

The Senate

Economics References Committee

The effectiveness of the *Trade
Practices Act 1974* in protecting
small business

March 2004

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PUBLIC HEARINGS AND WITNESSES

GLOSSARY OF ACRONYMS

ACA	Australian Consumers Association
ACCC	Australian Competition and Consumer Commission
ARA	Australian Retailers Association
ARFRANC	Angus and Robertson Franchisees Committee
BCA	Business Council of Australia
CN	Competitive Neutrality
COSBOA	Council of Small Business Organisations of Australia
FTC	Fair Trading Coalition
HIA	Housing Industry Association Limited
ILG	Independent Liquor Group
LCA	Law Council of Australia
LSAV	Liquor Stores Association of Victoria
MTAA	Motor Trades Association of Australia
NARGA	National Association of Retail Grocers of Australia
NECG	Network Economics Consulting Group
NFF	National Farmers' Federation
OECD	Organisation for Economic Co-operation and Development
SCCA	Shopping Centre Council of Australia
TPA	<i>Trade Practices Act 1974 (Cth)</i>

EXECUTIVE SUMMARY

AND LIST OF RECOMMENDATIONS

E.1 The Senate Economics References Committee's inquiry into the effectiveness of the *Trade Practices Act 1974* ('the Act') in protecting small business is the latest in a long series of government and parliamentary inquiries into the operation of this Act.

E.2 The most recent of these, the *Review of the Competition Provisions of the Trade Practices Act* ('the Dawson Report'), canvassed a number of areas relevant to this inquiry, particularly regarding the 'misuse of market power' provisions in Section 46 of the Act. After the Dawson Committee had completed its consultations with interested parties, however, several decisions were handed down from the Full Federal Court and the High Court which have raised questions about the application and operation of Section 46 of the Act. The decision of the High Court in *Boral Besser Masonry Ltd v ACCC* (the *Boral* case), in particular, raised these issues and forms a significant backdrop to this Committee's inquiry.

E.3 An issue which has been raised during many of these inquiries is the question of whether the Act should seek to protect *competition* or *competitors*. The Committee considers that the Act can best protect competition by maintaining a range of competitors, who should rise and fall in accordance with the results of competitive rather than anticompetitive conduct. This means that the Act should protect businesses (large or small) against anticompetitive conduct, and it should not be amended to protect competitors against competitive conduct. This inquiry considered how well the Act achieves this goal.

Misuse of market power

E.4 Section 46 of the Act prohibits corporations with a substantial degree of market power from taking advantage of that power for the purpose of eliminating or substantially damaging a competitor, preventing the entry of a competitor into the market or deterring or preventing a competitor from engaging in competitive conduct.

E.5 A number of submissions and witnesses argued in evidence that the High Court's decision in the *Boral* case has raised the threshold for determining that a corporation possesses a substantial degree of market power. They argued that the High Court's finding that Boral did not possess a substantial degree of market power means, effectively, that a corporation would have to be near dominant in the market to satisfy that element of section 46.

E.6 Accordingly, many including the ACCC argued that section 46 requires amendment to ensure that the lower threshold intended by Parliament is given effect in the legislation. The ACCC in fact informed the Committee that, as a consequence of the decision in *Boral*, it had discontinued four cases that had reached the 'second threshold' stage of its investigations in relation to section 46.

E.7 The Committee considers that the amendments suggested by the ACCC are consistent with the intention of Parliament in 1986, and that their inclusion in the Act would clarify the intentions of Parliament.

Recommendation 1

The Committee recommends that the Act be amended to state that the threshold of ‘a substantial degree of power in a market’ is lower than the former threshold of substantial control; and to include a declaratory provision outlining matters to be considered by the courts for the purposes of determining whether a company has a substantial degree of power in a market. Those matters should be based upon the suggestions outlined by the ACCC in paragraph 2.16 of this report.

E.8 The Committee received some evidence arguing that amendments are also required to section 46 in order to clarify what a court may have regard to in determining whether a corporation has ‘taken advantage’ of its market power.

E.9 Witnesses argued that the need for clarification arises from the Federal Court’s decision in *Safeway*, which found that the business rationale for the conduct was relevant to considering whether the corporation had taken advantage of its market power. The ACCC was concerned that this reasoning left open the possibility of a defence on the grounds of ‘rational business conduct’ to corporations which had unfairly taken advantage of their market power.

E.10 The Committee considers that the Act should be amended to remove current uncertainty with regard to the meaning of ‘take advantage.’ The Committee considers that its proposed amendment would make clear and explicit the link between proscribed conduct and the possession of substantial market power, and would deal with the issue of ‘rational business conduct.’

Recommendation 2

The Committee recommends that the Act be amended to include a declaratory provision outlining the elements of ‘take advantage’ for the purposes of s.46(1). This provision should be based upon the suggestions outlined in paragraph 2.28 of this report.

E.11 A number of submissions and witnesses expressed concern about predatory pricing activities which, they argued, are not adequately captured by section 46. The Committee notes that predatory pricing has proven difficult to define or establish. Low, or below cost, prices may be evidence of predatory pricing but they may also occur as a consequence of normal, competitive behaviour.

E.12 The Committee considers that the Act would be strengthened by making predatory pricing a clearer target of section 46.

E.13 One factor which may indicate that the relevant pricing is predatory is where the price-cutting company plans to recoup its losses by increasing prices once its

opponents have been driven from the market. However, there was dispute in the evidence before the Committee over whether recoupment is a *necessary* feature of predatory pricing.

E.14 The Committee considers that, while evidence of a corporation's intention to recoup losses may well contribute to the proof of an allegation of predatory pricing, there is nothing in s.46 which makes recoupment an element necessary to prove predatory pricing. The Committee considers that the Act could be improved by stating that recoupment is a factor which the courts *may* examine when considering allegations of predatory pricing.

Recommendation 3

The Committee recommends that the Act be amended to provide that, without limiting the generality of s.46, in determining whether a corporation has breached s.46, the courts may have regard to:

- **the capacity of the corporation to sell a good or service below its variable cost.**

The Committee recommends that the Act be amended to state that:

- **where the form of proscribed behaviour alleged under s.46(1) is predatory pricing, it is not necessary to demonstrate an capacity to subsequently recoup the losses experienced as a result of that predatory pricing strategy**

E.15 The Committee received some evidence suggesting amendments designed specifically to deal with the use of financial power to support predatory pricing. The proposed amendments set out to capture predatory pricing conduct of firms with financial power but not market power, that might otherwise fall outside the scope of section 46.

E.16 The importance of such amendments was highlighted by the outcome of the *Rural Press* case, handed down in December 2003. In that case, Rural Press pursued a clearly anticompetitive business strategy, but was not found to be in breach of the Act, partly because it relied on its "economic and financial power" and not its market power. An attempt by the trial judge to link economic, financial and market power was overturned on appeal.

E.17 The ACCC supported the use of the concept of financial power in regulating conduct contrary to s.46, but considered that rather than introducing a financial power threshold in s.46, financial power should be listed as one of the factors contributing to a determination of substantial power in a market.

Recommendation 4

The Committee recommends that s.46 of the Act be amended to state that, in determining whether or not a corporation has a substantial degree of power in a market for the purpose of s.46(1), the court may have regard to whether the corporation has substantial financial power.

‘Financial power’ should be defined in terms of access to financial, technical and business resources.

E.18 Evidence raised the issue of whether amendments are required to ensure that s.46 applies where a corporation uses market power in one market to engage in proscribed conduct in a second market. This issue was determined by the High Court late in the Committee’s deliberations, when in the *Rural Press* judgment the Court clearly stated that misuse of market power in a second market is not a breach of the Act.

E.19 The Committee considers that this should not be the case. The possession of market power in one market should not become the base for anticompetitive conduct in another market, and the Act should be amended to make this clear.

Recommendation 5

The Committee recommends that s.46 be amended to state that a corporation which has a substantial degree of power in a market shall not take advantage of that power, *in that or any other market*, for any proscribed purpose in relation to that or any other market.

E.20 The Committee, finally, considered the impact of coordinated market power on competition. The Committee considers that corporations which do not have a substantial degree of market power on their own, may obtain that power through ‘conscious parallelism’ or ‘coordinated interaction’ with other corporations. For this reason, the Committee considers that s.46 of the Act should be clarified to indicate that a company may obtain market power by virtue of its co-ordination with another company, and that such coordinated market power may amount to a substantial degree of power in a market.

Recommendation 6

The Committee recommends that s.46 be amended to clarify that a company may be considered to have obtained a substantial degree of market power by virtue of its ability to act in concert (whether as a result of a formal agreement or understanding, or otherwise) with another company.

Unconscionable conduct

E.21 Part IVA of the Act prohibits the anti-competitive behaviour known as ‘unconscionable conduct’. Section 51AC, which seeks particularly to protect small

businesses from unconscionable conduct by large businesses, attracted most comment during this inquiry.

E.22 A number of submissions sought to extend s.51AC to proscribe ‘unfair, harsh or unconscionable conduct’. The Committee considers that ‘harsh’ conduct is often a normal part of tough competitive dealing, and that the concept of ‘unfair conduct’ is much less legally certain than the concept of ‘unconscionable conduct.’ It is not clear that either of these proposed additions would enhance protection for small business under the Act, and as a result the Committee does not support their inclusion.

E.23 Subsections 51AC(9) and (10) limit the operation of s.51AC to the supply or acquisition of goods or services at a price in excess of \$3,000,000. A number of organisations called for greater clarity around the \$3 Million figure, suggesting it should operate on a per-invoice basis, and should be indexed. Other evidence suggested that the \$3 Million threshold was fundamentally inappropriate, and should be removed.

E.24 The ACCC agreed with this view, saying that subsection 51AC(3)(a) already stated that the courts may have regard to the relative strengths of the bargaining positions of the companies, so no threshold is necessary.

E.25 The Committee noted these arguments and further noted that subsections 51AC(1) and (2) exclude publicly listed companies from the protection of the section. The Committee agrees that the removal of the thresholds will not reduce the current protection for small businesses, and will enhance protection for businesses involved in transactions over \$3 Million, who are nevertheless subject to unconscionable conduct within the terms of s.51AC.

Recommendation 7

The Committee recommends that subsections 51AC(9) and 51AC(10) of the Act be repealed.

E.26 Submissions and witnesses also sought to extend s.51AC to proscribe a number of specific activities, including the unilateral variation of contracts, unilateral termination of contracts, and the presentation of standard form contracts. In relation to the behaviours identified in these activities, the Committee notes that many are already captured by the terms of s.51AC, particularly subsections (3)(j) and (k).

E.27 The Committee also notes evidence that there are occasions upon which the use of standard form contracts or unilateral variations of contracts may be pro-competitive and commercially beneficial for both parties. Standard form contracts, for instance, save both parties time and money when similar transactions are conducted regularly, and when the terms and conditions are well known and agreed by both parties. The Committee is concerned that the proscription of standard form contracts *per se*, would remove these cost saving benefits in addition to proscribing the unconscionable use of such forms.

E.28 The ACCC presented a slightly different proposal in relation to unilateral variation of contracts. The ACCC argued that, rather than proscribing such contracts, they should be added to the list of matters, contained in subsections 51AC(3) and (4), to which the courts may have regard in determining whether conduct is unconscionable. This proposal would not ban the unilateral variation of contracts outright, but would make it clear that such contracts could constitute conduct which is, in all the circumstances, unconscionable.

E.29 The Committee finds this argument compelling, since it would discourage the inappropriate use of unilateral variation of contracts, while allowing unilateral variation where such provisions are commercially necessary and pro-competitive.

Recommendation 8

The Committee recommends that subsections 51AC(3) and 51AC(4) of the Act be amended to include ‘whether the supplier (in s.51AC(3)) or acquirer (in s.51AC(4)) imposed or utilised contract terms allowing the unilateral variation of any contract between the supplier and business consumer, or the small business supplier and acquirer.’

E.30 Witnesses indicated to the Committee that some government authorities, particularly at State and local levels, are not covered by s.51AC of the Act, despite being large scale purchasers of products, often from small businesses. The Committee agrees that such authorities should be subject to the Act.

Recommendation 9

The Committee recommends that s.2B(1) of the Act be amended so that it is clear that Part IVA of the Act applies to the Commonwealth Government; and that the Government consult with the states and territories with a view to amending subsection 2B(1) of the Act, so that Part IVA of the Act applies to state, territory and local governments.

E.31 The Committee examined, in some detail, unconscionable conduct in retail tenancy arrangements. Some witnesses argued that ACCC has not pursued retail tenancy issues with sufficient vigour, despite the introduction of s.51AC which was intended to strengthen the remedies available to retail tenants who were the victims of unconscionable conduct.

E.32 The Committee observed, however, that since a number of State and Territory jurisdictions have drawn down versions of 51AC into their respective retail tenancy regimes the full impact of s.51AC on retail tenancies may be larger than is suggested by a simple observation of the ACCC’s activity.

E.33 The Committee recommends that the Commonwealth government work with its State and Territory counterparts to harmonise retail tenancy laws.

E.34 The Committee noted that there are inconsistencies and areas where the law could be strengthened, including in relation to the common practice of ‘secret pricing’ in retail tenancies. While the Committee does not support the compulsory disclosure of rental terms, the Committee does not support arrangements which prevent such disclosure. Such arrangements inhibit, rather than support, an informed market for retail tenancies. In particular, retail tenants who utilise the collective bargaining notification arrangements proposed in the Dawson Report and supported in this report should be able to freely share information about their rental prices and conditions. If this process fails to deliver satisfactory outcomes over time, the Government should consider the adoption of a mandatory code.

Recommendation 10

The Committee recommends that the Commonwealth Government negotiate with state and territory governments, with a view to introducing measures which would prohibit retail lease provisions compelling tenants to keep their tenancy terms and conditions secret.

Codes of conduct

E.35 The Committee considered Part IVB of the Act, which enables voluntary or mandatory industry codes to be prescribed under the Act, so that contravention of a relevant code also contravenes the Act. The Committee further noted the ACCC’s proposals to endorse codes of conduct which meet its quality criteria.

E.36 The Committee concurs with the scepticism expressed by a number of small business representatives about the extent to which voluntary codes of conduct can address entrenched problems within particular industries.

E.37 The Committee does not support the general use of voluntary codes as a substitute for sensible regulation. The Committee notes that the recommendations it has made in this report are likely to accomplish more to support successful competition than the most well-meaning ambitions of developing voluntary codes.

Collective bargaining

E.38 The Committee generally supports the Dawson Report’s recommendation for a notification process rather than an authorisation process for proposed collective bargaining arrangements. The Committee notes that these recommended collective bargaining arrangements include provision for collective boycotts, where these are judged to be in the public benefit.

E.39 Although the government accepted the recommendation of the Dawson Report in relation to collective bargaining, the Committee notes that it has yet to introduce the legislation to implement that proposal.

Recommendation 11

The Committee recommends that the Government immediately bring forward legislation to introduce a collective bargaining notification scheme, including the right to boycott, and excluding the proposed \$3 million threshold for notifications.

Creeping acquisitions

E.40 Submissions before the inquiry suggested that in the retail grocery sector and the retail liquor sector, large chains are acquiring the stores of independent competitors in a program of ‘creeping’ acquisitions. Witnesses expressed concern that s.50 of the Act, designed to prevent acquisitions that would have the effect of ‘substantially lessening competition in a market’, is inadequate in dealing with piecemeal acquisitions because no single purchase is likely, by itself, to lead to a substantial lessening of competition.

E.41 The ACCC itself expressed concern about this issue, but also noted that it has not yet determined whether creeping acquisitions in general (as opposed to specific case) do substantially lessen competition and so cause economic detriment. Further, if they do have this effect, the ACCC expressed uncertainty about whether the current section 50 provisions would be adequate to deal with that issue.

E.42 The Committee considers, as a matter of logic, that creeping acquisitions must, if continued indefinitely, at some point result in a very concentrated market. The clear consensus of evidence before the Committee supported this view, and no substantial arguments were raised to oppose it. Current merger law does not effectively address this issue. Section 50 of the Act should be strengthened to take account of the cumulative effects of acquisitions which over time may substantially lessen competition.

Recommendation 12

The Committee considers that provisions should be introduced into the Act to ensure that the ACCC has powers to prevent creeping acquisitions which substantially lessen competition in a market.

Divestiture

E.43 Divestiture powers are powers which enable a Court to order that a dominant corporation be broken up into several smaller corporations in order to prevent the anticompetitive domination of a market by one player.

E.44 Such powers are currently available under s.81 of the Act, but cannot be applied to creeping acquisitions, nor to offences under s.46. The Committee considers that the application of s.81 should be expanded, so that divestiture becomes a remedy for other breaches of the Act, including section 46 (Misuse of market power) and any

new section introduced in line with the Committee's recommendation 12 (relating to the regulation of creeping acquisitions).

E.45 As divestiture is a quite severe remedy, it is appropriate to provide "warning mechanisms" to ensure that a corporation which is expanding its business is able to comply with its obligations under the Act. A suitable warning mechanism could be based around a "trigger" market concentration.

E.46 This trigger should not operate as a *de facto* cap on market share. Rather it would require companies proposing acquisitions in concentrated industries to notify the ACCC. The Commission would then assess whether the acquisition would result in a substantial lessening of competition. The Committee notes that this already occurs in the retail grocery industry.

