Submission

Trade Practices Act Review

Senator the Hon Ron Boswell

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OVERVIEW

I address the review of the Trade Practices Act Part 1V from the perspective of an effective Trade Practices Act for the current and future needs of rural and regional Australia. The continuation of viable small businesses and primary producers are extremely important to regional and rural communities and their economies.

The Terms of Reference provide for a balanced input for the concerns of both big and small business. As noted in the government's program in the Governor General's address

" The proposed review of the competition provisions of the Trade Practices Act, and their administration, will examine whether they adequately encourage growth and international competitiveness, protect the balance between small and large business and support the growth of regional business."

The National Party in the speech of the Deputy Prime Minister, the Hon. John Anderson to the Press Club in August 2002 referred to the work program of the next term of government as being " across a range of policy areas where the divide is still most keenly felt- for example in competition between small business and large…"[1]

Australian business today operates under very changed circumstances. The domestic influences of competition policy reforms seek out anti competitive conduct balanced by the public benefit while there is great fluidity in businesses from the further influences of globalisation and trade and market liberalisation, plus increased privatisation.

[1] "Bridging the Divide" Speech by John Anderson MP Albury 15 June 2001

ADMINISTRATION

From the initial announcement of the terms of reference of the Review it has concerned me that big business has very publicly adopted the approach of a continued and concerted attack on the ACCC and Professor Fels. I believe this has introduced a completely unacceptable influence on the public perspective of the review, providing a disservice to the majority of Australians and to small business, and has been a poor lead- in to this Review.

Oversight of the ACCC

Big business is promoting the need for a Board of review to oversee the ACCC.

For example, Roger Corbett CEO Woolworths in BRW July 4-10 2002 proposed a board of management above the commission, which should include people with commercial law experience, and business experience and possibly a consumer representative.
The BCA goes further and proposes an Investigator General of Complaints against the ACCC.

At present Australia has an independent and wholly publicly funded Chairman and Commission Consequently the Chainman and Commission are able to operate at arms length from any matter and totally devoid of any monetary interest in the outcome of their decisions. Such a Board as proposed would oversee an independent Regulator and personnel but would by its composition consist of persons with interests in the business community, who would in effect become the final determiners on issues that affect their interests. This is contrary to the concept of judicial review and administrative review, which provides for an objective appeal process. Similarly in a process that is based on legal/economics criteria the same safeguards provided by the legal system should be involved. A Review Board would introduce for the first time decisions, which could involve a conflict of interest with board members' business interests or that of their competitors, differences of opinion on business theory and operational perspective and would not be able to guard against the possibility of self-interest.

Trade Practices administration has moved on from the earlier days of a less transparent relationship between the Commission and big businesses. The

trend for continued scrutiny by the Tribunal and Courts and Parliament of the ACCC should continue and is the most appropriate method of review. This review process provides an accessible, thorough and arms length review process. It is a far more appropriate form of accountability for a public interest body than accountability through a Board consisting of businesses that are potential parties to actions before the ACCC.

An independent and fearless regulator is critically important in a country like Australia with its small population and concentrated markets. Australia in these aspects is very different to the large markets of other countries like the United States and Europe. The comparatively small number of big businesses in Australia, which by their nature are the businesses under scrutiny by the ACCC necessitates the need for a strong independent and transparently accountable regulator, which can act without fear or favour towards all sectors of the economy. A Board including business people would introduce a totally changed non-independent and non-objective process of review, opening up appeals from and allegations of partisan decision making from other businesses.

I oppose any Inspector General of Competition as proposed by the BCA. It adds another layer and lengthens unnecessarily the final decision of the ACCC, leading to longer periods of uncertainty for business.

Australian big business does not need its own complaints “Ombudsman” or Judge of the Regulator. The position should not be publicly funded and would be compromised if it were to be industry funded. Australian business has access to and the means to access the Tribunal or courts for any allegations of illegal or administrative errors.

