Dawson Committee

TRADE PRACTICES ACT REVIEW

Supplementary Submission No. 2
by the
National Association of Retail Grocers of Australia

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DAWSON COMMITTEE
TRADE PRACTICES ACT REVIEW

NARGA SUPPLEMENTARY SUBMISSION No. 2

EXECUTIVE SUMMARY

NARGA wishes to draw the Committee's attention to a number of further recommendations aimed at ensuring that anti-competitive conduct is adequately dealt with and that Australia has a regulatory and administrative model that serves the needs of Australia and reflects best practice. These further recommendations supplement or expand upon those recommendations made in NARGA's original and first supplementary submission.

In relation to dealing adequately with anti-competitive conduct, NARGA further proposes that:

- the existing s 46(1) be amended to prohibit an entity having a substantial degree of market power from engaging in conduct that has the purpose of one of the existing paragraphs (a),(b) and (c);
- a clearly worded s 46(1) be used to deal with abuses of market power rather than unconscionability provisions better suited to abuses of contractual power between two parties;
- the ACCC identified dangers of `most favoured customer' or `meet the competition' clauses be acknowledged and dealt with expressly under the *Trade Practices Act*.
- if the Committee forms the view that the unconscionability provision – s 51AC - of the *Trade Practices Act* has a greater role to play in dealing with unethical commercial conduct, then consideration be given to broadening the scope of s 51AC by applying it to any conduct in trade or commerce, adding to the list of factors in s51AC(3) and a51AC(4), and removing the current $3million monetary threshold on the application of the section;

- if the Committee proposes to give s 51AC a greater role, then access to justice issues in relation to the provision be dealt with by expanding the jurisdiction of the Federal Magistrates Court;
- below cost selling be exposed to the competitive spotlight;
- the impact of creeping acquisitions be included in the list of factors in s 50(3), with the proviso that all the existing and possible new factors in s 50(3) only be relevant to the extent that they assist in assessing the impact of the conduct on the level of competition in the market; and
- a new s 50(7) be inserted to deal expressly with creeping acquisitions.

In the area of ACCC administration, NARGA is mindful that Australia may better reflect world's best practice and that greater use could be made of Associate Commissioners in providing an internal review mechanism or performing an internal quality assurance role**.** NARGA also proposes that a block notification procedure be available to confer immunity on the same type of exclusive dealing conduct engaged in by different entities. Finally, NARGA proposes that the existing s 155 investigatory powers remain unchanged in relation to non-criminal offences, but that a search warrant power should only be considered in relation to any criminal offences introduced to deal with anti-competitive conduct.

Overall, NARGA sees a greater role for a more formalized consultation process between the ACCC and all stakeholders. In particular, NARGA proposes that a competition law discussion group be convened bi-annually by the ACCC with the involvement of all stakeholders and chaired by an Associate Commissioner. On the question of providing the ACCC with a clear focus, NARGA believes that the time may have arrived where the utilities regulation roles of the ACCC should be hived off into a new body to be known as the Australian Utilities Commission.

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ADDITIONAL RECOMMENDATIONS

Recommendation 27:

NARGA proposes that the existing s 46(1) be amended to read:
(1) A corporation that has a substantial degree of power in a market shall not *engage in conduct* 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.

Recommendation 28:

NARGA advocates that abuses of market power by those entities having a substantial degree of market power be dealt with by a clearly worded s46 or specific prohibitions against anti-competitive conduct in Part IV of the *Trade Practices Act*, rather than the unconscionability provisions of the Act – provisions that currently deal only with limited abuses of contractual power between two parties.

Recommendation 29:

NARGA proposes that the ACCC identified dangers of `most favoured customer' or `meet the competition' clauses be acknowledged and dealt with expressly under the *Trade Practices Act.*

Recommendation 30:

If the Committee forms the view that the unconscionability provision – s 51AC - of the *Trade Practices Act* has a greater role to play in dealing with unethical commercial conduct, then NARGA proposes that consideration be given to:
- broadening the scope of s 51AC by applying it to any conduct in trade or commerce,
- adding to the list of factors in s51AC(3) and s51AC(4); and,
- removing the current $3million monetary threshold on the application of the section.

Recommendation 31:

NARGA proposes that in the interests of improving access to justice the jurisdiction of the Federal Magistrates Court be expanded to allow the Court to hear cases involving allegations of unconscionable conduct and breaches of mandatory codes of conduct under the *Trade Practices Act.*

Recommendation 32:

NARGA is concerned that persistent below cost pricing be placed under the competitive spotlight and recommends that, in addition to expressly prohibiting predatory pricing, retailers be required to inform consumers whether or not a particular item is being offered for sale at a price below the acquisition price plus all expenses ordinarily associated with the offering of the item for sale. NARGA would propose that where the item is offered for sale below the acquisition price plus all expenses ordinarily associated with the offering of the item for sale, the words `below cost' should be required to appear together with any statement of price in relation to the item.

Recommendation 33:

NARGA proposes that a new subsection (3A) be inserted into s 50 expressly stating that the factors in s 50(3) are to be taken into account only to the extent that they assist in assessing the actual or potential impact of the conduct on the level of competition in the relevant market.

Recommendation 34:

NARGA proposes that the impact of previous (or creeping) acquisitions on the level of competition be inserted as an additional factor in s 50(3).

