> (6) Notice of a penalty under this section must-
>
> (a) be in writing; and
>
> (b) specify the date before which the penalty is required to be paid.
> …
> (8) No penalty fixed by the Director under this section may exceed 10% of the turnover of the undertaking (determined in accordance with such provisions as may be specified in an order made by the Secretary of State).
>
> (9) Any sums received by the Director under this section are to be paid into the Consolidated Fund."

NARGA commends this international precedent to the Committee.

**Recommendation 18:**

**NARGA proposes that monetary penalties under the *Trade Practices Act* be increased to a maximum of 10% of the entity's turnover.**

## 4.5 Jail sentences for intentional collusive conduct by entities having a substantial degree of market power

NARGA proposes that jail sentences be introduced into the *Trade Practices Act* for intentional collusive conduct by entities having a substantial degree of market power. Few would doubt that these types of conduct are amongst some of the most detrimental forms of anti-competitive conduct engaged in by entities having a substantial degree of market power. Not only are these types of conduct aimed at denying consumers choice in terms of price and supplier, but they are entered into by the participants as an way of raking in substantial sums of money from consumers – sums of money that they would not otherwise be entitled to in the ordinary course of events. Inevitably, consumers are ripped off in a major way, with participants extracting millions of dollars, if not billions worldwide, that they would not, in a competitive market, have otherwise been able to extract.

In short, these types of intentional collusive conduct are no different to any other form of organized crime in which the participants knowingly conspire to take money from others in circumstances where in the absence of the collusion or conspiracy they would not have been able to do so. Given that intentional collusive conduct by entities having a substantial degree of market power is another form of organized crime in which society as a whole is adversely affected, there can be no doubt that society has a legitimate interest in ensuring that such conduct is dealt with under the *Trade Practices Act* in the strongest possible terms.

The provision of adequate deterrence against anti-competitive conduct is a key issue in the enforcement of the Act, particularly in relation to entities having a substantial degree of market power. Without sufficient deterrence the task of enforcing the Act is made unnecessarily difficult. Given that the promotion of compliance is integral to effectiveness of the Act, NARGA is a strong supporter of any initiative aimed at providing clear deterrence against anti-competitive conduct, especially anti-competitive

conduct that is highly organized in its intention of ripping off consumers. NARGA views criminal penalties in cases involving intentional price fixing, market sharing and bid rigging by entities having a substantial degree of market power as essential to the promotion of compliance with the Act.

Without changes to the *Trade Practices* Act dealing with intentional collusive conduct by entities having a substantial degree of market power in the strongest possible way, it would not be surprising to find such conduct continuing unabated. There is simply too much money to be made from the conduct for monetary penalties (even penalties based on turnover) to offer a sufficient deterrent against such conduct. The possibility of jail sentences provides the clearest warning to entities having a substantial degree of market power that such conduct is not tolerated by society.

### 4.5.1 International precedents – United Kingdom and Canada

The United Kingdom is in the process of introducing criminal penalties for what are described as `cartel offences.' The changes are found in the *Enterprise Bill* currently before the House of Lords. Of the provisions in the *Enterprise Bill*, sections 183 and 185 are the most useful in illustrating the proposed criminalization of intentional collusive conduct. These provisions relevantly provide:

> "**183 Cartel Offence**
>
> (1) An individual is guilty of an offence if he dishonestly agrees with one or more other persons to make or implement, or to cause to be made or implemented, arrangements of the following kind relating to at least two undertakings (A and B).
>
> (2) The arrangements must be ones which, if operating as the parties to the agreement intend, would –

(a) directly or indirectly fix a price for the supply by A in the United Kingdom (otherwise than to B) of a product or service,

(b) limit or prevent supply by A in the United Kingdom of a product or service,

(c) limit or prevent production by A in the United Kingdom of a product,

(d) divide between A and B the supply in the United Kingdom of a product or service to a customer or customers,

(e) divide between A and B customers for the supply in the United Kingdom of a product or service, or

(f) be bid-rigging arrangements.

**185 Cartel offence: penalty and prosecution**

(1) A person guilty of an offence under section 183 is liable-

(a) on conviction on indictment, to imprisonment for a term not exceeding five years or to a fine, or to both;

(b) on summary conviction, to imprisonment for a term not exceeding six months or to a fine not exceeding the statutory maximum, or to both."