I also put it on the public record through this submission that in the lead up to the Review big business, in attacking Fels, have adopted the stance of playing the man and not the ball. Big business has been engaged in a concerted attack on the ACCC and the Chairman with a main game of undermining within the community the ACCC and its chairman Professor Fels. Ironically I see these bullying and collusive tactics as part of the overall conduct that the Trade Practices Act and ACCC are there to oversee.

Recommendation 1:

There is no need for a further layer of a Review Board or an Inspector General. A Board should not be created to be composed of business people whose general interests it would be reviewing. The present review and accountability processes for the Australian Competition Commission, through the Australian Competition Tribunal and the Courts are adequate to ensure that the ACCC does not act contrary to the law. Furthermore Parliamentary Reporting through Estimates twice a year allows a very broad range of questioning and scrutiny, as does regular Parliamentary scrutiny through the House of Representatives Committee on Economics, Finance and Public Administration.

RURAL AND REGIONAL AUSTRALIA –

Regional and Rural Australia depends on the continued presence and viability of small businesses, primary producers and their processors. The mainstays of rural and regional towns are small businesses, for the business opportunities they provide, the locally based employment opportunities and the service they are able to provide for the particular circumstances of their Local area. The loss of smaller independent businesses in country towns has a snowballing effect, removing other businesses and employment from the area.

Small towns have noticed as the chains have expanded into other retail areas over time, the closure of their small businesses as butchers green grocers and bakers have had their business area integrated into the chains' supermarkets core businesses. Chains plans include for the further expansion into " bolt on " businesses whether they be florist, photocopying and photographic all the way to petrol and financial services.

While this can add to the provision of services and can lead to consumer price benefits, it should take place fairly and not through any anti competitive practices
local area. The loss of smaller independent businesses in country towns has a snowballing effect, removing other businesses and employment from the area.

Nevertheless it does have a deleterious and irreversible effect on rural and regional town The loss not only includes the loss of the business but the removal of the other economic and non economic benefits it provides to the town as part of the local community. These range from employment and use of local suppliers and service people, or the service that as provided through the existence of a small local supermarket prior to the deregulation of shopping hours and its use of locally sourced produce, to contributions to local community activities and charities.

The next effect is further decline of small towns as local businesses close is that as local people either are forced to travel to shop they choose to do all their business in sponge cities, the largest closest country town. as noted by the Productivity Report on the Impact of Compeition Policy Reforms on Rural and Regional Australia.

Small business in rural and regional towns needs an effective and accessible trade practices regime that will act against anti competitive conduct when it is unfairly attacks their businesses.

They need provisions that are strong and supportive enough that big business knows they cannot get away with breaches and that provide certainty and speedy accessibility to remedies. The present operation of remedy for misuse of market power under section 46 does not do this

It also depends on an effective, strong and independent regulator.

For regional and rural sectors the important requirements of the Trade Practices Act are:

1. That it provides access for effective remedies under the misuse of market power provision in s. 46

2. it allows for a speedy process for collective negotiations of like commercial activities when dealing with large concentrated customers or suppliers:

3.and does not permit the buyers to grow to disportionately dominate the market distorting bargaining power through creeping acquisitions or any weakening of the present mergers test.

SECTION 46 – MISUSE OF MARKET POWER

Terms of Reference 1. (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.

Section 46 does not provide ease of access to effective remedies for the present problems experienced by smaller businesses competing with large concentrated competitors. There is an increasing concentration of business creating an increasing ability for such competitors or buyers to use their strength through the many available means that flow from the present imbalance of market power between the large and the small.

The main problem with section 46 is that it has proved itself to be very difficult for small business to prove "purpose."

The purpose test, which involves proof of intent, has proved to require a very high standard of proof. As decided by the cases, the only people who know their purpose are the people doing it. Other than the unusual occurrence of a written internal document being discovered, as occurred with BHP in the Queensland Wire Case, (the "smoking gun" documents) the only opportunities for proving purpose comes through whistleblowers or disgruntled employees.