Recommendation 35:

NARGA proposes that a new subsection s50(7) be inserted into s 50 which provides that where s50(1) and s50(2) do not prevent the acquisition, yet the cumulative effect of the proposed acquisition and previous acquisitions in any relevant market is to substantially lessen competition in any relevant market, the proposed acquisition is not to proceed unless authorized or subject to an enforceable undertaking (for example, that the acquirer voluntarily divest an existing asset to offset the substantially lessening of competition of the proposed acquisition and previous acquisitions in the relevant market).

Recommendation 36

NARGA proposes that a block notification procedure be available to confer immunity under the *Trade Practices Act* in circumstances where the same type of exclusive dealing conduct is proposed to be engaged in by different entities.

Recommendation 37

NARGA proposes that the existing s 155 investigatory powers remain unchanged in relation to non-criminal offences, but that a search warrant power should only be considered in relation any criminal offences introduced to deal with anti-competitive conduct. Unless there is to be a criminalization of competition law offences, NARGA would strongly oppose any changes to or substitute for the existing s155 powers.

Recommendation 38:

NARGA proposes that a dedicated group of Associate Commissioners be appointed to the ACCC to provide an internal review mechanism or perform an internal quality assurance role.

Recommendation 39

NARGA proposes that a competition law discussion group be convened bi-annually by the ACCC to consider contemporary issues with the involvement of all stakeholders and chaired by an Associate Commissioner.

Recommendation 40:

NARGA proposes the establishment of an Australian Utilities Commission to take on the utilities regulation roles currently performed by the ACCC.

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1.1 Amending s46 of the *Trade Practices Act* so as to focus on the connection between the substantial degree of market power, the alleged conduct and the purpose behind that conduct.

NARGA is concerned that, in addition to the enforcement challenges associated with demonstrating an anti-competitive purpose under s46, the issue of `taking advantage' has emerged as a serious hurdle to the successful pursuit of s 46 cases. Indeed, the High Court's apparent restatement of the meaning of `taking advantage' in its decision in *Melway Publishing Pty Ltd v Robert Hicks Pty Ltd* [2001] HCA 13 has effectively raised the threshold in relation to establishing a breach of s46. In accordance with this apparent restatement of `taking advantage,' an entity is not to be seen as having taken advantage of its market power if the entity could have engaged in the same conduct in the absence of market power. This is emphasized by the Court at paragraph 61 of the judgement:

> "Bearing in mind that the refusal to supply the respondent was only a manifestation of Melway's distributorship system, the real question was whether, without its market power, Melway could have maintained its distributorship system, or at least that part of it that gave distributors exclusive rights in relation to specified segments of the retail market."

With evidence showing that the distributorship system had been in place since before the appellant had acquired a substantial degree of market power, the High Court found (at paragraph 68) that the appellant had not `necessarily' taken advantage of that power:

> "The creation and maintenance of the appellant's distribution system, at a time when it did not have a substantial degree of market power, shows that its maintenance, when the appellant had market power, was not necessarily an exercise of that power."

While it is clear that the *distributorship system* was in place since the beginning, the question at the heart of the case was whether or not the appellant would have engaged in the conduct - in this case, a refusal to supply 30,000-50,000 directories - in the absence of market power. According to the High Court, the answer was yes in view of appellant's support for the distributorship system at a time when it had no market power. The appellant's support for the distributorship system was seen by the High Court as demonstrating that a refusal to supply 30,000-50,000 directories would have also occurred in the absence of market power.

In theory, an appellant wishing to support a distributorship system could refuse to supply 30,000-50,000 directories. Of course, a publisher would not want to undermine a system that serves the commercial interests of both itself and its distributors. In reality, however, the question arises as to how long a refusal to supply 30,000-50,000 directories would have been maintained in a market where the publisher lacked market power. Indeed, would a publisher sit by for too long and watch a substantial share of the market go to a competitor? Would the publisher maintain its refusal in the face of a very real risk of losing a substantial share of the market? After all, in a market where a person lacks market power there would, by necessity, be substitute products offered by other competitors, each of which would also lack market power, but wishing to take market share wherever they can find it.

In short, while an entity having a substantial degree of market power may have acted in the same way in the absence of market power, the question should really be one of how long the behaviour would have continued in the absence of market power. Thus, although the conduct may have been possible at a time when the entity lacked market power, sight should not be lost of the commercial reality in which the conduct may not have been maintained for too long in the absence of market power for fear of risking the entity's business survival.

In contrast to the possibly short lived occurrence of the conduct in the absence of market power, the conduct in question may persist for an indefinite time where the entity has a substantial degree of market power. Indeed, the substantial degree of market power may be used to sustain the conduct with little or no risk to the entity's business survival. Unlike the case where the absence of market power would put the entity's very survival at risk, the engaging in conduct where the entity has a substantial degree of market power may work to entrench or enhance that market power.

Overall, there is a danger in making a comparison of conduct with and without market power. Clearly, entities behave differently depending on the circumstances and, in particular, whether or not they can sustain the conduct without risking losing substantial market share or their business survival. In short, the issue comes down to whether or not the entity can engage in the conduct without losing substantial market share or risking their business survival.