Canada treats bid rigging as a criminal offence. The relevant section of the Canadian *Competition Act* provides:

"47. (1) In this section, "bid-rigging" means

(a) an agreement or arrangement between or among two or more persons whereby one or more of those persons agrees or undertakes not to submit a bid in response to a call or request for bids or tenders, or

(b) the submission, in response to a call or request for bids or tenders, of bids or tenders that are arrived at by agreement or arrangement between or among two or more bidders or tenderers,

where the agreement or arrangement is not made known to the person calling for or requesting the bids or tenders at or before the time when any bid or tender is made by any person who is a party to the agreement or arrangement.

(2) Every one who is a party to bid-rigging is guilty of an indictable offence and liable on conviction to a fine in the discretion of the court or to imprisonment for a term not exceeding five years or to both.

(3) This section does not apply in respect of an agreement or arrangement that is entered into or a submission that is arrived at only by companies each of which is, in respect of every one of the others, an affiliate."

These international precedents are offered in support for the view that intentional collusive conduct is criminal in nature and treated as such in the competition laws of our western trading partners. In such circumstances, Australia is out of step with international best practice in this area.

**Recommendation 19:**

**NARGA proposes that Jail sentences be introduced into the *Trade Practices Act* for intentional collusive conduct by entities having a substantial degree of market power.**

## 4.6 Availability of a `Stop for Now' Notice (a cease and desist power) for dealing immediately with particularly detrimental anti-competitive conduct

NARGA proposes that the ACCC be given, subject to appropriate safeguards, the power to issue a `Stop for Now' Notice (a cease and desist power) for dealing immediately with particularly detrimental anti-competitive conduct. Such a `Stop for Now' Notice would, as the title suggests, require the recipient or recipients of the Notice to refrain from the conduct identified in the Notice as long as the Notice remains in force.

Under NARGA's proposal, a `Stop for Now' Notice would operate only for a maximum of six months, during which time the recipient or recipients can apply for an authorization of the identified conduct or provide a s 87B enforceable undertaking acceptable to the ACCC. In the event that no authorization application is lodged or s 87B enforceable undertaking given within three months of the date of the Notice, the ACCC would have a further three months in which to commence legal proceedings. Where the ACCC did not commence legal proceedings within the required time, the Notice would expire six months from the date of the Notice. Once ACCC legal action commences, however, the `Stop for Now' Notice would continue until such time as that legal action is completed and all appeals exhausted.

NARGA believes that its proposal strikes a balance between dealing swiftly with particularly detrimental anti-competitive conduct and allowing the recipient or recipients of a `Stop for Now' Notice the opportunity to have the conduct authorized (or otherwise approved), or have their day in Court. Naturally, if the ACCC does not commence legal proceedings within the required time period, the recipient or recipients of the Notice would be entitled to expect the Notice to lapse. Clearly, the provision of an expiry date for the `Stop for Now' Notice, together with the ability to seek judicial review of the ACCC's decision to issue the Notice, would provide ample accountability in their use and, more importantly, would prevent any possible misuse of such Notices.

NARGA fully supports giving the ACCC the power to deal swiftly with anti-competitive conduct as an interim measure. In doing so, NARGA is mindful that a balance needs to be struck between preventing the irreparable damage that may flow from anti-competitive conduct and enabling allegedly anti-competitive conduct to be approved in the public interest or tested before Courts. Accordingly, it is readily apparent that such a cease and desist power must be subject to appropriate safeguards and strict time limitations.

Having regard to the need to strike a balance between protecting the public interest and giving a person the opportunity to seek approval of the particular conduct or have their day in Court, NARGA proposes that the ACCC be able to issue a `Stop for Now' Notice. This notice would, while the Notice remains in force, operate to prevent the recipient or recipients from engaging in the conduct identified in the Notice.

In particular, NARGA would advocate that the ACCC be able to issue a `Stop for Now' Notice in relation to unilateral conduct if it is of the opinion that the conduct of an entity having a substantial degree of market power has or is likely to have the effect of:

- eliminating, substantially damaging or strategically targeting a smaller competitor;
- preventing entry into a market;
- deterring or preventing a person from engaging in competitive conduct; or
- substantially lessening competition.

Similarly, NARGA would in relation to collusive conduct advocate that the ACCC be able to issue a `Stop for Now' Notice if it is of the opinion that the conduct of two or more entities having a substantial degree of market power has or is likely to have the effect of substantially lessening competition.