This leads to great uncertainty for small business as to what constitutes misuse of market power, and reluctance to bring an action even when they are obviously being severely affected, because of the difficulty of proving intent and the lack of guidance from other cases

The meaning of the provision for small business requires clarification because an extensive body of precedents has not developed over the past 20 years. Even the most recent cases where the trend has been developing of inferring "purpose" as in s. 46(7), remain unclear due to the current appeal from the Full Federal Court decision in the *Boral* case. The very few High Court decisions leave a dearth of guidance for an increasingly pressured small business sector.

There are many examples in recent years, particularly as Australian business becomes more concentrated where damage as prohibited in s.46 (1) (a), (b)

and (c) has occurred but the action has neither been successful in the courts nor at an earlier stage of intervention by the ACCC, because the high requirement of proof of " purpose " could not be met.

The submission from the ACCC certainly confirms the difficulties they have in meeting the "smoking gun' test and the onerous forensic process. Small business would also confirm the difficulties they have experienced because the ACCC did not feel able to institute proceedings for 6 years despite being activitist in approach. Also this difficulty flows on, as the ACCC is then not able to bring pressure on large businesses through correspondence and direct dealings with them when small business reports misuse of market power and the ACCC is deterred because the documentary level of proof is not there. I am sure small business and farmers must have felt very disempowered and it would have confirmed their frustration to read in the ACCC Submission of the difficulties experienced by the ACCC in pursuing s. 46 matters.

Example 1:
Several years ago a grouping of Queensland abattoirs brought an action against a large abattoir in Queensland. Alleged conduct included paying increased buying prices at the ring that the smaller abattoirs could not match, with the effect that it directed all supply to them. The competing smaller local abattoirs located in country towns were severely weakened. However despite strong evidence of alleged abuse of market power, purpose could not reach the level required. This was at the time when the leading case was Queensland Wire with the very high standard of proof of the "smoking gun" document.

Example 2:
Recently the one remaining concrete block manufacturer in Far north Queensland has had to compete against the price of concrete blocks produced by the major national masonry companies, which are allegedly sold at a price below the cost of production. At the same time the companies were allegedly selling their pre mixed concrete (where there was no local competition) at a higher price with this higher price of concrete not reflected in the price of the processed form of a concrete block. In recent years many other small independent block manufacturers in Far North Queensland, which were good employers in small country towns have closed down bar this one. Country towns and their building industries can support local manufacturers, and local manufacturers are able to compete if the pricing is fair. Following complaints to the ACCC several years ago they initially

found there was not enough evidence to assert abuse of market power in contravention of s.46. Following the *Boral* decision in 2001 the ACCC then commenced further investigations. However the local manufacturer who had to reduce his staff to skeleton levels, several years later has not received any change of conduct following from the letters from the ACCC to the companies.

Example 3:
Successful Independent grocer in country town - as told to the Joint Parliamentary Retailing Inquiry 1999
This instance is an illustration of predatory pricing, the ineffectiveness of the law and a consequent low settlement pay out and the effect of the present difficulty in proving the "purpose" test on a previously successful local businessman and a regional community

A large grocery chain offered to buy the largest independent grocery store in a town where none of the chains operated, and as part of the sale negotiations sought to and were allowed access to all financial documents. The chain then decided to construct its own new store in the town. Once operational the chain started advertising individual products
below the statewide price but only in that one country town. Consequently, the store could not compete nor on sell its business.

The chain was very reluctant to acknowledge its use of the prior commercial in confidence information. The independent grocer by then without business and desperate, and after pressure was brought because of the Retailing Inquiry, ended up accepting a small amount of compensation in full settlement from the grocery chain.

Effect of concentration of markets in Australia.
Australia with its highly concentrated markets across many sectors has a particularly strong need for an accessible remedy for misuse of market power like predatory pricing. The Australian domestic market is highly concentrated across many sectors, more so that in other larger developed countries such as the United States and in European Union countries. This results in big corporations in Australia possessing large amounts of market power.