Indeed, an entity without market power cannot sustain a refusal to supply for too long for it risks denying itself a business opportunity to build market share or at its simplest losing customers that may not come back to the entity. An entity without market power cannot sustain below cost selling for too long for it risks going out of business. An entity without market power cannot price discriminate for too long for it risks losing business from those it is discriminating against on price. Those price discriminated customers can simply go to another entity, which also lacking market power would be happy to build market share. Conversely, customers lacking market power could not go to a supplier and demand a more favourable price to those received by rivals for the simple reason that the supplier would not want to lose business from those disadvantaged rivals.

Clearly, the existence of a substantial degree of market power is what allows an entity to engage in conduct that would have been short lived in the absence of the market power or even a threat to the entity's business survival. Rather than make a difficult and ultimately theoretical assessment of how an entity would behave with or without market power, the question for s46 should be whether or not the entity ***with a substantial degree of market***

has engaged in ***conduct*** for an anti-competitive ***purpose*** listed in paragraphs (a),(b) or (c). NARGA submits that the function of s 46 should be to outlaw ***conduct*** - in whatever form it may take - by entities that have a substantial degree of market power and who engage in the conduct for a prohibited ***purpose*** as listed in s46(1). By focusing on the conduct and the purpose behind the conduct, any speculation as to how the entity would behave with or without market power is removed and the spotlight placed squarely on the conduct engaged in by those having a substantial degree of market power and the purpose behind that conduct.

Recommendation 27:

NARGA proposes that the existing s 46(1) be amended to read:

(1) A corporation that has a substantial degree of power in a market shall not *engage in conduct* 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.

1.2 Abuses of market power should be dealt with under s46 rather than the unconscionability provisions

An effective prohibition against abuses of market power by entities having a substantial degree of market power is integral to the proper functioning of a competition law regime. Such a prohibition ensures that an entity having a substantial degree of market power is not allowed to engage in conduct that society, through its parliamentary representative, acknowledges is detrimental to the operation of a freely competitive market place. Without an ability to order the break up of entities having a substantial degree of market power, such a prohibition becomes even more important to the preservation of a vigorous competitive process. Indeed, if there was no prohibition against abuses of market power, there would be considerable hesitation within society about allowing entities to merge for fear that the newly merged entity would behave as it liked. An effective prohibition against abuses of powers goes a long way to allaying the competitive concerns associated with allowing entities to merge.

Clearly, a law that allows mergers to occur must go hand in hand with an effective prohibition against abuses of market power. Without an effective prohibition against abuses of market power, there is considerable risk that conduct aimed at hindering or undermining the competitive process would go unchecked. This is made worse in a jurisdiction such as Australia where there is no general divestiture power that a court could use to break up entities that are not constrained by either its competitors or competition laws. An effective prohibition against abuses of market power keeps entities with a substantial degree of market power honest and maximizes the opportunities for vigorous competition in the marketplace.

In short, abuses of market power are a distinct issue requiring a specific response – either through s46 or specific prohibitions against anti-competitive conduct. A proper functioning and effective s46 is critical and not to be confused with abuses of contractual or relationship power as in the case of unconscionable conduct prohibited under s 51AC. Abuses of market or economic power can occur in the absence of a contractual relationship. Contractual relationships raise their own particular issues – issues that s

51AC attempts to address. Such contractual issues revolve around notions of ethical conduct in circumstances where one of the contracting parties is in a position to affect significantly the other contracting party. For example, in a franchising relationship the franchisor is in a position to dictate all (or almost all) of the franchisee's operation. While compliance with the franchise system is a key factor in the success of the system, the enactment of s51AC recognizes that there must be an ethical context in which a franchisor exercises contractual power.

Importantly, s51AC focuses on those relationships in which there is some degree of interdependence between the parties. This is clearly a different focus to s 46 – a provision that looks at how conduct by an entity having a substantial degree of market power is intended to impact on the competitive process, rather than particular contracts or other interdependent relationships.

Overall, NARGA strongly believes that abuses of market or economic power must be dealt with by a clearly worded and effective s46 (or clearly worded competition laws), rather than by s51AC – a provision whose focus is primarily on providing an ethical framework in two-way contractual or other interdependent relationships.

Recommendation 28:

NARGA advocates that abuses of market power by those entities having a substantial degree of market power be dealt with by a clearly worded s46 or specific prohibitions against anti-competitive conduct in Part IV of the *Trade Practices Act*, rather than the unconscionability provisions of the Act – provisions that currently deal only with limited abuses of contractual power between two parties.

1.3 Dealing with the dangers of `most favoured customer' or `meet the competition' clauses

In addition to an effective s 46, NARGA is concerned to ensure that elements of one relationship (namely, supplier A and major customer B) are not used to impact – in an anti-competitive manner – on another relationship (namely, supplier A and major customer C). This may occur in circumstances where major customer B uses its substantial degree of market to require, in this case through contractual means, supplier A to give major customer B a better price than its rivals. Major customer B can then use the favourable price extracted from Supplier A in an uncompetitive manner, namely to undermine major customer C's ability to be a vigorous competitive force. Such an objective by major customer B can be achieved by requiring Supplier A to agree to `most favoured customer' or `meet the competition' clauses in their supply agreement.