Recommendation 13

The Committee recommends that s.81(1) of the Act be amended so that s.81 can be applied where a corporation is found to have contravened section 46, section 46A, or any new section introduced to regulate creeping acquisitions.

Powers of the ACCC

E.47 Before the Dawson Committee, the ACCC argued that it should be given the power to issue 'cease and desist' orders to stop anti-competitive conduct. Other organisations supported the extension of these powers before this Committee. The Committee considers that cease and desist powers are a vital tool for the ACCC if it is to prevent anti-competitive conduct from resulting in substantial damage to small business. The ACCC requires a tool which will enable it to act in 'real business time' yet which will protect the rights of companies against whom the cease and desist orders are sought.

Recommendation 14

The Committee recommends that the Act be amended to provide for cease and desist orders, modelled on the orders provided for in sections 74A to 74D of the *Commerce Act 1986* (NZ), appropriately modified to conform with Australian constitutional law.

E.48 The ACCC argued, before this Committee, for an extension of its powers under s.155 of the Act beyond the commencement of injunctive court proceedings. The Committee is reluctant to interfere in the powers possessed by the ACCC once a matter is before the courts. However the Committee considers that the ACCC should be able to apply to the courts for its s.155 powers to continue after the commencement of injunctive proceedings.

Recommendation 15

The Committee recommends that s.155 of the Act should be amended to enable the ACCC to seek the permission of the court (whether as part of a warrant application or otherwise) for the continued use of its powers under s.155 after the commencement of injunctive proceedings. The use of s.155 powers should cease prior to the commencement of substantive proceedings.

Resources of the ACCC

E.49 The ACCC acknowledged to the Committee that it is often constrained in its ability to pursue legal proceedings in relation to s.46 and s.51AC, because of the lack of availability of funding. The Committee wishes to rectify this problem.

Recommendation 16

The Committee recommends that the ACCC should be adequately funded to undertake its role as the principal litigant in s.46 and s.51AC cases.

Judicial arrangements

E.50 One organisation suggested to the Committee that jurisdiction for s.46 and s.51AC matters should be extended to lower courts and tribunals, in order to increase access to justice for small businesses. The Committee supports this proposal, and considers that the Federal Magistrates Court has developed expertise in resolving issues without requiring the expense of a fully contested court case. This expertise could resolve a substantial number of s.46 and s.51AC matters with cost savings for all sides. Recourse to the Federal Magistrates Court may also enable more small businesses to utilise the provisions of section 83 of the Act to seek damages where anti-competitive conduct has already been established by the courts.

Recommendation 17

The Committee recommends that the jurisdiction of the Federal Magistrates Court be extended to enable it to deal with Misuse of Market Power (s.46 and s.46A where cases rely upon s.83), Contravention of Industry Codes (s. 51AD) and Unconscionable Conduct (Part IVA).

Approaches adopted in OECD economies

E.51 In its discussion of the effectiveness of the *Trade Practices Act 1974*, the Committee has compared the provisions of the Act with those in the competition laws of a number of OECD economies. In particular, the Committee has considered approaches adopted in relation to the following issues:

- UK and US legislation regarding predatory pricing and recoupment (para 2.51);
- US legislation regarding definitions of ‘unfairness’ (para 3.29);

- UK legislation regarding the regulation of contracts (para 3.54ff);
- UK legislation regarding a ‘trigger’ of market concentration for the purpose of assessing acquisitions (para 4.76ff)
- New Zealand legislation regarding cease and desist powers (para 5.10ff)

CHAPTER ONE

THE INQUIRY

Reference to the Committee

1.1 On 25 June 2003, on the motion of Senator Conroy, the Senate referred the following terms of reference to the Economics References Committee, for inquiry and report by 1 March 2004:

Whether the *Trade Practices Act 1974* adequately protects small businesses from anti-competitive or unfair conduct, with particular reference to:

(a) whether section 46 of the Act deals effectively with abuses of market power by big businesses, and, if not, the implications of the inadequacy of section 46 for small businesses, consumers and the competitive process;

(b) whether Part IVA of the Act deals effectively with unconscionable or unfair conduct in business transactions;

(c) whether Part IVB of the Act operates effectively to promote better standards of business conduct, and, if not, what further use could be made of Part IVB of the Act in raising standards of business conduct through industry codes of conduct;

(d) whether there are any other measures that can be implemented to assist small businesses in more effectively dealing with anti-competitive or unfair conduct; and

(e) whether there are approaches adopted in Organisation for Economic Co-operation and Development (OECD) economies for dealing with the protection of small business as a part of competition law which could usefully be incorporated into Australian law.

(2) That the committee make recommendations for legislative amendments to rectify any weaknesses in the Trade Practices Act identified by the committee's inquiry.

Conduct of the inquiry

1.2 The Committee placed a call for submissions in *The Australian* newspaper and on the Senate's website. Closing date for submission was 22 August 2003, although in order to maximise participation in the inquiry, the Committee continued to accept submissions after that date. 55 submissions were received. A list of the parties who provided submissions is at Appendix 1.

1.3 On 11 December 2003, the High Court brought down its decision in the 'Rural Press' case (*Rural Press v ACCC* [2003] HCA 75). This judgment contained significant judicial consideration of s.46 of the *Trade Practices Act*, and in the

Committee's view, could have altered the positions of some witnesses and submitters who had provided evidence. As a result, the Committee called for additional submissions by writing directly to every organisation which had appeared as a witness, by issuing a media release to the Canberra press gallery, and by posting that media release on the Inquiry's website. The closing date for additional submissions was 14 January 2004. 7 supplementary submissions were received by that date.

1.4 The Committee held a total of six hearings during October and November 2003, in Canberra and Melbourne. A list of the witnesses who appeared at those hearings is at Appendix 2.

Previous inquiries into the Trade Practices Act

1.5 The *Trade Practices Act 1974* ('the Act') has been reviewed by parliamentary committees and government review panels on a number of occasions, starting as far back as 1976 (the 'Swanson Committee'). In this report, the Committee will make regular reference to the findings and evidence of two recent reports:

- The House of Representatives Standing Committee on Industry, Science and Technology ('Reid Committee') report, *Finding a Balance – Towards Fair Trading in Australia* (May 1997) which led to the implementation of s.51AC of the Act; and
- The *Review of the Competition Provisions of the Trade Practices Act* (the 'Dawson Report'), which reported to Government in January 2003 and was released to the public following the High Court's decision in the *Boral* case¹.

The Dawson report

1.6 The Dawson review had different terms of reference to this inquiry, and focused on Parts IV ('Restrictive trade practices') and VII ('Authorizations and notifications in respect of restrictive trade practices'). It did not include in its terms of reference, or in its report, consideration of the provisions of Parts IVA and IVB.

1.7 As a result, the common ground between the Dawson report and this report relates to s.46. However, this common ground is limited by the fact that, while the Dawson Report was released to the public after the *Boral* judgment, it was released to the Government prior to *Boral*. While Sir Daryl Dawson reconsidered the report and reaffirmed its recommendations after the *Boral* judgment, in the Committee's view the nature of debates and concerns around section 46 have shifted considerably since *Boral*. During the Dawson Inquiry, the primary concerns related to whether or not 'purpose' could be successfully demonstrated. Since *Boral*, the question of purpose and effect has become much less prominent, because the earlier test of whether a company has substantial market power has become contentious.

1 *Boral Besser Masonry Limited v Australian Competition and Consumer Commission* [2003] HCA 5, 7 February 2003.

1.8 Following is an outline of the Dawson Report's position on major issues considered in this report.

No requirement for an effects test in s.46

1.9 The Dawson report identified the insertion of an effects test into s.46 as the main issue raised with respect to s.46. The ACCC was the major proponent of an effects test, and the measure was 'generally supported in a number of submissions and opposed in other submissions.'² The report concluded:

The introduction of an effects test would mean that at least part of the current jurisprudence surrounding section 46 would be lost. [...] In the Committee's view, it would not be in the interests of competition or consumers to change section 46, given that cases currently before the courts offer a real prospect of developing a better understanding of the true scope of section 46.³

1.10 The Government's response supported the review's findings that no change should be made to s.46.

No amendment to s.46 to capture price discrimination

1.11 The Dawson report considered whether s.46 required amendment in order to better deal with price discrimination ('when like goods or services are provided to different persons at different prices, the difference in price being unrelated to the cost of providing the goods or services'⁴). A previous provision, s.49, dealt directly with price discrimination but was repealed in 1995.

1.12 The report concluded that 'price discrimination may be pro-competitive or anti-competitive'⁵ and that s.46 provides an appropriate way to distinguish between the two. It therefore recommended no change to s.46 on this basis, and the Government accepted the recommendation.

ACCC to issue guidelines on Part IVA

1.13 As noted above, Part IVA was outside the Dawson review's terms of reference, but a number of submissions raised issues in relation to this Part anyway. The report did not contain extensive discussion, but noted a certain level of confusion and recommended that the ACCC consider drafting guidelines to clarify some of this confusion. The government supported the development of these guidelines.

2 *Review of the Competition Provisions of the Trade Practices Act*, January 2003, p.77.

3 *Review of the Competition Provisions of the Trade Practices Act*, January 2003, p.84.

4 *Review of the Competition Provisions of the Trade Practices Act*, January 2003, p.89.

5 *Review of the Competition Provisions of the Trade Practices Act*, January 2003, p.92.

No extra powers for ACCC

1.14 The ACCC sought extension of its powers to (a) order companies to ‘cease and desist’ from anti-competitive conduct; and (b) continue using its powers under s.155 of the Trade Practices Act after the commencement of injunctive court proceedings. The Dawson review considered that no strong case had been made out to support either of these two powers, and raised constitutional (separation of powers) issues in relation to the ‘cease and desist’ orders. The government accepted the recommendation to this effect.

Collective bargaining notification process

1.15 Collective bargaining, in the context of the Dawson review, occurs when two or more small businesses band together to negotiate with a big business as one entity, in order to reduce the imbalance in market power and negotiating strength between themselves and the big business. The Dawson report took a positive view of collective bargaining. Collective bargaining is already permissible under the Trade Practices Act, but requires authorisation by the ACCC. Dawson proposed, instead, a notification process based on s.93 of the Act.

1.16 The difference between these processes is that under an authorisation process, the ACCC is entitled to determine whether or not the collective bargaining should be permitted, and the collective bargaining cannot proceed until the ACCC has made its decision. Under a notification process, however, the onus is reversed, and the collective bargaining may proceed if the ACCC does not object within a fixed period (the Dawson report recommended 14 days). This process would therefore be more ‘speedy and simple.’⁶ The government has accepted this recommendation, although the necessary legislative amendments are yet to be made.

1.17 Each of the preceding issues will be considered in more depth in this report, and the Dawson report’s position on each of them will be canvassed. However this summary of the Dawson report’s position on issues pertinent to this inquiry suggests the current state of the debate surrounding the Trade Practices Act.

Protecting competition, and protecting competitors

1.18 The terms of reference for this inquiry require the Committee to consider ‘whether the *Trade Practices Act 1974* adequately protects small businesses from anti-competitive or unfair conduct’.⁷ This raises the question of whether the Act *should* protect small business, and led to debate within submissions and evidence before the Committee as to whether the purpose of the Act is to protect *competition*, or *competitors*.

6 *Review of the Competition Provisions of the Trade Practices Act*, January 2003, p.118.

7 emphasis added.

1.19 The wider purpose of the Act is clearly to protect competition and consumers. Section 2 of the Act reads:

The object of the Act is to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection.

1.20 This notion has been supported by the High Court as recently as the *Boral* judgment, wherein Gleeson CJ and Callinan J stated:

The purpose of the Act is to promote competition, not to promote the interests of particular persons or corporations.⁸

1.21 However, the objects of the Act, quoted above, also refer to ‘fair trading’ which suggests that traders, including small businesses, might expect protection under the Act from ‘unfair trading’. This, in turn, has led the Committee considering in this report the extent to which the Act, and in particular sections 46 and 51AC, contribute to ‘fairness’ in the general, everyday and common-sense use of the term. The Committee is confident that the recommendations contained in this report will improve the protection provided by the Act for ‘fair trading’.

1.22 As a matter of logic, competition requires competitors. This is captured in the Act in section 50(3)(h) which allows the ACCC to consider whether a company acquisition ‘would result in the removal from the market of a vigorous and effective competitor.’ As a result, the Committee considers that while the objects of the Act refer directly to enhancing competition, these objects implicitly require – or at least prefer – the existence of an effective number of competitors.

1.23 Having stated this, the Committee recognises that there is a significant difference between protecting competitors, and protecting *particular* competitors. The entry and exit of competitors from the market is a normal part of vigorous competition. Market efficiency is often enhanced by driving inefficient competitors from the market.

1.24 The terms of reference also recognise this distinction, because they ask the Committee to report on whether the Act protects small businesses ‘from anti-competitive or unfair conduct’. The Committee is not asked to report on whether the Act protects small businesses from being harmed or ultimately failing as a result of competitive or fair conduct.

1.25 Section 51AC of the Act, which is considered in detail in Chapter 3, requires a small distinction from the argument above. Section 51AC was introduced with small business in mind, and offers small businesses protections which are not available to larger companies. However even this section protects small businesses as a class, rather than protecting individual businesses; and the section only protects small businesses from unconscionable conduct. There is nothing in s.51AC which would

8 *Boral Besser Masonry Limited v ACCC* [2003] HCA 5, par 87.

protect an inefficient small business from failing as a result of the pro-competitive behaviour of others.

1.26 To summarise the Committee's views on this issue, the purpose of the Act is to protect competition. This can best be achieved by maintaining a range of competitors, who should rise and fall in accordance with the results of competitive rather than anticompetitive conduct. This means that the Act should protect businesses (large or small) against anticompetitive conduct, and it should not be amended to protect competitors against competitive conduct. This view underpins the Committee's considerations in the rest of this report.

Outline of the report

1.27 This report will commence by addressing, in Chapter 2, matters relating to s.46 of the act, and in particular the question of what is meant, in the post-*Boral* marketplace, by a 'substantial degree of power'. Chapter 2 will also consider the use of the term 'taking advantage' in s.46, whether an effects test should be introduced, and whether s.46 should be amended to deal more directly with price discrimination and predatory pricing.

1.28 Chapter 3 of the report deals with unconscionable conduct, and particularly s.51AC. It considers whether the section should be amended to refer to 'harsh, unfair or unconscionable conduct', whether it should proscribe additional forms of behaviour, and whether it should also regulate contracts themselves, rather than just the conduct of negotiating parties.

1.29 Chapter 4 considers a number of other issues raised before the Committee. It considers the effectiveness of Part IVB of the Act, relating to Codes of Conduct, provisions relating to notification of collective bargaining arrangements, and whether the Act should be amended to deal more effectively with 'creeping acquisitions'.

1.30 Finally, Chapter 5 deals with the administration of the Act, considering whether the powers of the ACCC should be extended, whether the ACCC is sufficiently resourced to utilise the powers it already has, and whether the judicial arrangements for the resolution of matters under sections 46 and 51AC should be amended.

Acknowledgment

1.31 The Committee is grateful to, and wishes to thank, the organisations and individuals who assisted with this inquiry.

CHAPTER TWO

MISUSE OF MARKET POWER

Introduction

2.1 This chapter examines the effectiveness of s.46 in dealing with the misuse of market power by firms with substantial market power. The Committee also considers the implications for consumers, small business and the competitive process as a result of any inadequacies of s.46.

2.2 Most evidence from all sides of the debate agreed that a competitive market creates positive outcomes for the economy, business and consumers. However, views differed on how the interpretation and application of s.46 impacts on the competitive environments in which large, medium and small businesses operate.

2.3 Generally groups representing large business operators argued that s.46 was functioning well and had evolved into an effective method of controlling the misuse of market power. For example, Telstra stated:

In considering proposals to reform section 46, it is important to ensure that such reforms are consistent with promoting the objective that section 46 was intended to promote. That objective is to ensure that firms with substantial market power do not misuse their market power in a fashion that harms the competitive process. In this regard, Telstra does not believe that any serious problems have been identified in relation to the ability of section 46 to fulfil this important objective.¹

2.4 In contrast, the majority of groups representing the views of small business expressed the view that s.46 does not offer effective protection from the misuse of market power. In particular, they claim that recent High Court decisions have narrowed the interpretation of s.46 to the point where it is difficult for s.46 to be of any practical use.²

2.5 The first part of this chapter outlines the provisions of section 46. The Committee then analyses the debates over the interpretation of the various provisions, and in particular the arguments for and against the need to amend or clarify the section.

Section 46

2.6 Section 46 states:

1 *Transcript of Evidence*, Landrigan, 17 October 2003, p. 2.

2 *Transcript of Evidence*, McKenzie, 7 November, 2003, p. 42.

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

- (a) eliminating or substantially damaging a competitor of the corporation or of a body corporate that is related to the corporation in that or any other market;
- (b) preventing the entry of a person into that or any other market;
- (c) deterring or preventing a person from engaging in competitive conduct in that or any other market.