In the massive $38 billion grocery retailing sector, Australia has probably the most concentrated markets of all industrialised countries with

Woolworths having a 41%market share and Coles 32.9%. Similarly, the national liquor market, valued at $10 billion annually, is going along the same path of concentration and domination by the chains, with Coles at20 % market share and Woolworths 17%. Woolworths CEO was reported recently as aiming for the same market share in liquor as they have in groceries.

1. This leaves small business competing against Australia's largest corporations, which are vertically integrated with the means to take a loss in one activity where the market may not be as competitive, to penetrate another market where competition exists or, having the means to make raw materials for competitors dearer.

2. A further effect of Australia's concentrated markets is that an action using market power can have a more immediate effect resulting in a quicker and more efficient removal or destruction of a competitor. This is relevant today where the course to a legal remedy is more difficult and involves delays because the remedy is less certain.

3. Also in the Australian environment of a large powerful concentrated competitor small business by its nature does not have the advantages of big business of in house support services such as lawyers, accountants and human relations specialists.

Small business in Australia is operating in an environment where its competitors are a small number of large competitors, and must have an effective and workable avenue of redress when misuse of market power allegedly arises.

Proposal for Section 46 –

There is a need to introduce certainty into the "purpose" test.
This could be done by

1. Amending the present "purpose " test in s46 -

to provide that – Where a business having a substantial degree of market power, engages in conduct of the kind proscribed in section 46(1) (a-c) then a rebuttable presumption arises that the large business has engaged in unlawful conduct by taking advantage of its market power unless it can show otherwise.

This means that the person alleging misuse of market power should have to prove the conduct in s. 46 (a), (b) or (c). –

Once it is proven that a corporation having a substantial degree of market power took advantage of that power to partake in the proscribed conduct in a, b or c, then purpose is proven unless the lack of purpose can be otherwise proven. This would not reverse the onus of proof on the intial step of establishing that the proscribed conduct took place.

2. Due to the difficulty of proving the intent in the present "Purpose" Test, there should be further clarification and emphasis on section 46(7), and its use for proving purpose, that is, by inference from the conduct of the corporation ….

The developments on conduct in the decisions of the Full Federal Court (Finklestein and Merkel JJ) in *Australian Competition & Consumer Commission v Boral Ltd* in 2001 provides some clarification on the present difficulty in proving purpose. Generally, these judgments adopt a more historical and longer-term view of the actions involved in the misuse of market power.

There is an urgency to consider strengthening s.46 (7) along the lines of the Full Federal Court decision. The High Court appeal in the *Boral* case cannot be relied upon in this Review, as it will not be decided until after the review.

Unlike the larger jurisdictions in the European Union and the United States, only a small number of cases on s.46 purpose will ever come before the Courts. Judicial development for the meaning of "intent" for the purpose test will continue to be too slow to assist with the present uncertain situation that exists for both small and big business. In an Australian business environment characterised by rapidly increasing trends towards highly concentrated industry sectors, the meaning of " intent" needs to be clarified through this Review. Some greater emphasis on the use of s 46(7) is needed, introducing a more accessible and certain approach than the need for documentary proof of intent.

3. An Effects or Purpose Test

Introducing an alternate "purpose or effects" test raises the restriction an "effects" test could place on genuine commercial activities. A pure effects test will pick up the accidental conduct of misuse of market power, it would not allow legitimate activities like restructuring and changes of distributors.

An effects test, if introduced would have to be accompanied with sufficient safeguards to ensure that commercial activity was not restricted and that the accidental results of normal competitive conduct were not caught. An effects test is appropriate such as in the present effects test for Telstra because it has a lot of inherited power.

An "effects" test if introduced would have to incorporate the following safeguards.

- Proceedings could only be instigated by the ACCC
- It would include an authorisation process to cover activities that are necessary and normal commercial activities like changes in distribution networks, or restructuring.