Once the `Stop for Now' Notice has been issued, the recipient or recipients have three months in which to lodge an authorization application or provide a s 87B enforceable undertaking. If no authorization application is lodged or s 87B undertaking given within three months of the date of the Notice, then the ACCC has a further three months in

which to commence legal proceedings. If an authorization application is lodged, then the Notice will remain in force until such time as the authorization application is finally decided and any review application decided by the Australian Competition Tribunal decided.

Where no legal proceedings are commenced by the ACCC within six months, the Notice will cease to have effect after six months from the date of the Notice. If the ACCC commences legal proceedings within the six months, the Notice will remain in force until the proceedings are finally decided and all appeals exhausted.

Within the provision of clear parameters for the use of a `Stop for Now' Notice, NARGA believes that such Notices will play a critical part in the enforcement of the *Trade Practices Act* without preventing conduct that is in the public interest or preventing those allegedly engaging in the conduct from having their day in Court either through action commenced by the ACCC or through judicial review proceedings challenging the ACCC's issue of the Notice.

### 4.6.1 International precedents – United Kingdom and Canada

The United Kingdom *Competition Act* gives the Director General of Fair Trading in cases of urgency and, subject to certain safeguards, the ability to issue, as an interim measure, any direction the Director sees fit to prevent serious, irreparable damage to a person or category of person or to protect the public interest.

> "35. - (1) This section applies if the Director-
>
> (a) has a reasonable suspicion that the Chapter I prohibition has been infringed, or
> (b) has a reasonable suspicion that the Chapter II prohibition has been infringed,
>
> but has not completed his investigation into the matter.

(2) If the Director considers that it is necessary for him to act under this section as a matter of urgency for the purpose-

(a) of preventing serious, irreparable damage to a particular person or category of person, or
(b) of protecting the public interest,

he may give such directions as he considers appropriate for that purpose.

(3) Before giving a direction under this section, the Director must-

(a) give written notice to the person (or persons) to whom he proposes to give the direction; and
(b) give that person (or each of them) an opportunity to make representations.

(4) A notice under subsection (3) must indicate the nature of the direction which the Director is proposing to give and his reasons for wishing to give it.

(5) A direction given under this section has effect while subsection (1) applies, but may be replaced if the circumstances permit by a direction under section 32 or (as appropriate) section 33.

(6) In the case of a suspected infringement of the Chapter I prohibition, sections 32(3) and 34 also apply to directions given under this section.

(7) In the case of a suspected infringement of the Chapter II prohibition, sections 33(3) and 34 also apply to directions given under this section."

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Canada has also made detailed provision for the issue of `temporary orders' by the Canadian Commissioner for Competition in appropriate cases. The relevant provision is s 104.1 of the Canadian *Competition Act*:

> 104.1 (1) The Commissioner may make a temporary order prohibiting a person operating a domestic service, as defined in subsection 55(1) of the Canada Transportation Act, from doing an act or a thing that could, in the opinion of the Commissioner, constitute an anti-competitive act or requiring the person to take the steps that the Commissioner considers necessary to prevent injury to competition or harm to another person if
>
> (a) the Commissioner has commenced an inquiry under subsection 10(1) in regard to whether the person has engaged in conduct that is reviewable under section 79; and
> (b) the Commissioner considers that in the absence of a temporary order
> (i) injury to competition that cannot adequately be remedied by the Tribunal is likely to occur, or
>
> (ii) a person is likely to be eliminated as a competitor, suffer a significant loss of market share, suffer a significant loss of revenue or suffer other harm that cannot be adequately remedied by the Tribunal.
>
> (2) The Commissioner is not obliged to give notice to or receive representations from any person before making a temporary order.
>
> (3) On making a temporary order, the Commissioner shall promptly give written notice of the order, together with the grounds for it, to every person against whom it was made or who is directly affected by it.
>
> (4) Subject to subsections (5) and (6), a temporary order has effect for 20 days.

(5) The Commissioner may extend the 20-day period for one or two periods of 30 days each or may revoke a temporary order. The Commissioner shall promptly give written notice of the extension or revocation to every person to whom notice was given under subsection (3).

(6) If an application is made under subsection (7), the temporary order has effect until the Tribunal makes an order under that subsection.