Importantly, the dangers of `most favoured customer' or `meet the competition' clauses were raised by the ACCC in its Senate-ordered Report into grocery pricing. Indeed, such clauses entitling the buyer to terms that are at least as good as those offered to other buyers were specifically raised as a possible problem area. On page 50 of its Report, the ACCC notes that while such clauses may be to protect the buyer's competitiveness, they may result in reduced price flexibility or even price fixing depending on the circumstances.

In view of ACCC identified dangers of `most favoured customer' or `meet the competition' clauses, NARGA proposes that such clauses be appropriately prohibited to the extent that they impact detrimentally on competition in a relevant market.

Recommendation 29:

NARGA proposes that the ACCC identified dangers of `most favoured customer' or `meet the competition' clauses be acknowledged and dealt with expressly under the *Trade Practices Act*.

1.4 Possible reforms to s 51AC if the Committee considers it appropriate to give the provision a greater role

While it is important that abuses of market power are distinguished from abuses of contractual power and that a stronger s 51AC is not a substitute for an ineffective s46, NARGA recognizes that s51AC could have a greater role to play in dealing with unethical commercial conduct.

If the Committee determines that consideration of s51AC is permitted in the Committee's terms of reference, then NARGA proposes that there are a number of ways in which s51AC could play a role in preventing abuses of contractual or relationship power. NARGA's proposals would also remove a number of potential problem areas in the possible operation of s 51AC, thereby allowing the provision to become a more effective deterrent against abuses of contractual or relationship power.

From the outset, NARGA proposes that s51AC be a general prohibition against unconscionable conduct within trade or commerce. Currently, s 51AC is limited to unconscionable conduct in connection with the possible or actual supply/acquisition of goods or services. This connection to the supply or acquisition of goods or services is an artificial limitation operating to confine the operation of s 51AC to possible or actual supply or acquisition relationships. While this may cover many activities in trade or commerce, it focuses on the existence of a relationship between two parties. There may be instances where a supply or acquisition contract or relationship between A and B may impact on C, but it is arguable whether s 51AC would, in its current form, cover conduct between A and B that may be unconscionable towards C. By amending the present s 51AC to allow it to apply to any activity in trade or commerce, s 51AC may become more relevant to unconscionable conduct towards third parties.

Amending s 51AC to apply to conduct in trade or commerce would bring the provision into line with a provision such as s 52, a provision that prohibits, in trade or commerce conduct that is misleading or deceptive or likely to deceive. Like s 52 which operates as a

norm of conduct, so too should s 51AC be an ethical norm of conduct applicable to all activities in trade or commerce.

The application of s 51AC to a greater range of activities could be supported by the addition of new factors to which the courts could have regard under s51AC(3) and s51AC(4). These new factors, like existing factors, could guide the court in assessing whether or not the conduct is unconscionable in all the circumstances. NARGA proposes that the new factors would include:

- the extent to which the conduct impacts on third parties;
- whether a person has been coerced or harassed into engaging in particular conduct or a course of conduct by the another person;
- the extent to which a person demands or requires another person to discriminate between different parties; and
- the extent to which a person demands or requires more favourable treatment than another person.

Finally, NARGA advocates the removal of the current $3million threshold found in s51AC(9) and s51AC(10). This threshold is another artificial limitation on the operation of the provision focusing attention unnecessarily on a procedural issue rather than the merits of the case and, especially, whether or not there has been unconscionable conduct.

Recommendation 30:

If the Committee forms the view that the unconscionability provision – s 51AC - of the *Trade Practices Act* has a greater role to play in dealing with unethical commercial conduct, then NARGA proposes that consideration be given to:

- broadening the scope of s 51AC by applying it to any conduct in trade or commerce,

- adding to the list of factors in s51AC(3) and a51AC(4); and,

- removing the current $3million monetary threshold on the section's application.

1.5 Allowing the Federal Magistrates Court to hear cases involving allegations of unconscionable conduct and breaches of mandatory codes of conduct under the *Trade Practices Act.*

NARGA strongly believes that the relevance of prohibitions against unconscionable conduct and mandatory codes of conduct depends on the ability of an affected party to enforce the prohibition or code. While the ACCC is available to enforce such prohibitions or code, it is clear that the ACCC cannot pursue every case in which a party has been adversely affected by unconscionable conduct or breaches of a mandatory code under the *Trade Practices Act*. In such circumstances, the enforceability of a prohibition against unconscionable conduct becomes an access to justice issue.

At present, those affected by breaches of unconscionable conduct or the mandatory Franchising Code of Conduct are left essentially to pursue action in the Federal Court. Such a forum unfortunately is not readily accessible to parties, such as small businesses, who cannot afford to the costs associated with a Federal Court case. Such issues of access have been recognized by the Federal Government and, in turn, have led to the establishment of the Federal Magistrates Court as a more accessible forum where alternative dispute resolution processes can be emphasized.

Given the more accessible nature of the Federal Magistrates Court and, in particular, its clear mandate to explore the use of alternative dispute resolution, NARGA advocates the extension of the Court's jurisdiction to cover unconscionable conduct claims and alleged breaches of a mandatory code of conduct under the *Trade Practices Act*.