2.7 For the purpose of the Committee's inquiry three key elements of s.46 can be identified. These are the elements required to be established in order to make out a successful case under s.46, namely:

- substantial degree of power in a market;
- taking advantage of that power;
- for the purposes laid out in (a), (b) or (c)

2.8 At various times each of these required elements has attracted debate in respect of their interpretation and application by the court. Four High Court decisions are particularly significant in these debates, namely:

- *Queensland Wire Industries Pty Ltd v Broken Hill Pty Ltd (1989) 167 CLR 177*;
- *Melway Publishing Pty Ltd v Robert Hicks Pty Ltd [2001] HCA 13*;
- *Boral Besser Masonry Limited v ACCC [2003] HCA 5*; and most recently
- *Rural Press Ltd v ACCC [2003] HCA 75*.

Issues raised in relation to s.46

2.9 A number of issues in relation to s.46 were raised before the Committee, and the following issues are dealt with below:

- whether the Act gives sufficient guidance as to what constitutes substantial power in a market;
- whether the Act provides sufficient guidance as to what constitutes 'taking advantage of' market power;
- whether the Act provides sufficient protection against predatory pricing;
- whether a 'financial power' test should be introduced;
- whether the Act should proscribe the misuse of market power in a second market;

- whether the Act provides sufficient protection against the use of co-ordinated market power; and
- whether an ‘effects test’ should be included as an addition to or substitute for the current ‘purpose test’.

Substantial power in a market

2.10 In 1986, s.46 was amended by the *Trade Practices Revision Act 1986*, so that the section applied not only to ‘a corporation that is in a position substantially to control a market for goods or services’ but to ‘a corporation that has a substantial degree of power in a market’. In his second reading speech, the Minister noted that the purpose of this change was to reduce the threshold:

The test for the application of the section is to be reduced from that of a corporation being in a position substantially to control a market to a test of whether a corporation has a substantial degree of market power. As well as monopolists, section 46 will now apply to major participants in an oligopolistic market and in some cases, to a leading firm in a less concentrated market.³

2.11 Several witnesses to this inquiry argued, however, that the High Court’s decision in *Boral* effectively defeated the intention of parliament by raising the threshold back close to its pre-1986 level. Chairman of the ACCC, Mr Graeme Samuel, for instance, stated:

The High Court decision in the *Boral* case, in our view—and in the view of senior counsel—has given a legal interpretation to the wording of section 46, which indicates that parliament did not achieve its intention. The use of the words ‘substantial degree of market power’ did not lower the threshold below that of dominance as was previously the case with section 46. This is a legal issue. What we have said is that as the High Court appears to have made it clear that parliament did not achieve its intention and, as there is now some uncertainty as to what ‘substantial degree of market power’ now means, it is appropriate for parliament to revisit the intention it expressed in 1986 to clarify the meaning of section 46 and, in particular, to clarify the threshold for the application of the section in the way that was evidenced by the intention of parliament in 1986.⁴

2.12 This view was also supported by the Tasmanian Independent Retailers:

We believe the way forward is to restore, as we said, the parliamentary intent by addressing the key problems, substantial degree of market power, and take advantage in section 46 of the Trade Practices Act 1974.⁵

3 The Hon. L. Bowen MP, House of Representatives *Hansard*, 19 March 1986, p.1627.

4 *Transcript of Evidence*, Samuel, 31 October 2003, p. 83.

5 *Transcript of Evidence*, Richardson, 10 October 2003, p. 32.

2.13 NARGA supported the view that the threshold for market power had been raised to a level of market dominance. Professor Zumbo appearing for NARGA argued that, as a result, the court may not consider whether certain forms of behaviour are a misuse of market power, because the case does not satisfy the first hurdle, that is, establishing substantial power in a market:

It is a fundamental issue and we believe that it ought to be addressed. It could be addressed if the problems evident in section 46—the critical threshold issues of ‘substantial abuse of market power’ and ‘take advantage’—were addressed. We could then get into the conduct and see whether it was anticompetitive or just down to other factors—normal competitive factors. But we will never know unless we have an effective section 46.⁶

2.14 This view was supported by the Liquor Stores Association of Victoria in its evidence to the Committee:

What seems to be happening with section 46 is that we actually never get to the anticompetitive conduct itself; we seem to spend a lot of time deciding who is or who has a substantial degree of market power or power in the market and we never really get right down to the conduct itself.⁷

2.15 The Law Council of Australia (LCA), however, rejects the argument that the Boral decision has either rendered the interpretation of section 46 uncertain, or narrowed the parliamentary intention in the 1986 amendments. They argue that the High Court did not raise the threshold to dominance in Boral:

...it is being suggested that the 1986 amendments to section 46, which were designed to achieve a shift from dominance to a substantial degree of market power, have not been effective. We do not think that the High Court has raised the threshold to dominance. The High Court did not have to decide whether two or more firms can have market power. The Boral decision leaves this issue open. In fact, a majority of the Federal Court in the Safeway case found that Safeway had a substantial degree of market power with only 16 per cent of the relevant market, which is evidence that more than one corporation can have a substantial degree of power in a market. Further, the High Court will have the opportunity in the short term in any appeal from the Safeway decision to further clarify this issue.⁸

2.16 The ACCC argued that since, in its view, the courts have interpreted s.46 in a manner inconsistent with Parliament’s intent, clarificatory amendments to the Act are required. The ACCC proposed:

The policy intention behind s.46 should be given effect by amending s.46 to clarify the following principles:

6 *Transcript of Evidence*, Zumbo, 7 November 2003, p. 52.

7 *Transcript of Evidence*, Wilkinson, 31 October 2003, p. 53.

8 *Transcript of Evidence*, Castle, 7 November 2003, p. 21.

1. the threshold of ‘a substantial degree of power in a market’ is lower than the former threshold of substantial control;
2. the substantial market power threshold does not require a corporation to have an *absolute* freedom from constraint – it is sufficient if the corporation is not constrained to a *significant* extent by competitors or suppliers;
3. more than one corporation can have a substantial degree of power in a market;
4. evidence of a corporation’s behaviour in the market is relevant to a determination of substantial market power.⁹

2.17 The Committee considers that the suggestions made by the ACCC are consistent with the intention of Parliament in 1986, and that the inclusion of these points in the Act would clarify the intentions of Parliament without unduly extending or restricting the scope of the section. While the Committee recognises the Law Council’s point that a High Court decision in *Safeway* may yet consider the meaning of substantial market power, the Committee considers that these points of clarification can be added immediately, so that the law is plain, rather than waiting to see whether the courts interpret s.46 as Parliament intended. Further, the Committee notes that the ACCC has already dropped section 46 cases which, prior to *Boral*, would have proceeded. Further delays in clarifying the law are unnecessary, and the Committee therefore endorses the ACCC’s proposal.

Recommendation 1

The Committee recommends that the Act be amended to state that the threshold of ‘a substantial degree of power in a market’ is lower than the former threshold of substantial control; and to include a declaratory provision outlining matters to be considered by the courts for the purposes of determining whether a company has a substantial degree of power in a market. Those matters should be based upon the suggestions outlined by the ACCC in paragraph 2.16 of this report.

Take advantage

2.18 In order to contravene s.46, a corporation with substantial power in a market must *take advantage* of that power for one of the purposes proscribed in subsections (1)(a) (b) or (c). The initial interpretation of ‘take advantage’ was that it meant little more than ‘use’. Importantly, it was held that ‘take advantage’ did not imply that the power was used with a hostile purpose:

It is true that the words ‘take advantage of’ can be used with an adverse moral implication. This is particularly the case where the words are used with another person as their object. Of themselves, however, the words ‘take advantage of ... power’ are morally indifferent. As a matter of language, a Parliament can ‘take advantage’ of its legislative power to make good laws; a government can ‘take advantage’ of its executive power to protect and benefit the community; a trading corporation can ‘take advantage’ of its

9 Submission 30, ACCC, p. 19.

trading power to advance trade and competition to the benefit of its shareholders, its employees and those with whom it deals; an ordinary person can ‘take advantage’ of such power as he possesses to achieve objectives which are praiseworthy and socially desirable. Read in context, the words ‘take advantage of ... power’ are simply inadequate to superimpose upon the economic notions and objectives which s.46(1) reflects some indefinite moral or public purpose qualification requiring circumstances where the active or passive use of the relevant market power for one or other of the designated anti-competitive purposes is morally or socially undesirable.¹⁰

2.19 A number of court cases have refined the courts’ interpretation of the meaning of “take advantage” in the context of s.46. The *Safeway* case, the *Melway* case, and the *Rural Press* case have all given the courts opportunities to consider the term’s meaning.

2.20 In *Melway*, the High Court found that Melway had not taken advantage of its market power because the conduct in question was habitual or systematic conduct which had commenced before Melway acquired its market power, and because it was likely to maintain that conduct in a competitive market. The Court stated:

[61] 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 ...

[62] ... Melway had adopted its segmented distribution system before it secured its position of market dominance, and there was no reason to believe that it would not be both willing and able to continue that system in a competitive market.¹¹

2.21 The Federal Court, in its decision on *Safeway*, found that the business rationale of the conduct is important to the question of whether the corporation has taken advantage of its market power. The court gave an example related to refusal to supply: If a company with market power refuses to supply a customer due to concerns about the customer’s creditworthiness, this could hardly be considered to be ‘taking advantage’ of market power. If, however, the company refuses to supply a customer in order to drive them from the market, this is likely to be ‘taking advantage’ of market power.¹²

2.22 The ACCC argued that this question of business rationale opens up ‘a risk that the statement of the majority in *Safeway* may be relied upon to argue that a ‘rational

10 *Queensland Wire Industries Pty Ltd v BHP* (1989) 167 CLR 177.

11 *Melway Publishing Ltd v Robert Hicks Pty Ltd* (2001) 205 CLR 1 at 26.

12 *ACCC v Safeway Stores*[2003] FCAFC 149 (30 June 2003) at para 329, which uses BHP and Queensland Wire to make this example. It should be remembered that special leave to appeal from this decision to the High Court has been sought.

business conduct' defence has been introduced by a gloss on the 'take advantage' element.¹³

2.23 The High Court defined 'take advantage' even more narrowly in *Rural Press*. The court focussed on the use of the word 'could' in the *Melway* decision, cited above. The majority decision held that one test of whether a company had taken advantage of its market power was whether it *could* have acted in that way in the absence of the market power.¹⁴ This 'could' test, as applied in *Rural Press*, speaks to physical or business *capacity* rather than to rationale or intent, and appears to result in a situation where corporations may use their market power to engage in proscribed conduct with impunity, so long as they could also undertake that conduct in the absence of such power.

2.24 The ACCC described the effect of this judgment:

What this test means is that so long as it *could* physically be possible for a firm to engage in the conduct in the absence of its having market power, it will be held not to have taken advantage of its market power, even though it *would not on any rational commercial basis* have engaged in the conduct in the absence of market power ... In the Commission's view, such a test defeats the Parliament's intention in amending the Act in 1986 of lowering the application threshold for the section.¹⁵

2.25 The Trade Practices Committee of the Law Council of Australia took a different view, suggesting that the word 'could' was used in a general sense rather than being given a specific meaning:

An analysis of the application of the 'taking advantage' test by Federal and High Court judges reveals that the words 'would' and 'could' have been used interchangeably, sometimes within the same judgment ... what the test for taking advantage of market power requires is an examination of how the corporation might have acted in the absence of market power (ie. In a competitive market) – that is, the wider analysis of what the corporation might have, or 'could' have, done (rather than focussing only on what it would have done in particular circumstances). Ultimately though, whether that question is posited by use of the words 'would' or 'could' should not change the focus of analysis from that intended by the High Court – namely whether it is market power that gives rise to particular conduct, or whether that conduct might reasonably be engaged in by a firm lacking market power.¹⁶

13 Submission 30, ACCC, p. 20.

14 In the Committee's view, this is a slightly different test to that applied in *Melway*, because in *Melway* the behaviour had actually been conducted in a competitive market, prior to *Melway*'s acquisition of substantial market power. *Melway* therefore dealt with a real, rather than a hypothetical, exercise of conduct in a competitive market.

15 Submission 30b, ACCC, p. 4. See also submission 41c, NARGA, p. 6.

16 Submission 18b, Law Council of Australia, p.8.

2.26 The Committee concurs with the views of the ACCC. The words of the majority judgment seem quite clear since, in rejecting the ACCC's argument that the 'could' test should not be used, the judgment states that:

The Commission's criticism of the Full Federal Court for asking whether Rural Press and Bridge 'could' engage in the same conduct in the absence of market power must be rejected ... The Commission did not demonstrate either that [the Court, in *Melway*] did not mean what it said, or that what it said should be over-ruled.¹⁷

2.27 In his dissenting judgment, Justice Kirby described this reasoning as based upon 'a narrow, formalistic and substantially verbal ground'¹⁸, thus suggesting that the actual words used in the majority judgment – in this case, 'could' – should be given the highest weight. This tends to support the view expressed above by the ACCC.

2.28 The ACCC has submitted that s.46 should be amended to clarify that in determining whether a corporation has taken advantage of its market power, the courts should consider whether:

- the conduct of the corporation is materially facilitated by its substantial degree of market power;
- the corporation engages in the conduct in reliance upon its substantial degree of market power;
- the corporation would be likely to engage in the conduct if it lacked a substantial degree of market power; or
- the conduct of the corporation is otherwise related to its substantial degree of market power.¹⁹

2.29 The ACCC would also amend the section to make it clear that 'an inquiry as to the business rationale for the relevant conduct may be a relevant circumstance, but is not critical, to determining whether a corporation has taken advantage of its substantial market power in any particular matter.'²⁰

2.30 The Law Council of Australia argued against the ACCC's amendments, claiming that they had the potential to 'remove the filter in section 46 which requires a link between the conduct and the market power.'²¹

2.31 The Committee concurs with the views of the ACCC, and considers that the recommended amendments would make the Act more clear and remove current

17 *Rural Press* ([2003] HCA 75) at para 52 per Gummow, Hayne and Heydon JJ.

18 *Rural Press* ([2003] HCA 75) at para 121 per Kirby J.

19 Additional information, dated 18 November 2003, p.4.

20 Submission 30, ACCC, p. 21.

21 *Transcript of Evidence*, Castle, 7 November 2003, p. 22.

uncertainty with regard to the meaning of ‘take advantage.’ The Committee considers that the ACCC’s proposals, despite the views expressed by the Law Council, would make clear and explicit the requirement that a link be established between proscribed conduct and the possession of substantial market power.

Recommendation 2

The Committee recommends that the Act be amended to include a declaratory provision outlining the elements of ‘take advantage’ for the purposes of s.46(1). This provision should be based upon the suggestions outlined in paragraph 2.28 of this report.

Section 46 and predatory pricing

2.32 As noted above, s.46 states that a corporation with substantial market power is proscribed from taking advantage of this power for the purposes outlined under subsections (a), (b) and (c). These subsections are cast in general terms, rather than proscribing particular behaviours. However, predatory pricing was always one of the targets of s.46. In the second reading speech introducing the new s.46, the Minister stated:

What is being aimed at is the misuse by a business of its market power. Examples of misuse of market power may include in certain circumstances, predatory pricing or refusal to supply.²²

2.33 Predatory pricing has, however proven difficult to establish. Companies may set low, or below cost, prices as a consequence of normal, competitive behaviour. Such price setting may also be evidence of predatory pricing. The main point of difference relates to the intent of the corporation cutting its prices. If that corporation is cutting its prices in an attempt to ‘eliminate or substantially damage a competitor’²³ or drive them from the market, then that would be predatory pricing. It has, however, proven very difficult to establish this predatory intent.

2.34 A number of submissions and witnesses argued that s.46 has therefore failed to successfully address predatory pricing, and that consequently, amendment of the Act is necessary. Office Choice Limited, for instance, argued:

... urgent reform is required to Section 46 of the Trade Practices Act, particularly concerning the practice of predatory pricing as a misuse of market power in order to ensure the viability of small businesses and their ability to provide vigorous competition. [...]while Section 46 does not, in terms, prohibit predatory pricing, it was always assumed that this was the

22 The Hon. L. Bowen MP, House of Representatives *Hansard*, 19 March 1986, p.1627.

23 TPA s.46(1)(a).

very type of conduct at which Section 46 was aimed. Unfortunately, this assumption has been put to the test several times and has failed.²⁴

2.35 The Committee notes concerns that s.46 has not proven an effective means of countering predatory pricing, and considers that the Act could be strengthened by making predatory pricing a clearer target of the provision. The Committee therefore considers that the Act should be amended to make clear that predatory pricing is considered to be a behaviour contravening s.46.