(7) A person against whom the Commissioner has made a temporary order may, within the period referred to in subsection (4), apply to the Tribunal to have the temporary order varied or set aside and the Tribunal shall

(a) if it is satisfied that one or more of the conditions set out in paragraph (1)(b) existed or are likely to exist, make an order confirming the temporary order, with or without variation as the Tribunal considers necessary and sufficient to meet the circumstances, and fixing the effective period of its order for a maximum of 60 days after the day on which it is made; and

(b) if it is not satisfied that one or more of the conditions set out in paragraph (1)(b) existed or are likely to exist, make an order setting aside the temporary order.

(8) The applicant shall give written notice of the application to every person to whom notice was given under subsection (3).

(9) In the event of an application under subsection (7), the Commissioner is the respondent.

(10) At the hearing of an application under subsection (7), the Tribunal shall provide the applicant, the Commissioner and any person directly affected by the temporary order with a full opportunity to present evidence and make representations before the Tribunal makes an order under that subsection.

(11) Except as provided for by subsection (7),

(a) a temporary order made by the Commissioner shall not be questioned or reviewed in any court; and

(b) no order shall be made, process entered or proceedings taken in any court, whether by way of injunction, certiorari, mandamus, prohibition, quo warranto, declaratory judgment or otherwise, to question, review, prohibit or restrain the Commissioner in the exercise of the jurisdiction granted by this section.

(12) The making of a temporary order does not in any way limit, restrict or qualify the powers, duties or responsibilities of the Commissioner under this Act, including the Commissioner's power to conduct inquiries and to make applications to the Tribunal in regard to conduct that is the subject of the temporary order.

(13) The Commissioner shall file each temporary order with the Registry of the Tribunal. Once registered, the order is enforceable in the same manner as an order of the Tribunal.

(14) When a temporary order is in effect, the Commissioner shall proceed as expeditiously as possible to complete the investigation arising out of the conduct in respect of which the temporary order was made.

(15) No action lies against Her Majesty in right of Canada, the Minister, the Commissioner, any Deputy Commissioner, any person employed in the public service of Canada or any person acting under the direction of the Commissioner for anything done or omitted to be done in good faith under this section.”

NARGA offers these international precedents as recognition of the importance of giving the competition regulator the power to deal swiftly with anti-competitive conduct that can cause irreparable damage to victims of such conduct. Such a power, however, must be subject to appropriate safeguards, a point clearly recognized in the international precedents.

**Recommendation 20:**

**NARGA proposes that the ACCC be given, subject to appropriate safeguards, the power to issue a `Stop for Now' Notice (a cease and desist power) for dealing immediately with particularly detrimental anti-competitive conduct.**

## 4.7 Provision for a substantial penalty for destroying or altering information evidencing a possible breach of the *Trade Practices Act*

NARGA proposes that a substantial penalty be imposed for destroying or altering information evidencing a possible breach of the *Trade Practices Act*. This would send a clear message to the business community that destruction or falsification of documents will not be tolerated. Recent corporate experience demonstrates that entities are tempted to destroy or even falsify possibly incriminating documents. Such practices may hinder or prevent investigations into possible breaches of the *Trade Practices Act* and should be dealt with in the strongest possible terms, including possible jail sentences.

NARGA proposes that the *Trade Practices Act* should provide for substantial penalties, including possible jail sentences to be imposed in relation to the destruction or falsification of documents evidencing a breach or possible breach of the *Trade Practices Act*. Such conduct is intentional and undoubtedly aimed at covering up possible breaches of the *Trade Practices Act*. As intentional conduct aimed at avoiding detection or enforcement action, such conduct must be dealt with in the strongest possible terms. In providing for the imposition of substantial penalties a clear message is sent to the business community that the destruction or falsification of documents will not be tolerated.

### 4.7.1 International precedent – The United Kingdom and Canada

Under s 43 of the United Kingdom's *Competition Act* it is an offence to destroy or falsify documents requested by the Director General of Fair Trading as part of an investigation under that Act. That section relevantly provides:

> "43. - (1) A person is guilty of an offence if, having been required to produce a document under section 26, 27 or 28-

(a) he intentionally or recklessly destroys or otherwise disposes of it, falsifies it or conceals it, or

(b) he causes or permits its destruction, disposal, falsification or concealment.

(2) A person guilty of an offence under subsection (1) is liable-

(a) on summary conviction, to a fine not exceeding the statutory maximum;

(b) on conviction on indictment, to imprisonment for a term not exceeding two years or to a fine or to both."