Recommendation 31:

NARGA proposes that in the interests of improving access to justice the jurisdiction of the Federal Magistrates Court be expanded to allow the Court to hear cases involving allegations of unconscionable conduct and breaches of mandatory codes of conduct under the *Trade Practices Act.*

1.6 Exposing persistent below cost selling

NARGA is concerned that persistent below cost selling, particularly within the retail grocery industry, is going unchecked in terms of whether or not it is being engaged in by entities in an anti-competitive manner. The difficulty of assessing whether or not the conduct is being engaged in an anti-competitive manner is compounded by the difficulty of determining (from an external perspective) whether or not an entity is below cost pricing. Indeed, without an investigation being undertaken by the ACCC or other independent body, only the entity involved will know whether or not it is below cost pricing.

Based on the assumption that an entity will know its internal cost structure and given the importance of dealing effectively with below cost pricing, NARGA sees considerable merit in requiring an entity to disclose to consumers whether or not a particular item is priced below cost. This not only assists in identifying below cost pricing from a competition law enforcement point of view, but would inform consumers as to the pricing behaviour of the entity involved. These dual benefits of requiring an entity to disclose that it is below cost pricing its products has been recognized by the European Commission in its *Communication on Sales Promotion in the Internal Market Document* dated 9 October 2001. That Communication states (at pages 9-10):

> "***Information requirements for sales below costs***
>
> When discounts result in sales below costs the Commission's analysis has demonstrated that specific transparency conditions are required. It has been shown that bans on sales below cost as such are counter-productive and that the protection against unfair competition and consumer protection can be achieved in a more effective and proportionate manner by imposing specific information requirements.
>
> …to ensure that consumers can properly compare the economic value of products and services, an obligation to identify that a product or service is being discounted to such a point that it is resulting in a sale below cost is necessary. This ensures that

consumers understand that the economic value of the product or service is greater than the discounted price that they are being offered to purchase it. Moreover, this transparent presentation of below cost sales will facilitate the application of competition policy rules against predatory pricing in that it will be easier to detect systematic operations of this type that could reflect the abuse of a dominant position by a reseller."

Given the value of Australia drawing on world's best practice in dealing with anti-competitive conduct, NARGA strongly supports any overseas measure aimed at exposing below cost pricing to the competitive spotlight. Those entities engaging in below cost pricing for truly competitive reasons should have nothing to hide and, accordingly, should not be afraid of any requirement to disclose below cost pricing to consumers.

Recommendation 32:

NARGA is concerned that persistent below cost pricing be placed under the competitive spotlight and recommends that, in addition to expressly prohibiting predatory pricing, retailers be required to inform consumers whether or not a particular item is being offered for sale at a price below the acquisition price plus all expenses ordinarily associated with the offering of the item for sale. NARGA would propose that where the item is offered for sale below the acquisition price plus all expenses ordinarily associated with the offering of the item for sale, the words `below cost' should be required to appear together with any statement of price in relation to the item.

1.7 Focusing attention under s50 on an acquisition's impact on the competitive process

NARGA is concerned to ensure that a proposed acquisition's potential impact on competition in the relevant market is the focus of attention in the ACCC's consideration of that acquisition under s 50. The impact of the acquisition on the level of competition should be thoroughly assessed having regard to the impact of the acquisition on the ability of remaining competitors to offer competitive restraint on the merged entity. The level of competition remaining in a rural and regional market after the proposed acquisition should also be a factor. Clearly, the competitive restraint provided by remaining competitors and particularly their effectiveness in rural and regional markets should be a key consideration in any ACCC decision regarding the proposed acquisition.

In contrast, the willingness of the seller to be acquired should not be conclusive in an ACCC decision on whether or not to oppose the proposed acquisition. Indeed, the focus of the inquiry under s50 is whether or not the proposed acquisition substantially lessens competition in a relevant market. Any countervailing public interest issues in support of the acquisition must only be considered after the ACCC has made an assessment of the acquisition's competitive or anti-competitive impact. Within this context, NARGA is strongly of the view that the ACCC should only consider the competitive impact of the proposed acquisition under s 50. At this stage, public interest issues should not be allowed to cloud the issue – they should be considered as part of an Authorization application or proposed enforceable undertaking. After all, public interest issues are better dealt with in a transparent manner generally only possible in the Authorization process or suitably open enforceable undertaking process.

Similarly, any purported economic efficiency grounds in support of the proposed acquisition should only be relevant to the extent that they assist the ACCC in assessing the competitive impact of the proposed acquisition and may - as in the case of a `willing seller' situation - be better dealt within an Authorization or enforceable undertaking context.

The importance of focusing the ACCC's attention under s50 on the negative impact that a proposed acquisition has on competition goes a long way in supporting an amendment to s50 to the effect that the factors to be considered by the ACCC under s50(3) are only relevant to the extent that they impact adversely on competition.

Recommendation 33:

NARGA proposes that a new subsection (3A) be inserted into s 50 expressly stating that the factors in s 50(3) are to be taken into account only to the extent that they assist in assessing the actual or potential impact of the conduct on the level of competition in the relevant market.

1.8 Consideration of the impact of previous acquisitions when assessing present acquisition

In addition to inserting factors into the current s50(3) regarding the competitive impact of a proposed acquisition on small business competitors and rural and regional competition, NARGA proposes that a further factor be inserted into s50(3) regarding the impact of previous acquisitions by the same entity on the level of competition in the relevant market. That an entity can escape scrutiny under the current s 50(1) by engaging in piecemeal or strategic acquisitions is of considerable concern to NARGA and those wishing to ensure that s 50 deals adequately with anti-competitive acquisitions in whatever form that they may take in the relevant market.