2.36 However, the problem of defining what actually constitutes ‘low price’ or ‘below cost’ selling was raised by several witnesses, who pointed to the potential for predatory pricing cases to fail as a result of the difficulty of establishing what the relevant cost is. The Business Council of Australia quoted Professor Stephen Corones in their submission, giving some impression of how complex these definitional issues can become:

There is a vast literature in the United States and Europe on the topic of predatory pricing and how one proves its existence. Predatory pricing is sometimes referred to as “below cost pricing” but courts and commentators disagree as to the appropriate measure of costs. **Fixed costs** are costs which remain constant despite changes in output... **Variable costs** are costs which vary with changes in output... **Total cost** is the sum of fixed and variable costs. **Average cost** is the total cost divided by output. **Marginal cost** is the addition to costs resulting from the production of an additional unit of output. **Average variable cost** is regarded as a substitute for marginal cost.²⁵

2.37 Both Coles Myer and Woolworths described to the Committee some of the measures they take in order to avoid the perception of predatory pricing. The most important of these measures is that in both companies, store managers are permitted to lower prices on certain lines to *meet* local (small business) market prices, but are not permitted to *undercut* those prices.²⁶ Woolworths’ Chief Executive Officer Roger Corbett outlined the approach as follows:

We are of course very aware of where our major competitors sit. We, I suppose you could say, ruthlessly compete with those competitors to protect our business and ensure our customers are never disadvantaged. But we are, I hope, scrupulously careful in not targeting small players, for example in country towns. Big W’s general price level, for example, which is the same across the nation, may be lower. If we find a small operator that is going below us with a particular item, we then will not go below him. We will

24 Submission 12, Office Choice Ltd, pp. 2-3. Other submissions making a similar point included submissions 4 (Independent Liquor Group), 5 (Fair Trading Coalition), 7 (Palamedia Ltd), 28 (Motor Trades Association of Australia), 35 (Victorian Government), 41 (National Association of Retail Grocers of Australia), 42 (Metcash), 45 (ACT Government), and 50 (ARFRANC).

25 Submission 13, Business Council of Australia, p. 28, quoting Corones S.G. *Competition Law In Australia*, LBC Information Services, Sydney, p. 345. Emphasis added by BCA.

26 Submission 22, Coles Myer, p. 20.

match his price but never go below it as a matter of principle. So I suppose you might say the spirit of predatory pricing is reflected in that type of policy within our business.²⁷

2.38 The Committee considers that, while it may be possible for litigants to argue that any number of definitions of ‘cost’ are relevant to their particular circumstances, trade practices law has generally favoured the use of a good or service’s variable cost²⁸ as the appropriate yardstick.²⁹ If this were inserted into the Act, then the arguments about the appropriate definition of ‘cost’ would be resolved, and greater certainty would be provided to corporations, small businesses, and to the regulator.

Recoupment

2.39 An additional factor pointing to predatory pricing may be that the price-cutting company plans to recoup its losses by increasing prices once its opponents have been driven from the market. Some submissions argued that the consumer, who has benefited from lower prices during the act of predatory pricing, is not actually harmed until this process of recoupment takes place. The Business Council of Australia, for instance, stated that ‘the courts will look to some kind of recoupment to establish a strong likelihood of consumer harm.’³⁰

2.40 These arguments do not address the broader loss to the economy of a previously viable competitor. If a court does later establish that predatory pricing and recoupment have taken place, and applies a remedy or punishment, it cannot restore the lost competitor. This does not only leave the former competitor with a loss: it also leaves the consumers previously served by that competitor without the alternative goods, services, prices and presence which were formerly available. No court action can restore that economic loss. This emphasises the need for the Act to contain credible and enforceable provisions in relation to predatory pricing to provide a disincentive to predatory pricing in the first place.

2.41 The question of whether recoupment is a necessary element of predatory pricing, or just a useful indicator, was contentious during this inquiry. Although in the Boral decision the High Court was not actually required to determine whether Boral’s pricing decisions were predatory (since the case fell at an earlier threshold), the court did observe in passing that recoupment was not a necessary element of predatory pricing:

27 *Transcript of Evidence*, Corbett, 30 October 2003, p. 12.

28 Also described as ‘avoidable cost’.

29 See, for instance, the discussion in *Victorian Egg Marketing Board v Parkwood Eggs* 20 ALR 129 at 138 per Bowen CJ.

30 Submission 13, Business Council of Australia, p. 29.

While the possibility of recoupment is not legally essential to a finding of pricing behaviour in contravention of s.46, it may be of factual importance.³¹

2.42 NARGA argued that recoupment is not currently a component of s.46, since s.46 relates strictly to a corporation's purpose:

it must be remembered that there is no mention in s 46 itself of a concept of recoupment as an additional element in establishing breaches of s 46. All that is required by the wording of s 46 and the parliamentary intention behind s 46 is that the corporation has a substantial degree of market power and has taken advantage of that power for one of the anti-competitive purposes identified in the provision. To require proof of recoupment is to add a new element to s 46, a state of affairs certainly not contemplated by the parliamentary intention behind s 46.³²

2.43 The LCA, on the other hand, argued that recoupment is an important part of any sensible jurisprudence in relation to predatory pricing, citing McHugh J in *Boral*:

Courts in the United States and the United Kingdom Office of Fair Trading regard the concept of recoupment as a fundamental element of a successful 'predatory pricing' claim. Sound economic reasoning justifies the policy of the Office of Fair Trading and the United States jurisprudence ... [Care] must be taken in translating the United States decisions on 'predatory pricing' into s46 at the expense of an independent examination of the terms of the Act. Nevertheless, to require recoupment as a necessary element of a 'predatory pricing' claim fits in with the terms of s46.³³

2.44 The ACCC's submission agreed with NARGA's view that recoupment should not be necessary under s.46:

The ACCC takes the view that s.46 requires amendment to provide that in cases involving allegations of predatory pricing, a finding of expectation or likely ability to recoup losses is not required to establish a contravention of s.46. Such an amendment would ensure that the application of s.46 is consistent with Parliament's stated intention.³⁴

2.45 While the Committee agrees that recoupment is not a *necessary* element of predatory pricing for the purposes of s.46, evidence of an intention to recoup losses suffered during a period of alleged predatory pricing should be considered by the court. Such evidence may contribute to the court's view that a corporation has engaged in predatory pricing; however, the absence of an intention to recoup should not invalidate an allegation of predatory pricing.

31 *Boral* para 130 per Gleeson CJ and Callinan J.

32 Submission 41, National Association of Retail Grocers of Australia, pp. 103-104.

33 Submission 18, Law Council of Australia, p.23, citing McHugh J in *Boral* at 278.

34 Submission 30, ACCC, p. 22.

Recommendation 3

The Committee recommends that the Act be amended to provide that, without limiting the generality of s.46, in determining whether a corporation has breached s.46, the courts may have regard to:

- **the capacity of the corporation to sell a good or service below its variable cost.**

The Committee recommends that the Act be amended to state that:

- **where the form of proscribed behaviour alleged under s.46(1) is predatory pricing, it is not necessary to demonstrate a capacity to subsequently recoup the losses experienced as a result of that predatory pricing strategy**

Financial power

2.46 While the Law Council did not support changes to s.46, it did suggest some possible amendments which might be introduced to control predatory pricing, if the Committee took the view that such amendments were necessary.³⁵ These amendments focused on ‘financial power.’

2.47 Financial power essentially relates to the financial resources available to a competitor, whether those resources are currently directed towards activity in the market in question or not. It therefore describes, colloquially, how deep the company’s pockets are.

2.48 A company may have substantial financial power without having substantial market power. An example here might be Virgin Blue which, as a new entrant into the Australian airlines market in late 2000, was competing with Qantas and Ansett in the major route markets, and with Impulse as a low cost carrier. As a new entrant to the market, it lacked substantial market power, but with the financial might of the Virgin Group of companies behind the venture, Virgin certainly had financial power.³⁶

2.49 NARGA pointed out to the Committee that financial power, like market power, could enable companies to engage in predatory pricing:

Market share or financial power in these circumstances become critical factors as the greater the market share or financial power, the greater the

35 In this section, it may appear that the LCA supports the proposal that it has made. However the Committee is aware that the LCA only presented this option as a second-best option, and continually pointed out that it preferred the status quo.

36 For clarity, Virgin Blue is used here simply to provide a well-known example of a company with financial power but without substantial market power. The Committee does *not* suggest that Virgin Blue used this financial power in any inappropriate way.

corporation's freedom to engage in conduct that is by its very nature anti-competitive.³⁷

2.50 The Law Council's suggested amendments were designed specifically to deal with the use of financial power to support predatory pricing. The proposed amendments set out to 'catch unilateral predatory pricing conduct by firms with financial power but not market power (which arguably includes many firms in oligopolies)'.³⁸

2.51 The Law Council suggests the insertion of the following two subsections into section 46:

Section 46 (1AA)

A corporation with substantial financial power, or a substantial degree of power in a market, shall not take advantage of that power by selling, offering to sell, or inviting offers to purchase goods or services [below average variable cost] 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

© deterring or preventing a person from engaging in competitive conduct in that or any other market.

Section 46(1AB)

Section 46(1AA) will not apply to a corporation with substantial financial power (but not a substantial degree of power in a market) unless the relevant conduct is also likely to have the effect of substantially lessening competition in any market.

2.52 In the Law Council's view, the proposed amendments would cover predatory pricing by companies with substantial financial power, but 'would permit well resourced new entrants (eg Virgin Blue) pricing low to enter a market. [I]t would not inhibit innovation, it avoids more difficult concepts of justification on the grounds of economic efficiency, and it avoids any transfer of the onus of proof to the defendant.'³⁹

2.53 The Fair Trading Coalition also supported the introduction of a financial power element in s.46 with wider application than just predatory pricing:

37 Submission 41, National Association of Retail Grocers of Australia, p. 110.

38 Submission 18, Law Council of Australia, p.21.

39 Submission 18, Law Council of Australia, p.21.

I think financial power is a very important market element and, frankly, in a provision like section 46 the misuse of financial power should be there as well.⁴⁰

2.54 The Law Council itself, however, pointed out that its proposed amendment ‘still has definitional difficulties such as the reference to ‘financial power’ and ‘average variable cost’.⁴¹ The Business Council of Australia, acknowledging that the LCA had observed the limitations in its proposed model, stated:

... it would be difficult for a court to define, with any degree of certainty and precision, what constitutes ‘substantial financial power’. For example, would this include a company’s current financial position, bank facilities or the ability to raise finance? Equally, would it apply to their parent companies or even the personal wealth of industrial proprietors who may have the same role as parent companies in larger organisations? Nor can it be assumed that because a company is part of, or a subsidiary of, a larger corporation that it will readily have access to the funds of that larger entity. There is often fierce competition within corporations for access to capital. The mere fact that a parent entity has ‘substantial financial power’ does not automatically mean that that power is available to a particular subgroup of the entity.⁴²

2.55 The ACCC supported the use of the concept of financial power in regulating predatory pricing, but considered that rather than introducing a financial power threshold into s.46, financial power should be listed as one of the factors contributing to a determination of substantial power in a market:

...greater attention needs to be given in the context of section 46 to the role that financial power and financial resources play in enabling and facilitating both predatory pricing conduct and other unilateral anti-competitive conduct. The ACCC would be supportive of amending the section to make clear that, in determining whether a firm has a substantial degree of market power, the court may have regard to the financial resources available to the firm, including the financial resources of any related firm.⁴³

Rural Press and financial power

2.56 The relationship between financial power and market power was one of the central issues in the *Rural Press* case. The courts had no difficulty recognising that Rural Press possessed substantial financial power (suggesting some reassurance for the Law Council’s concerns as expressed above). The first instance trial judge, Mansfield J, found that this financial power constituted part of Rural Press’ market power:

40 *Transcript of Evidence*, Spier, 10 October 2003, p. 6.

41 Submission 18, Law Council of Australia, p.21.

42 Business Council of Australia, Supplementary submission, p. 35.

43 ACCC Additional Information, p.4.

In my judgment, in the present circumstances, the power of Rural Press and Bridge in the relevant market should be measured as including the financial resources and strength of Rural Press, as well as its existing publishing resources and expertise.⁴⁴

2.57 The Full Federal Court, on appeal, was unconvinced by Mansfield J's reasoning⁴⁵ and the High Court then put the issue beyond doubt by stating:

What gave those threats [made by Rural Press] significance was something distinct from market power, namely their material and organisational assets.⁴⁶

2.58 In other words, the High Court disagreed that financial power (material and organisational resources) was to be considered just a component of market power. Instead, it held financial power to be a distinct base of power.

2.59 In their supplementary submission, NARGA criticised the distinction supported by the High Court, stating:

Clearly, the majority of the High Court in the Rural Press case has failed to recognise that a corporation's substantial financial and material resources, like a substantial market share, are the very attributes that allow a corporation to act free from competitive constraint and, more critically, to the detriment of the competitive process.⁴⁷

2.60 In the Committee's view, the finding of Mansfield J in this case was close to the ACCC's suggestion noted above: financial power was not held to be a distinct base of power for the purposes of s.46, but was rather held to be a contributory element of market power. The Committee considers that the Act should be amended to give effect to the view arrived at by both the ACCC and Mansfield J in *Rural Press*.

2.61 In Recommendation 1, the Committee has recommended that the Act be amended to include matters to be adopted by the court in determining market power. The Committee considers that financial power should be added to this list. This will *not* amount to an automatic assumption that a corporation with access to substantial financial power also has substantial market power, but will allow the courts to make this connection where the facts of the case make it appropriate to do so.

Recommendation 4

The Committee recommends that s.46 of the Act be amended to state that, in determining whether or not a corporation has a substantial degree of power in a

44 *ACCC v Rural Press Ltd* (2001) ATPR ¶41-804 at 42,742 (para 130).

45 *Rural Press Ltd v ACCC* [2002] 118 FCR 236 at 277 (para 144).

46 *Rural Press Ltd v ACCC* [2003] HCA 75 at para 53 per Gummow, Hayne and Heydon JJ.

47 Submission 41c, NARGA, p.8.

market for the purpose of s.46(1), the court may have regard to whether the corporation has substantial financial power.

‘Financial power’ should be defined in terms of access to financial, technical and business resources.

Misuse of market power in a second market

2.62 In its submission, the ACCC noted that the provisions of s.46 explicitly proscribe taking advantage of substantial market power for a proscribed purpose ‘in that or any other market’.⁴⁸

2.63 The ACCC further noted that ‘it is clear that s.46 will apply if a corporation *engages in conduct in the market where it holds substantial market power*, with the purpose of excluding competition in a second market’.⁴⁹

2.64 ‘Market’ is defined in s.4E of the Act as ‘a market in Australia and, when used in relation to any goods or services, includes a market for those goods or services, and other goods or services that are substitutable for, or otherwise competitive with, the first-mentioned goods or services.’⁵⁰ It therefore provides the courts with the ability to define a particular market in whatever terms are appropriate to the facts. This amendment was intended as a liberalising and expanding reform of the law. It was not intended to allow spurious distinctions to be contrived to defend conduct which would otherwise have been proscribed.

2.65 Until recently, according to the ACCC, it also appeared ‘that a corporation with substantial power in one market could contravene s.46 through using that power *to engage in conduct in a second market* for one of the proscribed purposes’.⁵¹ This understanding was based on the Federal Court’s decision, upheld on appeal to the Full Federal Court, that the Victorian Egg Marketing Board had contravened s.46 by having power in the Victorian market and using it for proscribed purposes in the ACT egg market.⁵²

2.66 Chief Justice Bowen noted that although the Victorian board did not have substantial power in the ACT egg market:

In my view ... all that sec.46(1) requires is that there be a taking advantage of a power. The power in question is one in relation to a market which the corporation is in a position substantially to control. Properly construed the sub-section does not contain a further requirement that whatever it is that

48 TPA s.46(1).

49 Submission 30, ACCC, p.22.

50 This definition was inserted by the *Trade Practices Amendment Act 1977*.

51 Submission 30, ACCC, p.22.

52 Submission 30, ACCC, pp.22-23.

constitutes a ‘taking advantage’, has also to be done in relation to that same market.⁵³

2.67 The Full Federal Court, distinguished *Rural Press* from *Victorian Egg Marketing Board v Parkwood Eggs*⁵⁴ and determined that, for a breach of s.46 to occur, the market power must be taken advantage of in the market in which substantial market power is held. The High Court declined to overturn this finding:

The Full Federal Court said that the Commission, having chosen to plead and prove a very narrow market, with consequential advantages in terms of establishing market power and substantially anti-competitive purpose and effect, could not put that aside by treating the resources of Rural Press ... ‘which have no relevant relationship with that narrow market, as resources of or attributable to that market.’⁵⁵

2.68 The ACCC was critical of the High Court for simply observing the Full Federal Court comments without providing further clarity:

Of concern also to the Commission is that the strong suggestion in the Full Court’s judgment that a firm will only be found to have taken advantage of its market power when the impugned conduct took place in the market where the power existed was not the subject of any comment, adverse or otherwise, by the majority of the High Court.⁵⁶

2.69 Woolworths, however, argued that the *Rural Press* decision leaves open the question of misuse of market power in a second market:

It is a mischaracterisation to suggest that the decision in *Rural Press* means that a company can **never** be found to have breached section 46 in a case where, having substantial power in one market, it engages in conduct in a different or second market. There will be many occasions where there is a real link or ‘material assistance’ given to conduct in a second market by the fact of a corporation’s possession of substantial market power in another market.⁵⁷

2.70 The Committee considers that s.46 should prevent corporations who have a substantial degree of power in one market from taking advantage of that power for a proscribed purpose in another market. *Rural Press* is an excellent example of why. On the basis of the various judgments in this matter, it is clear that Rural Press had

53 Submission 30, ACCC, p.23 referring to *Victorian Egg Marketing Board v Parkwood Eggs Pty Ltd* (1978), ATPR 17,789.

54 The Court’s reasoning can be found in *Rural Press v ACCC* (2002) 118 FCR 236 at 278 (par 147).

55 *Rural Press* ([2003] HCA 75) at par 49 per Gummow, Hayne and Heydon JJ, footnotes omitted.