Recommendation 2 :

Due to the highly concentrated markets in Australia, Australia needs to have a misuse of market power provision that works for small business. The present "purpose" is inadequate as it does not provide sufficient certainty so as to discourage the proscribed conduct, and because of this, effective access to section 46 remedies for small business. The present test needs further clarification. The test for "purpose" of documentary evidence is too difficult to prove and does not act as a deterrent for the proscribed conduct. The section should spell out changes that reflect the recent trend of the Courts in developing " purpose" along the lines of inference of purpose from conduct as in 46(7).

An effects test, with safeguards so as to not restrict robust genuine commercial competition should also be considered.

CREEPING ACQUISITIONS

Presently this is a major situation in the enormous $38 billion a year grocery retailing industry. It is also the trend with liquor, hardware and many other retail sectors. The grocery retail industry is dominated by two chains Woolworths and Coles. Woolworths now have market share of (scanned grocery market) 41%, up from 35.5% in 1999 and Coles 32.9% up from 25.8% in 1999. (Source Jebb Holland Dimasi).

The carve up of the market share of Franklins, which was overseen by the ACCC resulted in an increase of market share to the independents from 17% to 25%. The year long moratorium on the sale of former Franklins stores to the big two will end in October 2002. A viable independent third force in the grocery market, for example, needs sufficient critical mass through market share to maintain such activities as an independent wholesaling sector, advertising and for supplier arrangements. It is crucial for competition in this huge market to have a strong third independent force.

Independent grocers are also an important part of smaller rural towns, who need an independent wholesaler to continue to serve these smaller regional independent supermarkets. There are many relevant factors; independents' market share at the present 25% is probably the minimum level required to remain a viable force with enough critical mass to demand competitive discounts and advertising dollars.

A balance should be struck that allows small business to have the right to sell their business for the highest return, but that prevents the use of creeping acquisitions to increase market share that would exceed the level of market share allowable under the mergers test. This dilemma is precisely illustrated by Woolworths' CEO as reported in the recent press when confirming they would buy more stores claiming, " We are the superannuation fund for a lot of independents."

While the government has amended the Act recently to include " regional market " within the definition of "market" in s. 50(6) as recommended by the Retailing Inquiry (1999) it is still to be seen whether this will be of sufficient effect against creeping acquisitions.

Notification of further acquisitions - Options

1.Make acquisitions mandatory for the grocery retail industry under the current Retail Grocery Industry Code. The Joint Parliamentary Inquiry into the Retailing Industry in 1999 recommended that Voluntary Code be reassessed to reconsider whether it needed to be made mandatory.
The Grocery Industry Code of Conduct requires voluntary notification of acquisitions. Both Coles and Woolworths are signatories to the Code, which has no enforcement provisions

Section 50 – the mergers provision of the Trade Practices Act - could be amende**d** to allow the ACCC to take into consideration previous mergers by an acquirer and to aggregate the effect of previous mergers, plus the state of competition in any relevant market.

This amendment would cover not only the grocery retailing industry but all retailing industries with a domination by the majors.

There however is a concern that an outcome not be created whereby a chain would be forced to build a new greenfield business with the indepedent retailer losing the opportunity to sell their business to the chain or other purchaser. The situation should neither be created where they have to compete against the newly constructed business in a very small market.

Mergers Test

The present mergers test of substantially lessening competition in a market, subject to authorisation on a public benefit test should be maintained. Any adjustments to the test made for other reasons should never have the effect of lessening the test.

It is important for small businesses competing with the large concentrated businesses that no lessening of the test is allowed.

There are examples of the existing mergers test preventing the further aggregation of market share in the concentrated grocery retailing industry. For example, in the 1990's in Western Australia, Coles Myer was prevented from buying out Foodlands under the present test. The survival of Foodlands meant that last year in 2001, Foodlands were able to expand to the eastern states, creating more competition in the grocery retailing and wholesaling markets when they purchased a number of the Franklins stores and their wholesaling arm. Similarly the present test allowed the merger of

the Mackay Sugar and CSR refining industries leading to the creation of a new and successful refined sugar export industry in Australia and a further contributor to many sugar towns, such as Mackay.