Creeping acquisitions are an obvious way to avoid scrutiny under the existing s50. NARGA is particularly concerned that if the creeping acquisitions had occurred all at once the current s 50 would have been an obstacle, while if undertaken in a piecemeal manner s50 becomes irrelevant or impotent in dealing with anti-competitive acquisitions. A choice needs to be made between allowing a mockery to be made of Parliament's intention in enacting s50 and choosing to recognize the potentially anti-competitive impact of creeping or strategic acquisitions.

As a very minimum, the potentially anti-competitive nature of previous/creeping acquisitions must be expressly recognized in s50(3) as a relevant factor in determining the competitive impact of the proposed acquisition. This clearly acts to put all those intent on undermining the operation of s50 on notice that their potentially anti-competitive tactics are not going unnoticed.

Recommendation 34:

NARGA proposes that the impact of previous (or creeping) acquisitions on the level of competition be inserted as an additional factor in s 50(3).

1.9 Inserting a new provision in s50 dealing specifically with creeping acquisition

In addition to recognising creeping/strategic acquisitions as a relevant factor in s50(3), NARGA proposes that every attempt be made to prevent a proposed acquisition that, when considered with previous acquisitions, demonstrates a pattern of conduct that substantially lessens competition in any relevant market. In short, if the present prohibitions in s 50(1) and s 50(2) against anti-competitive acquisitions do not prevent the proposed acquisition, being a further acquisition by the same entity in the relevant market, then regard must be had to inserting a new s50(7) prohibiting the proposed acquisition in certain circumstances.

Such a proposed new s50(7) would only come into operation after the proposed acquisition has been tested under the existing prohibitions under s 50. Where the existing s 50 does not prevent the acquisition the question would then arise as to whether or not the proposed acquisition is part of a pattern of conduct by the acquirer. That is, has the acquirer in this instance made previous acquisitions in a relevant market? If not, then prima facie there is no pattern of conduct to suggest that the acquirer is seeking to avoid the existing prohibitions in s50. If however the present acquirer has made previous acquisitions in a relevant market, which when considered together with the proposed acquisition, have the cumulative effect of substantially lessening competition in any relevant market, then the operation of the proposed new s50(7) would be triggered.

In short, the proposed new s50(7) would operate in those circumstances where the acquirer has engaged, over a period of time, in a pattern of conduct that has the cumulative effect of substantially lessening competition in any relevant market. Clearly, the proposed new s50(7) would only be intended to deal with those acquirers who are strategically making acquisitions that individually escape scrutiny under the existing s50, but cumulatively lessen competition in a substantial manner.

Importantly, the proposed new s50(7) would not detract from the operation of the existing prohibitions in s50(1) and s 50(2). Those existing prohibitions would remain the central

focus of s50. Where the proposed acquisition falls foul of those prohibitions it would be prohibited by virtue of the existing s 50. It is only where the operation of the existing s 50 is undermined or avoided by strategic acquisitions by the same acquirer over a period of time that the proposed new s50(7) would come into effect. This limited operation of the proposed s50(7) is clearly intended not to detract from the existing s50, but rather to ensure that the parliamentary intention behind the existing s50 is not undermined or avoided.

The proposed new s 50(7) would provide that where s50(1) and s50(2) do not prevent the acquisition, yet the cumulative effect of the proposed acquisition and previous acquisitions in any relevant market is to substantially lessen competition in any relevant market, the proposed acquisition is not to proceed unless authorized or subject to an enforceable undertaking (for example, that the acquirer voluntarily divest an existing asset to offset the substantially lessening of competition of previous acquisitions in the relevant market). While the focus of the Authorization would be to enable the acquirer to demonstrate that the public interest is served by the proposed acquisition, the focus of an enforceable undertaking would be to ensure that the detrimental competitive impact of the proposed and previous acquisitions is offset in some manner, for example, by the acquirer divesting one of its assets as happened in the case of Woolworths undertaking to divest company stores in return for being allowed to acquire ex-Franklins stores.

The importance of not allowing the existing s50 to be undermined by strategic or creeping acquisitions cannot be understated. Such strategic acquisitions over a period of time have the potential to undermine competition in the same major way as if the strategic acquisitions had all occurred at once. Why should choosing to make acquisitions in a piecemeal or strategic manner, but no less anti-competitive manner, allow those acquirers to escape scrutiny under the existing s50?

NARGA emphasises that the proposed new s50(7) is only intended to deal with strategic/creeping acquisitions by the same acquirer that would, when considered together or as part of a pattern of conduct, substantially lessen competition in any relevant market in the same way as they would have if undertaken at the same time. Without the proposed

new s50(7) an obvious way to avoid the existing s50 would be left open for acquirers wishing to avoid scrutiny of their acquisition plans.

Recommendation 35:

NARGA proposes that a new subsection s50(7) be inserted into s 50 which provides that where s50(1) and s50(2) do not prevent the acquisition, yet the cumulative effect of the proposed acquisition and previous acquisitions in any relevant market is to substantially lessen competition in any relevant market, the proposed acquisition is not to proceed unless authorized or subject to an enforceable undertaking (for example, that the acquirer voluntarily divest an existing asset to offset the substantially lessening of competition of the proposed acquisition and previous acquisitions in the relevant market).