56 Submission 30b, ACCC, p. 4.

57 Submission 27c, Woolworths, p. 2.

substantial market power in one market, that it used that market power (together with financial and economic power) to threaten a competitor with dire consequences, and that its actions had an anticompetitive result. Yet the victim, Waikerie Printing, obtained no protection from s.46. In dissent, Kirby J stated:

For a blissful moment Waikerie had conceived itself as entitled to pursue a policy of competition with Rural Press and Bridge. The suggestion that the application by Rural Press and Bridge of their ‘market power’ was causally irrelevant to the swift retreat of Waikerie seems, with every respect, to border on the fanciful.⁵⁸

2.71 The Committee considers that the Act should be amended to provide protection to businesses against anti-competitive conduct not only within a market, but in any other market.

Recommendation 5

The Committee recommends that s.46 be amended to state that a corporation which has a substantial degree of power in a market shall not take advantage of that power, *in that or any other market*, for any proscribed purpose in relation to that or any other market.

Coordinated market power

2.72 In its submission, the ACCC noted that s.46 matters typically deal with the misuse of market power by single corporations, although subsection 46(2) allows for the market power of related entities to be considered jointly. The ACCC stated, however, that:

It is not clear to what extent Australian jurisprudence recognises the application of s.46 to the coordinated use of market power by unrelated firms.⁵⁹

2.73 An example of the behaviour in question would be where a price war eliminates several competitors and the remaining firms tacitly agree to raise prices to ‘supra competitive levels without further vigorous competition’. The ACCC noted that:

In these circumstances, conscious parallelism in relation to pricing would effectively allow the remaining firms to jointly extract monopoly profits. If a corporation expects to be able to recoup its losses by supra competitive pricing made possible by conscious parallelism, this may assist a finding that the corporation possesses a substantial degree of market power.⁶⁰

58 *Rural Press* ([2003] HCA 75) at par 122 per Kirby J.

59 Submission 30, ACCC, p.24.

60 Submission 30, ACCC, p.25.

2.74 The ACCC stated that there is some indication that the courts may hold that ‘conscious parallelism or other forms of coordinated interaction’ could be considered relevant to an analysis of market power. For example, in *Dowling v Dalgety* Justice Lockhart remarked that a corporation may have power in a market through its own activities or, at least in part, because of its agreements, arrangements or understandings with others. He said that ‘those arrangements must be taken into account when assessing the particular degree of power exercised by the individual corporation’.⁶¹

2.75 Likewise in *Boral*, Chief Justice Gleeson and Justice Callinan suggested that where conscious parallelism or coordinated interaction can be established, they may be relevant to an analysis of market power. Their judgement said that although the ACCC’s attempt to establish conscious parallelism in the behaviour of Boral Besser Masonry and Pioneer had failed, ‘if it had succeeded, the case may have taken on a different complexion’.⁶²

2.76 The ACCC suggested that legislation in other jurisdictions explicitly recognises that two or more corporations may exercise coordinated market power, and argued that ‘consideration should be given’ to amending s.46 to encompass the concept of coordinated use of market power.

2.77 The Trade Practices Committee of the Law Council of Australia referred to these same judgements to argue that ‘there is nothing in any recent case which suggests that s46 cannot cover an oligopolistic market’.⁶³ The Trade Practices Committee also advised that ‘there is a substantial body of law about collective dominance in Europe which could support the proposition that members of an oligopoly may each have substantial market power’.⁶⁴

2.78 The Committee considers that the use of coordinated market power for a proscribed purpose has the same negative impact on competition as does the use of an individual company’s substantial market power. As a result, the Committee considers that the Act should be clarified to indicate that a company may obtain market power by virtue of its co-ordination with another company.

Recommendation 6

The Committee recommends that s.46 be amended to clarify that a company may be considered to have obtained a substantial degree of market power by virtue of its ability to act in concert (whether as a result of a formal agreement or understanding, or otherwise) with another company.

61 Submission 30, ACCC, p.24.

62 Submission 30, ACCC, pp.24-25.

63 Submission 18, Law Council of Australia, p.14.

64 Submission 18, Law Council of Australia, p.15.

An effects test

2.79 Critics of the purpose test have proposed the introduction of an ‘effects test’ to replace or supplement the purpose test. The inclusion of an effects test, it is claimed, will allow the court to examine the actual effect or damage to a competitor or competition, as opposed to the purpose behind the conduct.⁶⁵

2.80 The support for the introduction of an effects test stems from the difficulty in establishing the true purpose behind a competitor’s actions.⁶⁶ The required proof generally comes in the form of ‘smoking gun’ documents which establish that the conduct was in breach of one of the prohibited purposes in s.46(1).⁶⁷ The difficulty in making out this element was expressed by the former Chairman of the ACCC, Professor Fels:

In recent cases that we have taken to court the difficulty in proving the requisite purpose in the absence of smoking gun documents has been apparent.⁶⁸

2.81 The Liquor Stores Association of Victoria, for example, state that an effects test will assist in catching more sophisticated types of potentially anti-competitive conduct.⁶⁹ This is achieved by the removal of the importance placed on the ‘smoking gun’ documents that establish intent.

2.82 While advocating an effects test, the Fair Trading Coalition (FTC) conceded the possibility that such a test may have a detrimental impact by inadvertently catching competitive conduct which is not anti-competitive for the purposes of the TPA. The FTC addressed this problem by suggesting the inclusion of a statutory defence of pro-competitive behaviour.

2.83 However, the Business Council of Australia (BCA) contended that the purpose test approach is appropriate given that the line between robust competition and anti-competitive conduct is a fine one.⁷⁰ They noted that a purpose test reduces the possibility of a corporation being inadvertently caught for conduct that is simply aggressive competition as opposed to anti-competitive. Several witnesses supported the view that an effects test would inadvertently capture pro-competitive behaviour:

65 Submission 1, Liquor Stores Association of Victoria, p. 5.

66 *Policy Forum: Australia’s Competition Laws: Business, the ACCC and the Dawson Review*, Stephen P King, p. 425.

67 Senate Legal and Constitutional Standing Committee, *Hansard*, 17 April 2002.

68 Senate Legal and Constitutional Standing Committee, *Hansard*, 17 April 2002.

69 Submission 1, Liquor Stores Association of Victoria, p.10.

70 Submission 13, Business Council of Australia, p. 31.

The problem is that there are real risks that an effects test will blur the distinction between pro competitive conduct and conduct that actually harms the competitive process.⁷¹

2.84 The Committee notes that the evidence received in this inquiry from the ACCC has not pursued the inclusion of an effects test. When questioned on this Mr Samuel, Chairman of the ACCC highlighted three reasons for moving away from this approach:

The first is a recognition that the effects test has now been through nine reviews. With the exception of one all nine reviews have indicated that the effects test was not to be proceeded with, so there is that aspect. The second is to recognise, as the ACCC recognised at the time of putting it to the Dawson committee, that an effects test could potentially have some unintended consequences and therefore would need to be very carefully framed and that the simple inclusion of an effects test may do some damage to the integrity of the foundation stone of part IV, which I mentioned before—that is, the process of competition.

But the most important change is that as a consequence of the Boral decision it has become much clearer that the critical issues for the application of section 46 are now what constitutes having a substantial degree of market power and what constitutes taking advantage of that power. Indeed, in the Boral judgment several of the justices indicated that the issue of determining purpose and the issue of separating purpose from effect may not be as difficult as may have previously been contemplated.⁷²

2.85 The Committee notes that the ACCC's recent losses have not come about as a result of the difficulty in proving purpose. While sympathetic to some of the arguments for an effects test, the difficulties with introducing it mean that the Committee does not recommend the inclusion of an effects test.

71 *Transcript of Evidence*, Landrigan, 17 October 2003, p. 23.

72 *Transcript of Evidence*, Samuel, 31 October 2003, p. 89.

CHAPTER THREE

UNCONSCIONABLE CONDUCT

3.1 Term of Reference 1(b) requires the Committee to consider ‘whether Part IVA of the Act deals effectively with unconscionable or unfair conduct in business transactions.’

3.2 A number of suggestions and concerns were raised with respect to Part IVA during the inquiry. This chapter will consider the following:

- whether s.51AC should relate to ‘unfair, harsh and unconscionable’ conduct;
- whether additional matters should be inserted into s.51AC(3) and s.51AC(4);
- whether the Act should regulate the content of contracts, in addition to regulating the conduct of negotiating parties.

3.3 During the inquiry, particular concerns were also raised with respect to unconscionable conduct in the negotiation of retail tenancy leases. The final section of this chapter will consider that issue.

Unconscionable conduct

3.4 The notion of unconscionable conduct has its origins in equity law. In equity, contracts may be set aside where the plaintiff suffered a special disability that affected their ability to understand the nature or import of the agreement, and the defendant knew of this disability and took advantage of it.

3.5 The current doctrine of unconscionable conduct applicable in Australia derives from the High Court case of *Blomley v Ryan*¹ – ‘[the court has power to set aside a transaction]...whenever one party to a transaction is at a special disadvantage in dealing with the other party because of illness, ignorance, inexperience, impaired faculties, financial need or other circumstances affecting his ability to conserve his own interests, and the other party unconscientiously takes advantage of the opportunity thus placed in his hands.’²

3.6 Part IVA of the Trade Practices Act contains three key provisions which outlaw different forms of unconscionable conduct in different circumstances. The oldest provision is section 51AB³ which was introduced in 1986 as a consumer protection provision. Section 51AA was introduced in 1992, and extends the

1 *Blomley v Ryan* (1956) 99 CLR 362.

2 per Kitto J at 415.

3 Formerly s.52A, renumbered in 1992.

prohibition on unconscionable conduct to all corporations. Finally, section 51AC, which was introduced in 1998, gives particular protection to small business in its dealings with larger corporations. Section 51AC has attracted most comment during the course of the current inquiry.

Provisions of Part IVA

3.7 As noted above, Part IVA contains three provisions germane to this inquiry.⁴ These are each outlined below.

Section 51AA

3.8 Section 51AA prohibits corporations from engaging in ‘conduct that is unconscionable within the meaning of the unwritten law ... of the States and Territories.’⁵ It therefore represents Commonwealth statutory recognition of the common and equity law relating to unconscionable conduct.

3.9 The main advantage of this statutory recognition of unconscionable conduct is that it brought such conduct within the scrutiny of the then Trade Practices Commission, and allowed for the application of the forms of relief available under the TPA.

3.10 Unlike sections 51AB and 51AC, the conduct regulated in s.51AA is limited to the ‘meaning of the unwritten law’ in relation to unconscionability. This was most recently affirmed by the High Court in the *Berbatis*⁶ case:

The identification [of unconscionable conduct in s.51AA] thus made is the principles of law and equity expounded from time to time in decisions respecting the common law of Australia.⁷

3.11 The Committee noted concerns expressed by the National Association of Retail Grocers of Australia that the narrow interpretation of ‘unconscionable conduct’ used in *Berbatis* might be used in s.51AB or s.51AC.⁸ The Committee can find no evidence to suggest that the High Court will take this approach, and notes that the Justices in *Berbatis* were careful to distinguish 51AA from 51AB and 51AC.⁹

4 The other provisions are s.51AAB, which provides that ss 51AA and 51AB do not apply to financial services; and s.51ACAA, which provides for the concurrent operation of state and territory laws.

5 TPA s.51AA(1).

6 *ACCC v CG Berbatis Holdings Pty Ltd* [2003] HCA 18 (*‘Berbatis’*).

7 *Berbatis* at par 38, per Gummow and Hayne JJ.

8 Submission 41, National Association of Retail Grocers of Australia, p.131.

9 See *Berbatis* at par 32, per Gummow and Hayne JJ.

Section 51AB

3.12 Section 51AB prohibits corporations supplying goods or services to consumers from engaging ‘in conduct that is, in all the circumstances, unconscionable.’¹⁰ It is limited to goods and services ‘of a kind ordinarily acquired for personal, domestic or household use or consumption.’¹¹

3.13 Unlike s.51AA, s.51AB is *not* limited to the equity or common law meaning of unconscionable conduct. Instead, it is extended by allowing the court to consider five additional matters:¹²

- the relative strengths of the bargaining positions of the corporation and the consumer;
- whether, as a result of conduct engaged in by the corporation, the consumer was required to comply with conditions that were not reasonably necessary for the protection of the legitimate interests of the corporation;
- whether the consumer was able to understand any documents relating to the supply or possible supply of the goods or services;
- whether any undue influence or pressure was exerted on, or any unfair tactics were used against, the consumer or a person acting on behalf of the consumer by the corporation or a person acting on behalf of the corporation in relation to the supply or possible supply of the goods or services; and
- the amount for which, and the circumstances under which, the consumer could have acquired identical or equivalent goods or services from a person other than the corporation.

3.14 Section 51AB was not the subject of contention during the current inquiry.

Section 51AC

3.15 Section 51AC prohibits a corporation from engaging in unconscionable conduct in trade or commerce in connection with the supply or acquisition of goods or services, to a person or a private company.

3.16 The section was enacted as a measure to protect small business. The second reading speech stated that s.51AC ‘will provide a new substantive legal remedy for small business against unconscionable conduct under the Trade Practices Act’ and spoke of the provision’s ‘purpose of protecting small business.’¹³

10 TPA s.51AB(1).

11 TPA s.51AB(5).

12 TPA s.51AB(2). The section notes that this list is not exhaustive.

13 The Hon P. Reith MP, House of Representatives, *Hansard*, 30/9/1997, p.8800.

3.17 This purpose is accomplished by limiting transactions subject to s.51AC to those with a price of \$3 million or less¹⁴ and by exempting publicly listed companies from the protection of the provision.¹⁵

3.18 Like s.51AB, s.51AC extends the notion of unconscionability by providing a list of factors which the court may have regard to.¹⁶ These factors include the five noted above in s.51AB, and the following six additional factors. Like the factors in s.51AB, these are not intended to be exhaustive:

- the extent to which the supplier's conduct towards the business consumer was consistent with the supplier's conduct in similar transactions between the supplier and other like business consumers;
- the requirements of any applicable industry code;
- the requirements of any other industry code, if the business consumer acted on the reasonable belief that the supplier would comply with that code;
- the extent to which the supplier unreasonably failed to disclose to the business consumer:
 - any intended conduct of the supplier that might affect the interests of the business consumer; and
 - any risks to the business consumer arising from the supplier's intended conduct (being risks that the supplier should have foreseen would not be apparent to the business consumer);
- the extent to which the supplier was willing to negotiate the terms and conditions of any contract for supply of the goods or services with the business consumer; and
- the extent to which the supplier and the business consumer acted in good faith.¹⁷

3.19 Because it is a relatively new section, there is little case law to support s.51AC. No case under this section has yet come before the High Court. The ACCC, in its submission, described the full body of actions under this section:

The ACCC has resolved nine cases under s.51AC since the provision was inserted into the Act in July 1998. Of those matters, both *Simply No Knead*¹⁸ and *4WD Systems Pty Ltd and ors*¹⁹ were resolved by fully contested court

14 The limit was originally \$1 million.

15 See s.51AC(1)(a), (1)(b), (2)(a) and (2)(b) 'other than a listed public company'.

16 These lists are in s.51AC(3) for supply, and s.51AC(4) for acquisition.

17 TPA s.51AC(3)(f) – (k).

18 *ACCC v Simply No-Knead (Franchising) Pty Ltd* [2000] FCA 1365.

19 *ACCC v 4WD Systems Pty Ltd and ors* S170 of 2001 (Unreported).

outcomes. The remaining seven are the result of consent orders, voluntary undertakings, or other settlement.²⁰

Issues in relation to Part IVA

3.20 A number of issues were raised during the inquiry in relation to Part IVA. Given that s.51AC expressly protects small business, it is unsurprising that this provision attracted most attention from submitters and witnesses. Each issue will be discussed below.