A similar provision is found in s 65(3) of the Canadian *Competition Act*:

"(3) Every person who destroys or alters, or causes to be destroyed or altered, any record or other thing that is required to be produced pursuant to section 11 or in respect of which a warrant is issued under section 15 is guilty of an offence and liable

(a) on summary conviction to a fine not exceeding twenty-five thousand dollars or to imprisonment for a term not exceeding two years or to both; or

(b) on conviction on indictment to a fine not exceeding fifty thousand dollars or to imprisonment for a term not exceeding five years or to both."

NARGA points to these international precedents in support of its proposal to provide for substantial penalties, and even jail sentences, for the destruction or falsification of documents.

**Recommendation 21:**

**NARGA proposes that a substantial penalty be imposed for destroying or altering information evidencing a possible breach of the *Trade Practices Act*.**

## 4.8 ACCC leniency policy to be prescribed as a regulation under the *Trade Practices Act*

NARGA proposes that the ACCC's leniency policy be prescribed as a regulation under the *Trade Practices Act*. In doing so, NARGA is mindful that (i) as an administrative policy developed by the ACCC, there may be issues as to the binding nature of that policy, and (ii) as a regulation the policy would need to be tabled in Federal Parliament, thereby providing a valuable opportunity for Parliamentary oversight.

In short, NARGA fully supports a leniency policy that has been subject to Parliamentary oversight as a valuable tool to securing first hand evidence in support of enforcement action under Part IV of the *Trade Practices Act*. Such evidence is often difficult to secure for the simple reason that potential whistleblowers having been involved in breaches of the *Trade Practices* Act fear the consequences of coming forward to admit the contravention.

Clearly, a balance needs to be struck between offering immunity to those who have breached the law and the public interest in successfully pursuing and stamping out anti-competitive conduct. While the ACCC, as an independent expert body is well placed in developing workable guidelines, Federal Parliament is best placed to make an assessment as to the public interest.

Importantly, Federal Parliament's ability to disallow the regulation upon tabling places the policy under the parliamentary spotlight and introduces a valuable element of accountability in relation to the policy. Once a regulation under the *Trade Practices Act*, whistleblowers can be assured of the binding nature of the policy and can come forward in the secure knowledge that if they come within the policy they will be able to rely on its protection.

NARGA views an ACCC leniency policy as a critical element in any enforcement strategy. Without first hand evidence from participants in the anti-competitive conduct the ACCC is left to uncover contraventions of the *Trade Practices Act* through indirect means or to prove such contraventions through the drawing of inferences from available evidence.

Clearly, if the ACCC were able to have the benefit of first hand evidence from a whistleblower involved in the contravention, then the ACCC investigation would be a much more efficient, targeted process. The whistleblower would know the particulars of the contravention and would be extremely useful in assisting the ACCC with its investigation.

Naturally, whistleblowers that may themselves have been involved in the contravention would want to be secure in the knowledge that they would be adequately protected from legal proceedings if they came forward. While such assurances could be provided administratively by the ACCC, it is important that there be no doubt as to the binding nature of the leniency policy itself. Such assurance as to the binding nature of the leniency policy could be provided by prescribing the leniency policy as a regulation under the *Trade Practices Act*.

By prescribing the policy as a regulation under the *Trade Practices Act*, the policy would be required to be tabled in Federal Parliament. Such a process would inject an element of accountability as Parliament would have the ability to disallow the regulation. Where a regulation is in fact disallowed, Parliament would have the opportunity to explain its reasons which in turn would assist in the reworking or fine-tuning of the policy for future prescription under the *Trade Practices Act* and tabling in Federal Parliament. Where the regulation is not disallowed, there is the additional confidence that the public interest associated with the leniency policy has been considered and given parliamentary support.

**Recommendation 22:**

**NARGA proposes that the ACCC's leniency policy be prescribed as a regulation under the *Trade Practices Act*.**

## 4.9 Strengthening of statutory protection for whistleblowers who inform ACCC of breaches of the *Trade Practices Act*

NARGA proposes that the statutory protection for whistleblowers who inform the ACCC of breaches of the *Trade Practices Act* be considerably strengthened.

Given the difficulties of securing evidence to substantiate breaches of the *Trade Practices Act*, it is readily apparent that whistleblowers can play an extremely valuable role in the enforcement of competition laws.