1.10 Allowing the block notification of exclusive dealing conduct

NARGA is concerned that small business is disadvantaged by the current requirement for each entity engaging or intending to engage in exclusive dealing prohibited under s47 of the *Trade Practices Act* to lodge separately a notification pursuant to s93 of the *Trade Practices Act*. Indeed, while a large retailer operating multiple outlets may only need to lodge one notification application to cover all its stores, a number of unrelated small businesses competing with the large retailer are all obliged to lodge separate notification application together with separate lodgment fees.

In these circumstances, NARGA proposes that the unrelated small businesses should be allowed (if they choose to do so) to lodge one application in relation to the same type of exclusive dealing arrangement they intend engage in, together with a list of names of those small business operators. NARGA would view such a block notification process as merely streamlining the current process that can be cumbersome in its requirement for each entity having to lodge its own notification application together with a separate fee. Given that the ACCC would be merely reviewing the same type of conduct and its impact on competition, NARGA's proposal would not add significantly to the ACCC's cost of the assessing the application and accordingly NARGA would see the payment of one fee by the group lodging the notification as a key advantage of the proposal.

NARGA's concerns have recently arisen within the context of independent grocery retailers assessing the possibility of offering their customers the opportunity to get a discount on the price of petrol purchased from a particular service station with which the grocer would come to an agreement. Each of these grocers would, under the existing s93, be required to lodge a separate notification application despite the fact that the same type of exclusive dealing conduct is involved in each case. Given that the offering of petrol discounts is a key selling ploy adopted by one of the major supermarket chains (and foreshadowed to be adopted by the other major supermarket chain), independent grocers need to respond by offering comparable petrol discounts.

NARGA would be concerned about the competitive impact on small business independent grocers were each of them required to lodge a separate notification together with a separate fee.

Recommendation 36

NARGA proposes that a block notification procedure be available to confer immunity under the *Trade Practices Act* in circumstances where the same type of exclusive dealing conduct is proposed to be engaged in by different entities.

1.11 Leaving s155 investigatory powers unchanged except where anti-competitive conduct is criminalized

NARGA is concerned that attacks on the ACCC's use of its power s155 are self-interested ones seeking to draw support from the occasional high profile given by the media to their use. Let there be no misunderstanding of the importance of the use of investigatory powers in enforcing the competition provisions of the *Trade Practices Act*. Those powers in their existing form are critical to the collection of evidence of breaches of the Act.

Those existing s 155 powers are not unfettered powers – the ACCC must have a reason to believe that a breach of the Act has occurred. That `reason to believe' is subject to review by the Courts – a fact omitted or understated by those seeking to weaken the ACCC's vital investigatory power. The supervisory role of the Courts represents a clear check on the ACCC's s155 powers. Those concerned with the use of the ACCC's s155 powers have always been able to challenge the use of those powers in Court – not to mention their ability to raise legitimate concerns through Federal Parliamentary means and, in particular, before the House of Representatives Standing Committee on Economics, Finance and Public Administration.

Concerns – whether or not well founded – about a high profile case in which the media has drawn public attention to the ACCC's use of s155 is not a sufficient basis for altering a set of powers that hitherto worked well. Any concerns about the use of the media are better dealt with by an appropriate drafted ACCC code of media dealings and not by undermining a set of powers aimed at assisting in the enforcement of critical competition laws.

In short, NARGA sees no basis for changing the existing s155 powers in relation to non-criminal breaches of the *Trade Practices Act*. Those powers are subject to judicial review – a supervisory role that the Courts can exercise if called to do so. It is up to parties with concerns regarding the particular use of s155 powers to invoke that supervisory jurisdiction. It is only in the area of possible criminalization of competition law breaches

that NARGA would accept the legitimate role of search warrants. After all, those facing criminal prosecution should have the benefits of the additional protections our legal system offers such parties. Unless there is to be a criminalization of competition law offences, NARGA would strongly oppose any changes to of substitute for the existing s155 powers.

Recommendation 37

NARGA proposes that the existing s155 investigatory powers remain unchanged in relation to non-criminal offences, with a search warrant power to be considered only in relation to any criminal offences introduced to deal with anti-competitive conduct. Unless there is to be a criminalization of competition law offences, NARGA would strongly oppose any changes to or substitute for the existing s155 powers.

1.12 Appointing Associate Commissioners to ACCC to provide an internal review mechanism or perform an internal quality assurance role

NARGA considers that internal ACCC review processes could be strengthened by appointing Associate Commissioners to the ACCC with responsibility for reviewing internal decision making processes and reporting to the ACCC Chairman and CEO.

Associate Commissioners have often been underutilized by the ACCC. Despite being individuals of considerable standing in their respective fields, the ACCC has often only made limited use of that expertise. NARGA believes that much more focused use could be made of Associate Commissioners in performing an internal review or quality assurance role. After all, Associate Commissioners have the clear advantage of being part of the ACCC while remaining independent of the day to day running of the ACCC.