‘Unfair, harsh or unconscionable’

3.21 A number of submissions sought to extend the provisions of Part IVA, and section 51AC in particular, to prohibit ‘unfair, harsh or unconscionable’ conduct. The Fair Trading Coalition, for instance, stated:

In the absence of amendment to section 51AC to include ‘unfair’, ‘harsh’ as well as ‘unconscionable’ conduct the provision will continue to be ineffective. Oppressive and opportunistic behaviour by corporations with greater bargaining power or which are the economic captors of tenants and franchisees will continue unabated.²¹

3.22 This proposal is founded on the view that the current test for unconscionability is too difficult to prove legally, and that tests for ‘unfair’ and ‘harsh’ conduct would be more easily met, and would therefore offer greater relief to small businesses:

Section 51AC is not providing small business with redress against unfair conduct; it cannot. ‘Unconscionability’ is a much higher threshold than the ‘unfairness’ test which was originally proposed. Awaiting the outcome of further cases (assuming that some reach the Courts) will not solve the problems with s.51AC. Unconscionability, particularly following the recent High Court decision in *Berbatis Holdings*, cannot deliver the redress that the House of Representatives Standing Committee sought to provide for small business.²²

3.23 Other evidence, generally from larger business interests, opposed the extension of s.51AC on two grounds. The first of these was that sometimes healthy competitive behaviour can be harsh, and even unfair, and that to prohibit these forms of conduct may inadvertently reduce competition. The representative of the National Competition Council, for instance, stated in evidence that ‘I do not think [un]fairness

20 Submission 30, ACCC, p. 41.

21 Submission 5, Fair Trading Coalition, p.23.

22 Submission 5, Fair Trading Coalition, p.25.

and harshness are synonyms for anticompetitive conduct. I think they are looking at different things from a different perspective.²³

3.24 The second ground for opposing the extension of s.51AC was that the concepts of ‘unfair’ and ‘harsh’ conduct are not well-defined legally. As a result, the proposed extension of the section may have the effect of making the law less clear and precise, and therefore making compliance more difficult. The representative of Telstra stated:

We believe there is no justification for changes to section 51AC. We particularly believe there is no justification for introducing concepts such as ‘unfair’ or ‘harsh’ in this section. These concepts are unnecessary and unworkable in business to business transactions. The concept of unfairness in business is subjective. It provides no meaningful guideline as to how business is to act in a particular transaction with another business. Business cannot wait several years for an arbitrator or judge to determine on a case-by-case basis whether in his or her subjective judgment one business has acted unfairly to another business.²⁴

3.25 While the Committee recognises that harsh conduct might well be a matter for judicial interest in a contextual sense, the Committee considers that it would be inappropriate to include the term ‘harsh’ in s.51AC. The Committee noted the dictionary definition of harsh as ‘repugnant or roughly offensive to the feelings; severe, rigorous, cruel, rude, rough, unfeeling’²⁵ and came to the view that a business’s behaviour may be any of these without being anticompetitive. Indeed, a certain amount of harsh behaviour may well be necessary for competitive success.

3.26 ‘Unfair’ however presents the Committee with a more difficult decision. The Committee noted that the terms of reference for this inquiry ask it to consider the Act’s effectiveness in dealing with ‘unconscionable or unfair conduct.’ The Committee further noted that throughout the inquiry, various stakeholders used the terms ‘unconscionable’ and ‘unfair’ interchangeably.²⁶

3.27 When the original s.52A (now s.51AB) was inserted into the Trade Practices Act, it was ‘directed at conduct which, while it may not be misleading or deceptive, is nevertheless clearly unfair or unreasonable.’²⁷ The term ‘unconscionable’ was, however, preferred because it built on a base of equity law and Australian case law.²⁸

23 *Transcript of Evidence*, 31 October 2003, Feil, p.75.

24 *Transcript of Evidence*, Landrigan, 17 October 2003, p.47.

25 OED 2nd ed

26 Indeed, the bill inserting s.51AC was called the Trade Practices Amendment (Fair Trading) Bill.

27 The Hon. L. Bowen MP, House of Representatives *Hansard*, 19 March 1986, p.1627.

28 The *Explanatory Memorandum*, Trade Practices Revision Bill 1986 outlines this reasoning and relevant case law.

So, while the Act uses the legally familiar term ‘unconscionable’, the mischief which the Act seeks to address seems closer to ‘unfair’ conduct.

3.28 If the Act seeks to proscribe ‘unfair’ conduct, it remains reasonable to consider why it should not simply say so. Unfortunately, however, ‘unfairness’ remains a legally ambiguous concept. Its dictionary definition²⁹ leads directly back to consideration of what is equitable or just, which in turn would suggest attention back to the equity doctrine of unconscionability.

3.29 The use of ‘unfair’ in trade practices law has a chequered history in the USA, where it first emerged in the *International News Service* case³⁰ in 1918. The decision in this case was controversial, and the concept of ‘unfairness’ itself remains legally controversial. The Appeals Court of Massachusetts provided, in 1979, a summary which remains apt:

What is unfair is a definitional problem of long standing, which statutory draftsmen have prudently avoided. ‘It is impossible to frame definitions which embrace all unfair practices. There is no limit to human inventiveness in this field.’³¹

3.30 Australian law also lacks a clear concept of ‘unfairness.’ In the *Moorgate Tobacco Case*³² the High Court found that ‘Australian law knows no general tort of unfair competition or unfair trading.’ In *Hexagon v Australian Broadcasting Commission*³³ the concept of a tort of ‘unfair competition’ was considered, but only as an extension or species of the tort of ‘passing off.’ In *Dosike v Johnson*³⁴ the concept of ‘fairness’ in a contract was considered, and Franklyn J observed that a decision on ‘fairness’ required ‘appropriate consideration to the balancing of competing interests,’³⁵ which, on the face of it, appears very similar to the task given to the courts in section 51AC of the Trade Practices Act.

3.31 The Fair Trading Coalition, in its submission, referred the Committee to three statutes where ‘unfair’ appears.³⁶ In two of these³⁷ ‘unfair’ and ‘unjust’ are used in relation to *contracts*, not conduct. As noted below, these are distinct, and s.51AC does not regulate contracts. The third statute, the *Tenancy Tribunal Act 1994* (ACT), uses ‘unfair’ to support one matter which the Tribunal may consider in determining

29 ‘not fair or equitable; unjust’ OED 2nd ed.

30 *International News Service v. Associated Press* (1918) 248 U.S. 215 [63 Law. Ed. 211].

31 *Levings v Forbes & Wallace Inc* 8 Mass.App.Ct 498, 396 N.E.2d 149.

32 *Moorgate Tobacco Co. Ltd. v Phillip Morris Ltd and another* 156 CLR 414.

33 *Hexagon Pty Ltd v Australian Broadcasting Commission* (1975) 7 ALR 233.

34 *Dosike Pty Ltd v Johnson* 16 WAR 241.

35 at 249 per Franklyn J.

36 Submission 5, Fair Trading Coalition, p.24.

37 The *Contracts Review Act 1980* (NSW) and the *Industrial Relations Act 1996* (NSW).

whether conduct is unconscionable. In that Act, ‘unfair tactics’³⁸ are indicative of unconscionable conduct, not equivalent to unconscionable conduct. None of these statutes provides compelling reasons for change.

3.32 On balance, the Committee considers that introducing a concept of ‘unfairness’ to s.51AC carries a serious risk of making the section unworkably ambiguous, by calling on concepts with an unclear legal meaning. It is not clear that ‘unfair’ would represent a lesser test than ‘unconscionable’ or that such a provision would enhance protection for small business. Finally, given that s.51AC is relatively new, there is not yet any basis to conclude that the courts will be unable to apply the section in accordance with the intentions of the Parliament.

3.33 As a result, the Committee does not recommend the insertion of either ‘harsh’ or ‘unfair’ into s.51AC.

The \$3 million threshold under s.51AC

3.34 Subsections 51AC(9) and (10) limit the operation of s.51AC to the supply or acquisition (or possible supply or possible acquisition) of goods or services at a price in excess of \$3,000,000. This limitation, which was originally \$1 million, was set in order to specifically focus the protection of the section on small businesses:

As this is a new provision targeted to small business, the new provision will be limited to transactions which do not exceed \$1 million.³⁹

3.35 A number of organisations called for greater clarity around the \$3 million figure, suggesting it should operate on a per-invoice basis, and should be indexed:

ILG members along with many other small business organizations seeks confirmation that the \$3 million threshold applying to transactions covered under these proposed changes will be on a per transaction or invoice basis. Moreover, the figure must be net of taxes and indexed on a regular basis to prevent erosion of this arrangement.⁴⁰

3.36 However, other evidence suggested that the \$3 million threshold was fundamentally inappropriate, and should be removed. Telstra, for instance, suggested that the \$3 million figure is not a sensible definitional measure of ‘small business’:

I think there is an important conceptual issue as to what small business is. [...] I know what the threshold is in relation to the unconscionable conduct provisions in the act—it is \$3 million—but when the man on the street talks

38 *Tenancy Tribunal Act 1994* (ACT) s.36(d).

39 The Hon P. Reith MP, House of Representatives, *Hansard*, 30/9/1997, p.8800.

40 Submission 4, Independent Liquor Group, p.6.

about small business I am not sure that there is that level of clarity around what a small business is.⁴¹

3.37 NARGA argued for the removal of the threshold:

Finally, NARGA advocates the removal of the current \$3 million threshold found in s 51AC(9) and s 51AC(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.⁴²

3.38 The ACCC agreed, stating that subsection 51AC(3)(a) already stated that the courts may have regard to the relative strengths of the bargaining positions of the companies, so no threshold is necessary:

Our submission indicates that we do not think the current threshold is appropriate and, indeed, that we think the concept of a threshold is in itself inappropriate. We think the current threshold is inappropriate because it is a sudden cut-off. Just below \$3 million is within the section, while just over \$3 million is outside the section, when in fact the context of the section is dealing with unconscionable conduct between larger businesses that are in a superior bargaining position compared to businesses that may be in a lesser bargaining position. We think that ought to be the threshold for the application of the section. In other words, it should deal in the vertical supply line or the vertical relationship where there is an existence of a superior bargaining position and an inferior bargaining position. That ought to be the entry point of the section.⁴³

3.39 The Committee noted the arguments made by NARGA and the ACCC, and further noted that subsections 51AC(1) and (2) exclude publicly listed companies from the protection of the section. The Committee agrees that the removal of the thresholds will not reduce the current protection for small businesses, and will enhance protection for businesses involved in transactions over \$3 million, who are nevertheless subject to unconscionable conduct within the terms of s.51AC.

Recommendation 7

The Committee recommends that subsections 51AC(9) and 51AC(10) of the Act be repealed.

Additional behaviours under s.51AC

3.40 The Fair Trading Coalition recommended that s51AC be amended to proscribe the following conduct:

41 *Transcript of Evidence*, Landrigan, 17 October 2003, p.15.

42 Submission 41, National Association of Retail Grocers of Australia, p.138.

43 *Transcript of Evidence*, Samuel, 7 November 2003, p.16.

- unilateral variation of contract or associated documents;
- the termination of contract by one party without just cause or due process (though it is not intended that the rights of parties to repudiate a contract be removed);
- the bringing into existence of documents or policies after the signing of the contract which are then binding and which can also be used to vary the original agreement or contract; and
- the presentation of ‘take it or leave it’ contracts or agreements.

3.41 A number of submissions supported the Fair Trading Coalition’s proposed amendments.⁴⁴ The Trade Practices Committee of the Law Council of Australia opposed these amendments, both on the basis that the current provisions are adequate and it is unnecessary to provide further protection,⁴⁵ and because of concerns about the content of the proposed provisions.

3.42 The Law Council noted that ‘take it or leave it’ or ‘standard form contracts’ reduce the transaction costs associated with doing business, for the benefit of both large and small businesses. The Australian Capital Territory Government agreed, but noted that in some cases these standard form contracts can remove any opportunity for small businesses to negotiate:

Generally, standard term contracts are used because the cost of customising each transaction can be prohibitive for both parties. The use of standard terms is not in itself a sign that one of the parties is in a weaker bargaining position. Indeed, the terms of many standard forms are fair and reasonable. Unfortunately, that is not always the case.⁴⁶

3.43 The Committee considers that if, as the Law Council and the ACT Government note, there is the potential for standard form contracts to be beneficial, then they should certainly not be proscribed *per se*, as this would proscribe both the beneficial and the unconscionable standard form contracts.

3.44 The National Farmers’ Federation made a similar criticism of the proposed ban on unilateral variations, which, in its view, like standard form contracts may be competitive and commercially necessary:

There are occasions when this conduct is reasonable, and it may be difficult to carve out these occasions: for example, where a bank, with many banking products, can unilaterally vary the appropriate interest rate. Another concern is that the definition of prohibited conduct is vague: for example, banning

44 See, for instance, submissions 1 (LSAV), 4 (ILG), 25 (COSBOA), and 28 (MTAA).

45 See submission 18, Law Council of Australia, p.34.

46 Submission 45, ACT Government, p.13.

unilateral variation means negotiation is required; how would ‘negotiation’ be defined?⁴⁷

3.45 The Committee further noted that the behaviours in the four suggestions advanced by the Fair Trading Coalition may already be captured by the terms of s.51AC, particularly subsections (3)(j) and (k):⁴⁸

- (j) the extent to which the supplier was willing to negotiate the terms and conditions of any contract for the supply of goods or services with the business consumer; and
- (k) the extent to which the supplier and the business consumer acted in good faith.

3.46 In considering its views on this issue, the Committee sought real examples of bullying conduct which verges on (or constitutes) unconscionable conduct, and obtained an internal Memo from Caltex Australia Limited, relating to the rollout of its retail petrol joint venture with Woolworths. In the memo, which has quickly gained public notoriety as ‘the FUD memo’, Caltex negotiators are instructed as follows:

We want to use Fear, Uncertainty and Doubt (the FUD factor) to destabilise franchisee confidence in future outcomes as appropriate ... if the argument is plausible and well executed the franchisee may be left believing that they have to offer/compromise more than previously considered to become part of the [joint venture] ... if we are successful in influencing franchisee expectations in our favour we may be able to contribute less to get each deal across the line.⁴⁹

3.47 The Committee considers that Caltex’s behaviour in issuing, and in all likelihood acting upon⁵⁰ the FUD memo, was reprehensible. Caltex itself appear to agree, as the Caltex CEO wrote to the Franchisees on 19 November 2003 to state:

Our franchisees are important to us and I am determined that importance should be reflected in all our dealings with you. The approach proposed in the memorandum is not acceptable to me, my leadership team or any of the Caltex senior management under any circumstances and you have our personal undertaking that our dealings with franchisees over the proposed venture with Woolworths will be conducted honourably and ethically.⁵¹

47 *Transcript of Evidence*, Burke, 7 November 2003, p.71.

48 And their equivalents in subsection (4).

49 Caltex internal memo *Franchisee Discussions – Project Valentine – Conditioning Phase w/c 08/09/03*.

50 The memo is dated 8 September 2003 and Caltex’s apology was dated 19 November, a lapse of more than two months during which Caltex’s staff would presumably have been complying with the memo.

51 Letter from Dave Reeves, Managing Director and CEO, Caltex Australia Limited, to Caltex franchisees, 19 November 2003.

3.48 However, in the Committee's view, behaviour such as that proposed in Caltex's original memo would already contravene s.51AC, without any further amendments. Subsection 51AC(3)(d) would seem to be particularly pertinent.

(d) whether any undue influence or pressure was exerted on, or any unfair tactics were used against, the business consumer ...

3.49 The Committee cannot see any compelling reasons to adopt the proposed changes. However the Committee noted that the ACCC presented a slightly different proposal in relation to unilateral variation of contracts. The ACCC argued that, rather than proscribing such contracts, they should be added to the list of matters, contained in subsections 51AC(3) and (4), to which the courts may have regard in determining whether conduct is unconscionable. This proposal would not ban the unilateral variation of contracts outright, but would make it clear that such contracts could constitute conduct which is, in all the circumstances, unconscionable. The ACCC argued:

The ACCC recommends that the imposition or exploitation of such unfettered unilateral variation clauses be added to the list of factors to which the court may have regard under ss.51AC(3) and ss.51AC(4). Such addition would, on the one hand, provide greater certainty for small businesses contracting with larger businesses and also prevent those larger businesses from unfairly exploiting the advantage that such clauses offer.⁵²

3.50 The Committee finds this argument compelling, since it would discourage the unconscionable use of unilateral variation of contracts, while allowing unilateral variation where such provisions are commercially necessary and pro-competitive.

Recommendation 8

The Committee recommends that subsections 51AC(3) and 51AC(4) of the Act be amended to include 'whether the supplier (in s.51AC(3)) or acquirer (in s.51AC(4)) imposed or utilised contract terms allowing the unilateral variation of any contract between the supplier and business consumer, or the small business supplier and acquirer.'

Regulating conduct and regulating contracts

3.51 Currently, Part IVA regulates conduct, not contracts. This is consistent with the wider law in unconscionable conduct:

The bargaining process, and not its outcome, is the focus of the inquiry into whether unconscionable conduct has been established for the purpose of general law principles. That is, the concern of the equitable doctrine of unconscionable dealing is with procedural, not substantive, unfairness.

52 Submission 30, ACCC, pp. 48-49.

However, aspects of the outcome of a bargain may lead to an inference concerning the unconscionability of the bargaining process.⁵³

3.52 Some submissions suggested that s.51AC of the Trade Practices Act should be extended to cover unfair contracts in addition to unconscionable conduct. The ACT Government, for instance, submitted:

that the introduction of a new Part IVAB in relation to unfair terms in contracts would assist those small businesses that suffer the imposition of harsh or unfair terms in contracts with larger businesses and suppliers due to the significant inequality of bargaining power that exists between the parties. [...] It is entirely possible for unfair terms to be imposed on small businesses due to the poor bargaining position in which they often find themselves in relation to large companies and suppliers. This conduct of placing a small business in a 'take it or leave it' position will frequently fall short of the high bar set for determining unconscionable conduct, but the resulting unfair terms and economic consequences that flow from them, can cause significant harm to small businesses.⁵⁴

3.53 The Committee noted that the Australian Consumers Association (ACA), which did not make a submission to this inquiry, argued for the regulation of unfair contracts in its submission to the Dawson review.⁵⁵ The Committee noted that the ACA's arguments related specifically to the conduct of business between business and consumers, whereas the Committee primarily considered s.51AC, which is restricted to business to business transactions. It may be that the regulation of unfair terms in contracts with consumers is an area for further policy development, however this issue was not raised before this Committee.