There are many examples of global expansion by Australian companies demonstrating that the present test does not prevent the global entry of industries. The present test provides the opportunity for substantial growth leading in Australia and overseas while at the same time by not allowing some mergers maximises competition in the domestic market.

The present mergers test also acts to promote domestic competition, by encouraging big business to participate in further overseas expansion rather than buying out their domestic competition.

Recommendation 3:

Retain the present mergers test. Any changes for administrative purposes should not lessen in any way the meaning of and effect of the present mergers test.

COLLECTIVE ARRANGEMENTS

Collective Arrangements under the Trade Practice Act are essential for groupings of individual small businesspeople and primary producers to negotiate collectively and for their representative industry bodies to negotiate on their behalf.

Presently, any type of joint buying or collective bargaining arrangement may contravene section 45(2) as having the effect of substantially lessening competition.

As the introduction of national competition policy has led to the deregulation of primary producers, they have been immediately required to cease operating through collective means such as statutory marketing authorities which had exemption from the Trade Practices Act, to individual farmers, forbidden to collectively negotiate unless authorised.

At exactly the same time, similar forces have resulted in increasingly smaller number of processors, and customers as businesses have consolidated and gained greater market share and market power. For example there are now three and predicted to be two dairy processors with the main buyers of farmers produce being concentrated in the two major grocery chains. There is instantly an enormous imbalance of market power between individual farmers and the buying power of their buyers.

With increased deregulation, both small business and primary producers have been left without any immediate replacement structure with which to negotiate their agreements. In reality deregulated industries have suffered in their newly deregulated environment as authorisations have taken several years to be achieved. Meanwhile contracts have been negotiated with suppliers without any benefit of collective strength and in a situation of great imbalance of market power.

For example the recent dairy authorisation to the Australian Dairy Farmers' Federation Ltd ADFF took over 2 years to be granted by the ACCC, It is still not in existence as it has been appealed by National Foods. It was granted to allow dairy farmers that have a "shared community interest" and contains some good defining of " shared community interest", plus authorises the ADFF's proposal to discuss separately with Coles and Woolworths the consequences of tender processes on its members.

During this two-year period, the major chains introduced national tenders. and processors consolidated to three. It is reported that the national tender cost the industry $500 million. This is a huge loss over this two-year period to the industry, to individual farmers and to their communities. Had an authorisation been able to be granted during this two-year period the effects on the industry and rural communities may have been very different.

While these arrangements can be given authorisation by the ACCC, it is
1. **A costly process** ($7,500.00 in fees, plus legal costs)
2. **A lengthy process** - it took the peak industry body, Australian Dairy Farmers Federation several years to receive their authorisation, now under appeal at a crucial time of a new deregulated market.
3. **Open to appeal** to the Australian Competition Tribunal – National Foods appealed to the ACT on the ADFF authorisation, at the time of the next round of national contracts. The ADFF expenditure amounted to nothing as the authorisation process starts again with the incurring of costs by the ADFF.

The appeal process itself is lengthy. Section 102 sets an extendable 60-day time limit on a determination, which can then go on further appeals to the Courts.

Overarching Authorisations

Overarching Authorisations are also needed to be authorised for groups of similar primary producers and small business people or their industry organisation require the ability to collectively negotiate with big business when there is a disproportionate balance of market power. The existence of an authorisation provides a lever when there is not a fair deal on offer.

There is considerable public benefit involved in collective negotiation for primary producers which the ACCC has recognised: such as collective arrangements may generate savings in time and labour in negotiation processes, there can be efficiency gains where collective arrangements reduce the cost of collection, for the analysis and dissemination of market information, and that mechanisms can facilitate the transition from a regulated to a deregulated environment.