Unlike Commissioners and Commission staff, Associate Commissioners can bring an understanding, independence and objectivity to any review of the ACCC internal process that cannot be done either by a total `insider' or `outsider.' A `total insider' is too close to the `action,' while a `total outsider' cannot often have sufficient access to and understanding of internal processes. Associate Commissioners, while being part of the ACCC can at the same time stand back as they are not part of the day to day running of the ACCC, a characteristic that makes them ideal candidates to undertake an independent, objective ongoing review of the ACCC's internal processes. The mechanism for appointing Associate Commissioners is already in place and all that is needed is their appointment following recognition that they can play an extremely valuable role in performing internal review and quality assurance functions.

NARGA proposes that, in view of the considerable advantages of strengthening ACCC internal review and assurance processes, a dedicated group of Associate Commissioners be appointed to the ACCC to be provide an internal review mechanism or perform an internal assurance role. Significantly, Associate Commissioners can also be available to lend their individual expertise in areas in which the ACCC could be lacking or would

benefit from additional insights that an Associate Commissioner can bring, particularly in acting as an additional conduit between the ACCC and its stakeholders. In short, NARGA is of the view that considerable use of Associate Commissioners could be made in assessing and improving, where required, ACCC internal procedures.

Recommendation 38:

NARGA proposes that a dedicated group of Associate Commissioners be appointed to the ACCC to provide an internal review mechanism or perform an internal quality assurance role.

1.13 Convening a bi-annual competition law discussion forum

In keeping with the advantages of an Associate Commissioner in performing an internal review role and in opening up additional links between the ACCC and its stakeholders, NARGA proposes the establishment of a bi-annual competition law discussion forum chaired by an Associate Commissioner and bringing together key stakeholders in competition law enforcement. This forum would open up an ongoing private dialogue between stakeholders regarding current and future directions in competition law and policy. The ACCC or individual stakeholders would submit discussion papers on key issues to the forum with the expectation that other stakeholders contribute their views on those issues and possibly work towards a consensus in formulating law reform proposals.

This process would assist the ACCC and stakeholders in understanding each other's respective positions and being chaired by an Associate Commissioner should avoid any concerns that the forum is just a vehicle for either the ACCC or a particular stakeholder to dominate discussion. Indeed, where carefully chaired, the forum would provide a vehicle for genuine discussion and not a place where only one view is heard.

Recommendation 39

NARGA proposes that a competition law discussion group be convened bi-annually by the ACCC to consider contemporary issues with the involvement of all stakeholders and chaired by an Associate Commissioner.

1.14 The establishment of an Australian Utilities Commission

NARGA considers that the time may have arrived for there to be careful consideration of the ACCC's future direction and role. After six or so years of deregulation, privatization and competition policy reform in which the ACCC has been given more and more responsibilities in the utilities regulation area, it is an opportune time to consider whether the ACCC's utilities regulation roles may be better handled by a newly formed Australian Utilities Commission. Such an Australian Utilities Commission would be focused entirely on regulating pricing and access issues in areas such as telecommunications, electricity, gas, airports and railways.

More importantly, such a Utilities Commission could also take over the National Competition Council's access and deregulatory work once the Council's other work in assessing government progress in implementing National Competition Policy (NCP) and related reforms comes to an end. Combining the ACCC's and NCC's utilities responsibilities would mean that Australian would have one Federal regulator focused entirely on the all-important regulatory oversight of utilities coming within the Federal Government's jurisdiction.

While the placing of further utilities responsibilities in the ACCC's hands could have been previously justified given that the ACCC was a readily available vehicle for dealing with the new responsibilities if and when they arose, Australia has now reached a point where most of the Federal utilities deregulation and privatization has taken place such that the creation of a new separate Australian Utilities Commission would enable the ACCC to get back to its core business of competition and fair trading law enforcement. The ACCC's core role has always been Australia's competition and fair trading law enforcement and it should now return to focusing entirely on such enforcement. After all, in leading overseas competition law jurisdictions such as the United Kingdom and the United States, the competition and fair trading enforcement agency is a distinct body to the utilities regulators.

In short, the separation of utilities regulation and competition/fair trading law enforcement is in keeping with world's best practices and something that Australia should carefully consider, particularly as the two roles may at times be inconsistent with one another. Indeed, while the ACCC can within a utilities context be a price fixer, the ACCC has a mandate under the competition provisions of the *Trade Practices Act* to enforce a prohibition against price fixing.

While utilities regulation and competition/fair trading law enforcement may be ultimately concerned with the public or consumer interest, the two roles have quite a different emphasis in terms of how they are carried out on a day to day basis. The utilities regulation role is quite pro-active and intrusive, where the ACCC often acts as judge and jury, while competition/fair trading law enforcement requires the painstaking collection of evidence of breaches of the law to be brought before the courts. Given the difference in the day to day focus of the two different roles, there may be a blurring of the roles or a lack of sharp focus on the carrying out of either or both roles. Indeed, the accumulation of many – and possibly inconsistent - roles by the ACCC raises the question of whether or not the ACCC is just doing too much. There is now the real danger of the old adage of `jack of all trades, master of none' becoming applicable.

Any possible danger of the ACCC doing or being perceived as having too much on its plate can be easily removed by hiving off its utilities regulation roles into a new Australian Utilities Commission. Such a division not only makes sense in allowing utilities regulation and competition/fair trading law enforcement to be undertaken respective by a specialist body focused entirely on the task at hand, but more importantly is in keeping world's best practice.

Recommendation 40:

NARGA proposes the establishment of an Australian Utilities Commission to take on the utilities regulation roles currently performed by the ACCC.