3.54 Both the ACT Government and the ACA pointed to the United Kingdom's *Unfair Contract Terms Act 1977* and *Unfair Terms in Consumer Contracts Regulation 1999* as models which might be adopted within the Trade Practices Act.

3.55 The UK legislation has recently been reviewed by the UK Law Commission, which will report in 2004 on a possible amalgamation and simplification of the statutes. Its consultation paper makes it clear that in the UK, there are no provisions equivalent to section 51AC in the Australian Trade Practices Act. That is, the regulation of negotiating *conduct* is based largely upon common and equity law, which provides that 'contracts may be avoided on grounds such as fraud, non-fraudulent misrepresentation, duress, undue influence and "unconscionability"'.⁵⁶

53 *Laws of Australia*, 35.9 (Unconscionable Dealing) par 12.

54 Submission 45, ACT Government, p.12.

55 Dawson Review Submission 105, pp.35-40.

56 *Unfair Terms in Contracts*, Law Commission Consultation Paper no. 166; Scottish Law Commission Consultation Paper 119, p.7. In Appendix A, this consultation paper discusses the Australian Trade Practices Act, and s.51AC in particular, as an alternative approach to the UK model.

3.56 While the approach to this policy issue in Australia was to regulate the conduct of the negotiating parties by extending the notion of unconscionable conduct, the approach taken in the UK was to regulate the contractual outcomes while relying on the equitable doctrine of unconscionability.

3.57 The Law Council opposed the proposal to regulate contracts on the basis that ‘the definition of “unfair terms” in the UK Regulations is unclear. It said that it does not, at this stage, consider that any additional protection is necessary, especially in light of early judicial interpretation which equates unconscionability for the purposes of s51AC with unfairness.’⁵⁷

3.58 The Committee considers that the current provisions of s.51AC are adequate and do not need to be supplemented by ‘unfair contracts’ provisions. If negotiations between those with market power and those without (eg. some landlords and tenants) are conducted in a way which is conscionable within the meaning of s.51AC, if the business with market power utilises its negotiating skills appropriately and both parties to the bargain have an adequate opportunity to look to their own interests, then the terms of the resultant contract – even if they appear unfair and unbalanced – ought not to be a matter for regulatory scrutiny beyond the scrutiny which is already imposed by state legislation and regulatory schemes.

Public sector agencies and s.51AC

3.59 A number of submissions and witnesses raised concerns that s.51AC does not provide adequate protection to small businesses who have dealings with government agencies. The Fair Trading Coalition (FTC) stated that ‘the public sector is a significant purchaser of goods and services in our economy and should be subject to the same ‘rules’ as any other purchaser of goods and services.’⁵⁸ The FTC called for this to be stated explicitly in the Act.

3.60 It appears to the Committee that Commonwealth agencies are already bound by s.51AC. Section 2A of the Act makes it clear that the Act applies to a Commonwealth agency ‘in so far as it carries on a business’. The Fair Trading Coalition called for this to be amended to include all commercial activities. However, the Committee noted the judgment of the Federal Court in *Fasold v Roberts*:

I agree with Rolfe J that, generally speaking, the word ‘business’ as used in the *Fair Trading Acts*, bears the dictionary meaning of ‘trade, commercial transactions or engagement’. However, that will not always carry matters very far. I think that in addition, ordinarily at least, the concept of ‘business’ imports, as Barwick CJ suggested in *Hungier v Grace*, a notion of system, repetition and continuity. I appreciate and accept that due regard should be paid to the ‘wide and flexible meaning’ attributed to the word ‘business’ in common usage [...] Nonetheless, in general, for an undertaking to constitute

57 Submission 18, Law Council of Australia, p.35.

58 Submission 5, Fair Trading Coalition, p.24.

a business it will have to be conducted with some degree of system and regularity.⁵⁹

3.61 Given that Commonwealth government purchasing involves ‘trade, commercial transactions or engagement’ and that it is ‘conducted with some degree of system and regularity’ it is very likely that such purchasing already comes within the meaning of ‘business’. However the Committee recognises that for clarity, the Act may need to be amended to make it explicit that s.51AC applies to the Commonwealth Government.

3.62 Mr Douglas Williams of the Civil Contractors Federation gave the Committee an indication of the difficulties sometimes faced by contractors dealing with government agencies, including state and local government agencies:

Just to give you an idea of some of the practices we are talking about, at the high level we are talking about take it or leave it contracts. We are also talking about allowances embedded in contracts that have been agreed with other parties which are passed on with no power to even negotiate, let alone get an outcome. We are talking about tenders which are let and where months pass, if not a year, before agreement is reached for work to commence and yet the client comes to our member and says, ‘You must proceed at the same price.’ There are things such as extensive variations to the requirement to hold your price and, one of the most common of all, people saying, ‘Congratulations, you have won the tender. Now we want you to drop your prices by 15 per cent.’⁶⁰

3.63 Section 2B of the Trade Practices Act states that state governments (and local governments given that they act ‘by an authority of the State or Territory’) are bound by Parts IV, VB, and XIB of the Act. They are not bound by Part IVA of the Act.

3.64 The states and territories have implemented the *Competition Principles Agreement* which, under competitive neutrality arrangements, requires government agencies as *providers* of services to maintain competitive neutrality. However, the National Competition Council stated:

[Competitive Neutrality (CN)] policy is silent on the manner in which government businesses (or governments per se) operate as direct purchasers of goods and purchases and governments’ tendering and contracting-out arrangements.

CN does however embody the principle that government businesses should be subject to the same regulations as their private sector counterparts (regulatory neutrality). On that basis, if a limitation on the application of s51AC provided a government business with a competitive advantage vis-à-

59 *David Fasold & anor v Allen Roberts & anor* [1997] 439 FCA (2 June 1997).

60 *Transcript of Evidence*, Williams, 31 October 2003, pp. 65-66.

vis a private sector competitor it would be appropriate to remove the limitation unless clear public policy reasons for not doing so exist.⁶¹

3.65 The Committee agrees with the position that government agencies in all jurisdictions should conduct commercial activities without engaging in unconscionable conduct. Amending the Act so that Part IVA of the Act, including s.51AC, applies to state and territory governments, would have this effect.

Recommendation 9

The Committee recommends that s.2B(1) of the Act be amended so that it is clear that Part IVA of the Act applies to the Commonwealth Government; and that the Government consult with the states and territories with a view to amending subsection 2B(1) of the Act, so that Part IVA of the Act applies to state, territory and local governments.

Unconscionable conduct and retail tenancies

3.66 Retail tenancies have long been an area of particular controversy, and touch on the unconscionable conduct and the market power provisions of the Trade Practices Act. The controversy extends at least as far back as the 1976 Swanson Committee, which found that ‘leases, being inherently necessary in the supply of a fundamental service in many areas of the economy, should be at least subject to examination to ensure that they do not contain terms and conditions substantially restrictive of competition.’⁶²

3.67 In its submission to this inquiry, the ACCC outlined the many aspects of retail leases which regularly give rise to complaints under the Act:

- problems with, or at, lease re-renewal;
- negotiation of rent increases;
- discrimination between tenants that occupy similar premises for similar purposes;
- alleged anti-competitive behaviour by lessor;
- disputes over the interpretation of the conditions within the lease;
- problems arising from renovations to a shopping complex;
- misrepresentations regarding future earnings;
- not allowing the lessee to transfer the lease to a tenant of their choice;
- casual leasing; and
- restrictions placed on the business of existing tenants.⁶³

61 Submission 14a, National Competition Council, pp.2-3.

62 *Report to the Minister for Business and Consumer Affairs, the Hon. John Howard MP*, Parliamentary paper 228/1976, para 4.43, p.21.

63 Submission 30, ACCC, p.46.

3.68 The introduction of s.51AC was intended to strengthen the remedies available to retail tenants who were the victims of unconscionable conduct. In the second reading speech for the Trade Practices Amendment (Fair Trading) Bill 1997, the Minister stated:

This measure also will provide an avenue under the Trade Practices Act for some small and specialist retailers to pursue remedies where retail leasing contracts or conduct by retail landlords was unconscionable. It will be particularly beneficial to retail tenants as it allows a court to have regard to the relative strengths of the bargaining position of the retailer and the landlord in determining whether the conduct is unconscionable.⁶⁴

3.69 The Australian Retailers Association, however, expressed the view that the promise of s.51AC is not being realised:

The ACCC has not addressed retail tenancy matters with sufficient vigour under the new Section 51AC provisions. Although there have been a number of cases seeking to apply the new provisions to tenancy issues, none have been pursued.⁶⁵

3.70 The Committee observed, however, that since a number of state and territory jurisdictions 'have drawn down versions of 51AC into their respective retail tenancy regimes'⁶⁶ the full impact of s.51AC on retail tenancies may be larger than is suggested by a simple observation of the ACCC's activity. The Shopping Centre Council of Australia noted:

There is throughout Australia extensive State and Territory legislation regulating retail tenancies. This legislation is industry specific and contains detailed provisions regulating retail leasing. The general approach in the State and Territory legislation is to lay down detailed rules on all aspects of the retail tenancy relationship and to seek to resolve retail tenancy disputes by easily accessible and cost efficient mediation. If mediation is not successful either party is able to refer the matter to experienced tribunals for a prompt and cost efficient determination.

This State and Territory legislation has either 'drawn down' the provisions of section 51AC of Part IVA of the Trade Practices Act or is in the process of doing so.

There is, therefore, already in existence an extensive body of rules about acceptable behaviour by owners and managers in transactions with tenants. Where a tenant claims an owner or manager has breached one of the rules

64 The Hon P. Reith MP, House of Representatives, *Hansard*, 30/9/1997, p.8801.

65 Submission 29, Australian Retailers Association, p.5.

66 Submission 30, ACCC, p.46.

there is adequate redress by easily accessible and cost efficient mediation and, as a last resort, legal proceedings.⁶⁷

3.71 The Committee recognises that these state and territory laws, directed specifically towards the regulation of retail tenancies, provide the current basis for regulation of the industry. The Committee considers that the Commonwealth should work with state and territory counterparts to harmonise retail tenancy laws. If this process fails to deliver satisfactory outcomes, then it may be necessary to adopt a mandatory code of conduct for retail tenancies, and to prescribe that code of conduct under Part IVB of the Act.

Secrecy of lease provisions

3.72 One retail tenancy issue which obtained particular attention during the inquiry was the use of ‘secret pricing’ in retail tenancy contracts. ‘Secret pricing’ is either a landlord practice in that a price list of all lettable premises is not made publicly available, or it prevents the lessee from disclosing the terms and conditions of their lease. The effects of such pricing on competition can be severe:

As a principle, secret pricing is generally a stratagem which allows the vendor (in this instance the landlord), and those with unusual or exaggerated market power (such as landlord or retail oligopolies), to maximise their returns and to unjustifiably discriminate between similar buyers with similar needs, but differing abilities to negotiate or pay. If those same pricing stratagems were used against customers buying houses, cars, financial services, white goods, consumables and so on – there would be political, social and regulatory uproar.⁶⁸

3.73 The Committee heard in evidence that this process of secret pricing remains prevalent in retail tenancies, and relates both to the rental price, and to any ‘incentives’ offered by shopping centres, which effectively constitute rebates on those prices:

The lack of disclosure of relevant information is quite clearly common practice. More importantly, the disclosure of incentives that are being offered is also very tightly controlled. [...]I currently see, where I am advising people, someone being offered \$10,000 as an incentive versus someone next door being offered \$100,000 as an attraction to get them in. In many instances, their rents are still about the same—say \$1,200, \$1,300 or \$1,400 a metre—because that is what they want as the face rent for the valuation of the centre. But, if you were to take into account what the effective rent was, it would be significantly less.⁶⁹

67 Submission 8, Shopping Centre Council of Australia, p.1.

68 Murray, Senator A (1997) *Leases, Landlords and Tenants*, p.8.

69 *Transcript of Evidence*, Lonie, 17 October 2003, p.31.

3.74 The Shopping Centre Council expressed the view that, under some circumstances, secret pricing could have benefits for both the shopping centre and the retailer, by allowing a lower price for certain stores:

Assuming for the moment you have done a special deal with that tenant where because of his difficulties you have rebated the rent, you may be worried as the owner that that will have a tremendous knock-on effect if you do it for everyone else. The problem the owner has is: what does he do in that circumstance? From the owner's point of view, he might say, 'I'm prepared to give you the discount but I'm not prepared to give it to anyone else because I know that I'll have everyone else complaining of it.' In that circumstance, I think that is quite fair. You could have another set of circumstances where it would be totally unfair to have such a clause in there—unfair and obnoxious.⁷⁰

3.75 The Committee agrees that there may be circumstances where it is in the interests of both parties for confidentiality to be maintained. However, under those circumstances, it should not be necessary for contract clauses to be imposed by the larger party upon the smaller – mutual self-interest should be enough to keep the price secret. On the other hand, the Committee takes the view that these arrangements are likely to be the exception rather than the rule, and that there is consequently no justification for standard retail tenancy contract terms which prohibit parties from disclosing the pricing arrangements of the lease.

3.76 The Committee does not support the compulsory disclosure of rental terms, or the collection of such terms on a public register. However, the Committee considers that tenants who wish to disclose their rental conditions to others should be able to do so. Certainly if tenants make use of the proposed collective bargaining provisions outlined under Dawson and accepted by the Government, then those tenants who are part of the collective should be able to share information with one another.

Recommendation 10

The Committee recommends that the Commonwealth Government negotiate with state and territory governments, with a view to introducing measures which would prohibit retail lease provisions compelling tenants to keep their tenancy terms and conditions secret.

Conclusions regarding unconscionable conduct

3.77 The Committee notes that s.51AC is still a relatively new section, and that the court system has had neither time nor occasion to develop a sophisticated body of jurisprudence in relation to it. The suggestions put before the Committee, to extend the section to include 'harsh' and 'unfair' conduct; to include additional proscribed behaviours; and to regulate both negotiating conduct and content of contracts, all proceed from the premise that the current section is ineffective in protecting small

70 *Transcript of Evidence*, Speed, 17 October 2003, p.53.

business. The Committee considers that this premise has not yet been proven, and that section 51AC provides small businesses with the level of protection intended by the parliament when the provision was enacted. The two recommendations the Committee has made for change to s.51AC will further increase this protection.

3.78 On the issue of unconscionable conduct in retail tenancies, the Committee considers that while there is not yet a substantial body of Commonwealth case law, s.51AC has been drawn down by state and territory law, and forms part of those strong state-based statutory regimes.

3.79 The Committee considers that the routine imposition of secret pricing terms on tenants has an anti-competitive effect and, indeed, is intended to thwart a competitive negotiating process. The Committee considers that this practice should end.

CHAPTER FOUR

CODES OF CONDUCT AND OTHER ISSUES

Introduction

4.1 Part IVB of the *Trade Practices Act 1974* provides a framework for the prescription of both voluntary and mandatory codes of conduct. In this chapter, the Committee considers the effectiveness of that section in promoting better standards of business conduct, and in particular, the ACCC's proposal to introduce a system for endorsing voluntary codes of conduct.

4.2 The chapter also analyses evidence relating to two further issues relating to the protection of small businesses against anti-competitive or unfair conduct. They are the issues of collective bargaining and creeping acquisitions.

Codes of conduct

4.3 Section 51AE of the Act provides that:

The regulations may:

- (a) prescribe an industry code, or specified provisions of an industry code, for the purposes of this Part; and
- (b) declare the industry code to be a mandatory industry code or a voluntary industry code; and
- (c) for a voluntary code, specify the method by which a corporation agrees to be bound by the code and the method by which it ceases to be so bound (by reference to provisions in the code or otherwise).¹

4.4 The main differences between a prescribed voluntary industry code and a prescribed mandatory industry code are:

- a prescribed voluntary industry code is only binding on the members of the industry that agree to be bound by the code, while a mandatory prescribed code is binding on all members of that industry; and
- the ACCC's obligations to monitor a prescribed mandatory industry code of conduct are envisaged to be greater than in relation to a prescribed voluntary code of conduct, if not all industry stakeholders subscribe to the voluntary code.²

1 TPA s.51AE.

2 Submission 30, ACCC, p.50.

4.5 The Committee notes that mandatory codes, especially when prescribed under the Trade Practices Act, essentially make new law, following consultation with the industry, but without the opportunity for the parliamentary debate which a Bill would attract. The Committee considers that in general it is more appropriate to legislate openly than to impose quasi-regulatory solutions developed outside the Parliament.