NARGA proposes that the *Trade Practices Act* be amended to enable the identity of the whistleblower to be kept confidential (where requested by the whistleblower) and to protect, in appropriate circumstances, an employee whistleblower from being dismissed, suspended, demoted, disciplined, harassed or otherwise disadvantaged or denied a benefit of employment.

The protection currently provided under the *Trade Practices Act* for those giving evidence is somewhat limited in scope. For example, some protection is provided under s 162A of the *Trade Practices Act*:

> "162A. Intimidation etc.
>
> A person who:
>
> (a) threatens, intimidates or coerces another person; or
> (b) causes or procures damage, loss or disadvantage to another person;
>
> for or on account of that other person proposing to furnish or having furnished information, or proposing to produce or having produced documents, to the Commission or to the Tribunal or for or on account of the

other person proposing to appear or having appeared as a witness before the Tribunal is guilty of an offence punishable on conviction by a fine not exceeding 20 penalty units or imprisonment for 12 months.

Note 1: Chapter 2 of the Criminal Code sets out the general principles of criminal responsibility.

Note 2: Part IA of the Crimes Act 1914 contains provisions dealing with penalties."

NARGA notes that this provision does not operate to protect the identity of the whistleblower nor an employee whistleblower within their employment context. If whistleblowers are to be protected against the considerable risks to them personally and their career, then further specific statutory protection must be afforded to them. Employee whistleblowers often have very credible, first hand experience of the entity's wrongdoing and such evidence may be crucial in bringing successful proceedings against the entity under the *Trade Practices Act*.

**4.9.1 International precedent - Canada**

NARGA points to the Canadian *Competition Act* as providing an appropriate international precedent in support of its proposal for strengthening the statutory protection for whistleblowers. The relevant provisions state

"66.1 (1) Any person who has reasonable grounds to believe that a person has committed or intends to commit an offence under the Act, may notify the Commissioner of the particulars of the matter and may request that his or her identity be kept confidential with respect to the notification.

(2) The Commissioner shall keep confidential the identity of a person who has notified the Commissioner under subsection (1) and to whom an assurance of

confidentiality has been provided by any person who performs duties or functions in the administration or enforcement of this Act.

66.2 (1) No employer shall dismiss, suspend, demote, discipline, harass or otherwise disadvantage an employee, or deny an employee a benefit of employment, by reason that

(a) the employee, acting in good faith and on the basis of reasonable belief, has disclosed to the Commissioner that the employer or any other person has committed or intends to commit an offence under this Act;

(b) the employee, acting in good faith and on the basis of reasonable belief, has refused or stated an intention of refusing to do anything that is an offence under this Act;

(c) the employee, acting in good faith and on the basis of reasonable belief, has done or stated an intention of doing anything that is required to be done in order that an offence not be committed under this Act; or

(d) the employer believes that the employee will do anything referred to in paragraph (a) or (c) or will refuse to do anything referred to in paragraph (b).

(2) Nothing in this section impairs any right of an employee either at law or under an employment contract or collective agreement.

(3) In this section, "employee" includes an independent contractor and "employer" has the corresponding meaning.”

NARGA commends this international precedent to the Committee.

**Recommendation 23:**

**NARGA proposes that the statutory protection for whistleblowers who inform the ACCC of breaches of the *Trade Practices Act* be considerably strengthened.**

## 4.10 ACCC to have the power to grant Block Authorizations for particular categories of conduct

NARGA proposes that the *Trade Practices Act* be amended to allow for ACCC block authorization of particular categories of conduct.

The authorization process could be greatly simplified if the ACCC could authorize a particular category of conduct that may be engaged in by different entities or groups rather than requiring each of those entities or groups to apply separately for an authorization.

Under this proposal, it would not matter who in fact was engaging in the conduct as the block authorization would operate to grant immunity in relation to the particular type of conduct.

NARGA supports a proposal to allow the ACCC to be able to grant an authorization of particular types of conduct rather than requiring each party intending to engage in the conduct to separately lodge an authorization. Given that there is a fee associated with the lodging of an authorization, there is a considerable cost saving from a business point of view from a particular type of conduct being authorized as part of one process or application.

A block authorization process would also give rise to efficiency benefits from an ACCC point of view as the ACCC would only need to deal with one process or application relating to the particular conduct rather than dealing with separate applications from each entity or group intending to engage in the conduct.