The use of collective negotiations goes to the heart of the terms of reference of this Review and is the means to make the Trade Practices Act " "flexible

and responsive to the transitional needs of industries going, or communities affected by, structural and /or regulatory change and to the requirements of rural and regional areas."

It also is the objective of the government. The Deputy Prime Minister the Hon. John Anderson in his 2001 election policy speech referred to " small business concerns centre on the disparity between small and large businesses, when they negotiate terms, conditions and prices. The disparity is reinforced by the Trade Practices Act. When a large corporation or chain negotiates with its suppliers, it does so with the bargaining strength conferred on it by its large number of retail outlets. In effect, it is collectively bargaining on behalf of many retailers. However, when local small businesses negotiate with their suppliers, they bargain for themselves alone. The Trade Practices Act prevents them from bargaining collectively with their suppliers- unless they obtain a special authorisation, which is complex, expensive and time- consuming. Consequently, in the main streets of our towns there is a compeitive imbalance between stores that are located next door to each other. The first task of the Review into the Trade Practices Act must be to produce practical and workable recommendations to redress the imbalance."

While collective negotiations and overarching authorisations should be always available under the Act they are also essential for the adjustment period following deregulation as per the terms of reference

Current examples are a newsagent's organisation either nationally or in the state, have applied for a final authorisation to negotiate supply agreements with the small number of large national and international publishers. Newsagents have been proceeding through an authorisation process for the past 2 years, which has still not been issued. The previous authorisation expired several years ago. Meanwhile, whilst awaiting authorisation they are warned and prevented by the ACCC from any type of joint buying or collective bargaining arrangement as it may contravene the TPA.

In recent years the publishers have supplied newspapers to the major retail chains. These supermarkets often are given preferential treatment due to their size and bargaining power. By comparison any type of joint buying or collective bargaining arrangement by newsagents or their association may contravene 45(2) of the Act and newsagents and have been instructed as such by the ACCC.

Proposal to address the two means to collectively negotiate

1. Under the present Authorisation proposal Authorisations should be available to groups of producers with " a commonality of interest" to collectively negotiate and set supply conditions with their suppliers, as has been granted to a group of 500 dairy farmers who supply Pauls in SE Queensland,

Protected conduct would include

1. Agreements on sale price of products and to whom it would sell, quality, transport arrangements, standard growing agreements, appointments of representatives from groups to enter negotiations on agreements and resulting contracts
2. To agree to withhold their products from sale to particular buyers by agreement amongst themselves
3. Agreement on co-operative advertising and advertising rates paid to advertisings agencies and the media.

2. Overarching Authorisations, to numerous similar arrangements between various different parties on the application of any one of the parties as was granted to the Australian Dairy Farmers Federation

The process should

1. Include The granting of one authorisation but covering a series of identical arrangements or conduct throughout the country.
2. Involve only one authorisation fee regardless of the number of similar arrangements under consideration
3. Require only one determination to be issued by the Commission

Notification

Another avenue could also be available for certain collective arrangement by way of notification, which already exists in the Trade Practices Act.

It is pleasing to note in their submission that this is the Commissions preferred option for addressing small business concerns.

The existing Notification process in the TPA could be extended to include a Notification process to allow primary producers and small business with the inclusion of the ability to boycott such large corporations.

The notification protection should be as for the presently existing notification for anyone for actions of exclusive dealing and third line forcing- (which has a 21-day objection period by the ACCC.)

It should -
1. be automatically granted and remain valid until revoked by the ACCC. - the basis for revocation should only be that conduct substantially lessens competition and there is insufficient public benefit.
2. have low notification fees - as for exclusive dealing, which is $2,000.00 and $1,000.00 for third line forcing, with a reduction to $100.00 for application by an individual or corporation.
3. be voluntary and in many instances regional
4. be given to small businesses when negotiating with large customers or suppliers
5. be limited to collective negotiations or bargaining and would not cover dealings with those not the subject of the negotiation
6. provide protection from section 45 (contracts, arrangements or undertakings that restrict dealings or affect competition)
7. cover collective arrangements including the refusal to do something, a boycott.