### 4.10.1 International precedents

The United Kingdom has introduced a procedure whereby a block exemption can, subject to certain qualifications be granted in relation particular categories of conduct. The availability of a block exemption is provided for by s 6 of the *Competition Act (UK)*:

> "6. - (1) If agreements which fall within a particular category of agreement are, in the opinion of the Director, likely to be agreements to which section 9 applies, the Director may recommend that the Secretary of State make an order specifying that category for the purposes of this section.
>
> (2) The Secretary of State may make an order ("a block exemption order") giving effect to such a recommendation-
>
> (a) in the form in which the recommendation is made; or
> (b) subject to such modifications as he considers appropriate.
>
> (3) An agreement which falls within a category specified in a block exemption order is exempt from the Chapter I prohibition.
>
> (4) An exemption under this section is referred to in this Part as a block exemption.
>
> (5) A block exemption order may impose conditions or obligations subject to which a block exemption is to have effect.
>
> (6) A block exemption order may provide-
>
> (a) that breach of a condition imposed by the order has the effect of cancelling the block exemption in respect of an agreement;

(b) that if there is a failure to comply with an obligation imposed by the order, the Director may, by notice in writing, cancel the block exemption in respect of the agreement;

(c) that if the Director considers that a particular agreement is not one to which section 9 applies, he may cancel the block exemption in respect of that agreement.

(7) A block exemption order may provide that the order is to cease to have effect at the end of a specified period.

(8) In this section and section 7 "specified" means specified in a block exemption order."

This block exemption procedure complements an individual exemption procedure provided for in s 4 of the *Competition Act (UK)* in much the same way that NARGA's proposed block authorization procedure would complement the existing authorization procedure available under the *Trade Practices Act*.

**Recommendation 24:**

**NARGA proposes that the *Trade Practices Act* be amended to allow for ACCC block authorization of particular categories of conduct.**

## 4.11 Globalisation of competition law enforcement

NARGA proposes that Australia takes appropriate steps to promote the development of a multi-lateral international competition law and enforcement framework.

Increasing globalisation of business requires globalisation of competition laws.

Unless competition laws and their enforcement transcend national jurisdiction there is a very real risk that national laws will become increasingly impotent in stamping out anti-competitive conduct at an international level.

NARGA strongly advocates Australia taking whatever international initiatives it can in actively promoting a multi-lateral competition law framework. It is readily apparent that conduct undertaken or agreed upon at an international level can impact across a number of national jurisdictions. Individually, competition regulators in such jurisdictions are typically only able to deal with aspects of the conduct or agreement affecting their particular jurisdiction. This may lead to inconsistent enforcement action as between jurisdictions, or at worse, a lack of treatment in those jurisdictions not having an effective competition regulator.

Clearly, anti-competitive conduct or agreements at an international level will not just impact on the price of goods or services in one market, but may also have a knock on effect on other markets for goods or services. For example, a price fix in a market for component parts for another product will inevitably lead to higher prices for that integrated product. Consumers lose out from less competitive prices.

International anti-competitive conduct or agreements impact on Australian consumers and, accordingly, Australia has a clear interest in actively promoting or being involved in any multi-lateral competition law and enforcement initiatives.

**Recommendation 25:**

**NARGA proposes that Australia takes appropriate steps to promote the development of a multi-lateral international competition law and enforcement framework.**

# TERMS OF REFERENCE

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

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

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

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

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

1. The Committee is to review the operation of the competition and authorisation provisions of the Act, specifically Parts IV (and associated penalty provisions) and VII, to determine whether they:

(a) inappropriately impede the ability of Australian industry to compete locally and internationally;

(b) provide an appropriate balance of power between competing businesses, and in particular businesses competing with or dealing with businesses that have larger market concentration or power;

(c) promote competitive trading which benefits consumers in terms of services and price;

(d) provide adequate protection for the commercial affairs and reputation of individuals and corporations (in this regard, the Committee may examine the processes followed by the ACCC and the laws under which the ACCC operates, but is not to reconsider the merits of past individual cases);
(e) allow businesses to readily exercise their rights and obligations under the Act, consistent with certainty, transparency and accountability, and use compliance or authorisation processes applicable to their circumstances; and
(f) are flexible and responsive to the transitional needs of industries undergoing, or communities affected by, structural and/or regulatory change and to the requirements of rural and regional areas.

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

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

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

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

The Committee is to report by end of November 2002.