Notifications would be public with some confidentiality rules -

1. Protection to involved small businesses would provide protection under the Act until the ACCC made a positive finding on ground that it is anti competitive as was against the public interest.
   The onus would be on the ACCC to establish it was against public benefit, and not on small business to prove public benefit
2. Normal appeal processes would apply to the ACCC decision

The protection would only apply to the arrangements between the small businesses and/or their associations. Those not in the category do not have the protection even if are involved in or affected by the conduct.

Further non- exclusive factors could be introduced into the Act for consideration by the ACCC in assessing public benefit.
. the needs of small business and the communities dependent on them
. the relative strengths of the buyer in the relevant market
. any effect on competition
. the interests of consumers

Recommendation 4:
Collective negotiations by way of speedy and cheaper authorizations and through a process of overarching authorisations for organisations bodies are essential requirements for a Trade Practices Act operating in the present Australian environment of large concentrated buyers and suppliers with small business people and farmers forbidden per se from acting together.

The Notification process is available.

IMPLEMENTATION OF NATIONAL COMPETITION POLICY

A Review into the Trade Practices Act cannot escape the consequences of the reorganisation of business activity that has arisen from the introduction of the National Compeition 'Policy. The implementation of National Competition Policy by the State and Commonwealth governments as overseen by the Australian Compeition Council (ACC) has taken place and sometimes caused either directly or indirectly increased concentration of business sectors, making competition for small business all that much harder. For example with the deregulation of extra retail sectors, such as liquor stores, the chains now able to buy independents to gain more market share. A similar trend would have taken place had pharmacies been deregulated under the Wilkinson Review into pharmacies. Also the NCP reform of deregulation of trading hours has impacted most heavily on small competing independently owned businesses.

The federal government prior to the 2001 election requested the states to extend the public interest test for NCP to include Rural and regional interests.

With NCP I believe that state governments, which have conducted the "public interest" test on the state, regulated sector have the best knowledge of the local conditions and are better able to assess the " public interest."

The Productivity Commission Inquiry Report on "The Impact of Competition Policy Reforms on Rural and Regional Australia" 8 September 1999 recommendation 5 endorsed this when it recommended that "The National Compeition Council should no longer be able to conduct legislation reviews. The Commission commented "A possible conflict of interest for the NCC may arise here because the NCC is also responsible for monitoring each jurisdiction's compliance with their NCP commitments and for making recommendations to the Commonwealth Treasurer on competition payments. It would be more appropriate for reviews of the Commonwealth legislation (and nationally significant legislation reviews) to be conducted by bodies, which are seen to be at arm's length from NCP assessment processes."

Accordingly if a state government recommends against deregulation on " public interest" grounds under the National Compeition Agreement, this

decision should be adopted and not overridden by pressure of the NCC and the non-payment of the next tranche of Commonwealth payment.

Rural and regional Australia with its predominance of small business and individual farmers now operates in a new environment created by such factors as globalisation and market liberalisation, the continued concentration of large businesses, and major changes from the implementation of national competition policy.

This Review is very timely as it can address this newly emerged business environment and its future trends.

In this brave new open world of larger and larger business competitors, suppliers and buyers, small business and individual farmers find themselves in a certain and predictable position of less and lessening bargaining power.

In this context rural and regional businesses and their communities need redress against this imbalance.

This can be achieved by making the misuse of market power provision in s.46 workable, accessible and predictable so that it operates as a remedy and a deterrent.

It also illustrates that the new set of circumstances in rural and regional Australia needs a mergers test that ensures sufficient competition in which to do its business, from selling its products through the supply chain to conducting its banking.

To complete this redress by means of changes to the present Trade Practices farmers and small business of similar interests must also have available to them an easy, accessible, speedy and cheap processes to collectively negotiate.