4.6 The ACCC also noted that a mandatory prescribed code tends to place a greater burden on it to provide industry and consumer education in relation to the conduct regulated by the code. By contrast, the obligation to educate industry and consumers about the conduct regulated under a voluntary code is either borne in full by or shared with industry.³

Prescription of codes of conduct

4.7 In 1999, the Government issued guidelines governing the prescription of codes of conduct. The guidelines noted that the Minister will only consider initiating a proposal for prescribing a code of conduct if:

- the code would remedy an identified market failure or promote a social policy objective; and
- the code would be the most effective means for remedying that market failure or promoting that policy objective; and
- the benefits of the code to the community as a whole would outweigh any costs; and
- there are significant and irremediable deficiencies in any existing self-regulatory regime – for example, the code scheme has inadequate industry coverage or the code itself fails to address industry problems; and
- a systemic enforcement issue exists because there is a history of breaches of any voluntary industry codes; and
- a range of self-regulatory options and ‘light-handed’ quasi regulatory options has been examined and demonstrated to be ineffective; and
- there is a need for national application as state and territory fair trading authorities in Australia also have the options of making codes mandatory for their own jurisdiction.⁴

4.8 However, the Committee considers any situation where the final four of these conditions are met – self-regulation is not working, systematic breaches are common, light-handed approaches are ineffective, and there is a need for national application – must be a very strong candidate for legislative regulation, whether through the Trade Practices Act or through harmonised state and territory legislation.

3 Submission 30, ACCC, p.51.

4 Submission 30, ACCC, p.50.

Endorsement of codes

4.9 The ACCC has proposed a system of endorsement for voluntary codes of conduct. The system of endorsement will provide an intermediate step between unsupervised voluntary industry codes of conduct and the prescription of codes, whether voluntary or mandatory. Endorsement would not, however, provide any particular status under the Trade Practices Act.⁵

4.10 The Chairman of the ACCC, Mr Graeme Samuel, explained the endorsement proposal by distinguishing in the first instance between ‘ineffective’ and ‘effective’ voluntary codes. He described ineffective codes as those which do not oblige parties to the code to comply, and which contain neither enforcement regimes nor penalties for breaches. He said that ‘the commission has little interest in those codes and little interest in those that want to promote those codes’.⁶

4.11 Effective codes, by contrast, have been developed with a commitment to resolve matters of debate and concern within an industry. Mr Samuel said:

They will almost invariably contain provisions for transparency, accountability, administration of compliance, and penalties for non-compliance. These might include suspension from participation in certain sectors of the industry and the benefits that might be involved by being participants, for example, in industry organisations.⁷

4.12 The ACCC’s endorsement system, Mr Samuel proposed, would focus on these effective codes and work with them to attain ‘an even higher level of compliance and a higher level of behaviour’. This ‘higher level’ would require the attainment of transparency, accountability and enforcement procedures capable of being audited. The commission would consider formally endorsing codes that attain this level.⁸

4.13 Mr Samuel emphasised that ‘endorsement will be hard to obtain and easy to lose’.⁹ The process of endorsement will not, however, be a legal process and will not confer legal status: ‘If I might say so, I think the concept of endorsement is very much a reputational issue. Endorsement will give, we would hope, a level of reputation to an industry that its behavioural standards are very high. Disendorsement, of course, will have exactly the opposite impact’.¹⁰

5 Except possibly in relation to subsections 51AC(3)(g) and (h), and subsections 51AC(4)(g) and (h) which allow the court to consider lack of compliance with industry codes as an indicator of unconscionable conduct.

6 *Transcript of Evidence*, Samuel, 7 November 2003, p.2.

7 *Transcript of Evidence*, Samuel, 7 November 2003, p.2.

8 *Transcript of Evidence*, Samuel, 7 November 2003, p.3.

9 *Transcript of Evidence*, Samuel, 7 November 2003, p.2.

10 *Transcript of Evidence*, Samuel, 7 November 2003, pp.6-7.

4.14 The Committee notes that the ACCC has issued draft guidelines outlining how the endorsement process would work. Mr Nigel Ridgway, Deputy General Manager, Compliance Strategies Branch, told the Committee that twelve industry groups have so far approached the ACCC seeking support to work through the endorsement process.¹¹

Industry view

The views of industry, and particularly representatives of small business, reflected extreme scepticism of voluntary codes, with or without ACCC endorsement. Industry representatives expressed the view that in many, if not most, cases voluntary codes were of little use, because those companies acting in a manner which might be ruled invalid by a successful code, were the companies least likely to negotiate a code in good faith, least likely to sign up to a voluntary code, and least likely to comply with its terms. 'In terms of technical problems with voluntary codes, one is coverage: you could have 95 per cent coverage but maybe the five per cent who are engaging in the unfair or unethical behaviour do not join.'¹²

4.15 Ms Wendy Phillips, representing the Pharmacy Guild of Australia as a member of the Fair Trading Coalition, told the Committee:

I think the principle [of implementing voluntary codes] is a nice one, but probably a voluntary code only really works effectively if you have it being negotiated between parties who have some equality in the marketplace. Where one party is in a much stronger bargaining position, they may not even be prepared to enter into a voluntary code.¹³

4.16 Mr Michael Delaney, representing the Motor Trades Association of Australia as a member of the Fair Trading Coalition, expressed similar experience:

All our experience has been that we simply cannot get the voluntary codes. Chairman Samuel's ambition and articulation of the issue we certainly supported, but it is our experience that the parties had no economic or practical interest in joining in doing something voluntary. Appeals to morality or public interest do not seem to get you very far. So we wonder whether much can come of the voluntary codes.¹⁴

4.17 The Australian Retailers Association (ARA) provided evidence of the failure of a voluntary retail tenancy code, precisely because of its voluntary nature:

In New South Wales we originally had a code of conduct back in 1989, 1990 and 1991 which both sides basically agreed to use. However,

11 *Transcript of Evidence*, Ridgway, 7 November 2003, p.3.

12 *Transcript of Evidence*, Gardini, 10 October 2003, p.25.

13 *Transcript of Evidence*, Phillips, 10 October 2003, p.9.

14 *Transcript of Evidence*, Delaney, 10 October 2003, p.25.

ultimately it failed: certain parts of it were used selectively because it was voluntary, and that really led to the legislation in 1993 in New South Wales.¹⁵

4.18 The ARA considers that there is not currently sufficient goodwill for the development of a broad voluntary code in its industry:

In fact, all voluntary codes, as we stated in our submission, rely on the good faith and goodwill of the participants to that code. The ARA has experience in a number of codes, and the participants do come to the table to address business practices with good faith and goodwill. We have tried in the past with various aspects in relation to retail tenancies, and our view is that they have failed because the parties have not been committed to that code operating.¹⁶

4.19 The ACCC itself noted the existence of voluntary codes which achieve little and which, in the Committee's view, add justification to small business scepticism about voluntary codes:

There are voluntary codes which I would describe as being relatively ineffective. They are codes which, if I can take an almost black-and-white example, indicate that a course of behaviour is to be pursued by the parties at their will, but they might explicitly state that there is no obligation on the part of the parties to comply with the codes, there are no enforcement regimes contained within the codes, there are no penalties for breaches of the codes. The commission's view is that they are rarely effective codes. They state at the commencement almost a cultural intent that they are there in name only but rarely have the spirit or culture of compliance attached to them.¹⁷

Committee's view

4.20 The Committee considers that the scepticism of small businesses regarding voluntary codes of conduct is warranted. In an ideal world, self-regulation under voluntary codes of conduct may be appropriate. However the need for regulation – be it self-regulation or external regulation – generally only emerges once there are already conflicts within the industry. These conflicts, in turn, make it less likely that a spirit of goodwill will exist to enable the development of a voluntary code.

4.21 Under such circumstances, it is unacceptable for the parliament to stand by and simply hope that a voluntary code will emerge to solve an industry's entrenched problems. The recommendations which the Committee has made in this report are likely to accomplish more to support successful competition than the most well-meaning ambitions of developing voluntary codes.

15 *Transcript of Evidence*, Lonie, 17 October 2003, p.28.

16 *Transcript of Evidence*, Moore, 17 October 2003, p.38.

17 *Transcript of Evidence*, Samuel, 7 November 2003, p.2.

4.22 The Committee notes some media suggestions that industry has been reluctant to approach the ACCC for endorsement of codes¹⁸ and the ACCC's rebuttal that interest has in fact been steady.¹⁹ The ACCC's plan to endorse voluntary codes is, as noted above, a matter outside the Trade Practices Act and therefore somewhat outside the Committee's terms of reference. In general, the Committee considers that codes offer one way to contribute to better market behaviour. However, even ACCC-endorsed voluntary codes cannot be a substitute for appropriate regulation.

Collective bargaining

4.23 In some industries, small businesses must bargain with big business. Individually, the small businesses may lack bargaining power and so may seek to join together to bargain collectively in order to gain competitive parity with the relevant big business. As noted in the Dawson Report:

Collective bargaining at one level may lessen competition but, at another level, provided that the countervailing power is not excessive, it may be in the public interest to enable small business to negotiate more effectively with big business.²⁰

4.24 Prior to the Dawson report, sections 88 and 90 of the Trade Practices Act allowed the ACCC to authorise collective bargaining where it was satisfied that the public benefit would outweigh any lessening of competition that would result. However, the process of obtaining authorisation was claimed to be expensive and time consuming.

4.25 The Dawson report recommended that, as an alternative to authorisation, a notification process should be introduced for collective bargaining proposals. The Government accepted that recommendation. However, the Committee notes that it has been nearly one full year since the Dawson report was tabled, and the Government has not yet introduced legislation to implement the proposal for collective bargaining notifications.

4.26 The significance of the change is that under the authorisation process, the applicant had to establish that there would be a net public benefit in the proposed collective bargaining arrangement whereas, under the notification process, the ACCC will have fourteen days to establish that there is no public benefit.

4.27 Mr Brian Cassidy, Chief Executive Officer, ACCC, noted that the change was essentially procedural. He said: 'there may be some proposals at the margin which would not get up under authorisation but will get up under notification because of that

18 *Australian Financial Review* "ACCC's ethics plan falls flat" 15 October 2003, p.3.

19 *Transcript of Evidence*, Samuel, 7 November 2003, p.4.

20 *Review of the Competition Provisions of the Trade Practices Act*, January 2003, p.115.

reversal in the onus of proof. Basically, apart from that it is a change of process rather than a change of substance'.²¹

Evidence to the inquiry

4.28 Most evidence to the Committee's inquiry supported the implementation of a notification process for collective bargaining by small business, although the Housing Industry Association expressed significant concerns about it.

4.29 Representatives of the Fair Trading Coalition said that:

The FTC remains very supportive of the government's commitment to introduce a collective negotiation notification arrangement for small business which includes a right of collective withdrawal and a role for representative associations as bargaining agents. We see that collective negotiation arrangement as being of significant benefit to many small businesses.²²

4.30 The Australian Retailers Association (ARA),²³ the National Association of Retail Grocers,²⁴ and the National Farmers Federation²⁵ also supported the proposed collective bargaining arrangements, but each raised some issues of concern.

4.31 The ARA, for example, noted that collective bargaining or bargaining by representative associations on behalf of members is an important issue for negotiating the terms of retail tenancies. However, they also suggested that since non-disclosure of relevant pricing information is common practice among shopping centre landlords, it may be difficult for bargaining agents to obtain the information they need.²⁶

4.32 The Committee's recommendation in the previous chapter, relating to the prohibition of secrecy provisions in retail tenancy contracts addresses this difficulty.

4.33 The NSW Farmers Association described to the Committee the state of the poultry industry in NSW, where 'in poultry production, Inghams Bartters and Baiada's have a combined market share of 60%'.²⁷ The Association called for 'a simpler, less expensive and more timely notification process for collective bargaining among small businesses, in particular within contract agriculture.'²⁸ The Committee agrees that poultry farmers are an example of a small business group which could

21 *Transcript of Evidence*, Cassidy, 31 October 2003, p.95.

22 *Transcript of Evidence*, Delaney, 10 October 2003, p.3.

23 *Transcript of Evidence*, Hubbard, 17 October 2003, p.29.

24 *Transcript of Evidence*, McKenzie, 7 November 2003, p.48.

25 *Transcript of Evidence*, Burke, 7 November 2003, p.70.

26 *Transcript of Evidence*, Hubbard, 17 October 2003, p.31.

27 Letter of 1 December 2003.

28 Letter of 1 December 2003.

obtain significant benefits from the introduction of notification arrangements for collective bargaining.

4.34 While supporting the collective bargaining notification arrangements, Mr Alan McKenzie, Director, NARGA expressed concern that they constituted simply a procedural change. NARGA itself favoured widening the scope of arrangements that would be given immunity under the Trade Practices Act to include a larger tolerance by the ACCC of collective boycotts.²⁹

4.35 Mr McKenzie also questioned why, under the proposed notification process, notifications would be able to be lodged only for transactions valued at \$3 million or less when, under the authorisation process, there is no specified threshold.³⁰ The Committee notes in this connection that this is an 'initial' arrangement and that the Minister will be able to vary the threshold amount by regulation.³¹ The Committee has already noted its opposition to the \$3 million threshold for section 51AC, and extends this opposition to the use of the \$3 million threshold for collective bargaining.

4.36 Finally, the National Farmers' Federation (NFF) proposed that the ACCC be given 21 days, rather than 14, to respond to notifications. NFF representatives stated:

The difference between 14 days and 21 days is that 21 days may allow other businesses to provide adequate comment on it and may allow the ACCC to give a fairer consideration of it. We would rather ... see the correct decision made within 21 days than an incorrect decision made within 14 days.³²

4.37 Only one organisation, the Housing Industry Association (HIA), opposed the collective bargaining arrangements recommended by the Dawson report.

4.38 The HIA's concerns relate particularly to the possible consequences if collective bargaining is adopted by contractors supplying services to the residential construction industry. Its view is that contractors who obtain collective bargaining rights would cease to compete with one another, and would instead adopt the same collective bargaining structures as unionised employees in the commercial construction industry.³³ The HIA argued that the ACCC should have a mechanism with which 'it can immediately identify collective agreements that are industrially motivated' and refuse to allow them to remain on the register.

29 *Transcript of Evidence*, McKenzie, 7 November 2003, p.48.

30 *Transcript of Evidence*, McKenzie, 7 November 2003, p.48.

31 Submission 30, ACCC, p.56; *Review of the Competition Provisions of the Trade Practices Act*, January 2003, p.121.

32 *Transcript of Evidence*, Potter, 7 November 2003, p.73.

33 Submission 10, Housing Industry Association, p.7.

Committee view

4.39 The Committee considers that the concerns of the HIA essentially amount to a fear that contractors may choose to join a union and bargain collectively as a union. The HIA posits this as somehow unacceptable and threatening, because the union is likely to be a successful negotiator. The Committee cannot countenance any suggestion that workers or employers, be they contractors or otherwise, should be unable to bargain collectively, as they can under present laws or in the manner suggested by Dawson. Collective bargaining, where it provides a public benefit, should be fully supported, whether a union facilitates the collective bargaining or not.

Collective Boycotts

4.40 The committee noted the support from a number of small business organisations including the Fair Trading Coalition, COSBOA, NARGA and the National Farmers Federation, for the right to collectively boycott as part of any collective bargaining notification under the Act. Further, the Committee noticed that it did not receive any evidence opposing such a move, with the exception of the Business Council of Australia, which did not actually oppose collective boycotts but warned that care must be taken in assessing their public benefit.³⁴

4.41 The Dawson report supported the inclusion of collective boycotts under the proposed notification scheme despite concerns expressed by the ACCC.³⁵ The Dawson report however did not make collective boycotts the subject of a recommendation, and the Government's response did not address the issue directly.

4.42 The Committee notes that any proposal for collective boycotts would be subject to the same public benefit tests applied to collective bargaining generally. The ACCC noted in evidence that collective boycotts are already available under the current authorisation process. Mr Brian Cassidy, ACCC Chief Executive Officer, made these points as follows:

... we would need to decide whether or not a notification for collective bargaining that included a boycott had a net public benefit. There is nothing to prevent someone from seeking authorisation from us at the moment for a collective negotiation arrangement with a boycott. Indeed, we have authorised a couple of those in recent months. It basically comes down to what are very similar tests between authorisation and notification as to whether there is an overall net public benefit in the arrangement that is put to us.³⁶

34 Submission 13, BCA, p.53.

35 *Review of the Competition Provisions of the Trade Practices Act*, January 2003, p.118.

36 *Transcript of Evidence*, Cassidy, 31 October 2003, p.95.

4.43 The Committee acknowledges and supports the vast weight of evidence and submissions in favour of boycotts as part of a collective bargaining notification regime.

Recommendation 11

The Committee recommends that the Government immediately bring forward legislation to introduce a collective bargaining notification scheme, including the right to boycott, and excluding the proposed \$3 million threshold for notifications.

Creeping acquisitions

4.44 Some representatives from both the retail and wholesale independent grocery sector argued that the Trade Practices Act should be amended to protect small businesses from the alleged anti-competitive effect of creeping acquisitions by the two major chains.³⁷ In the final section of this chapter, the Committee considers this argument.

4.45 The Committee notes that there is dispute between the independent grocery sector and Coles Myer and Woolworths, the major chains, about precisely how to measure their respective market shares. For example, Mr Roger Corbett, Chief Executive Officer, Woolworths stated that the food, liquor and grocery data provided by the Australian Bureau of Statistics indicates that Woolworths has 28 per cent of the market, Coles Myer 22 to 23 per cent, and the independents about 50 per cent of the market.³⁸ He described the Australian market as ‘a very well-balanced market by world standards’. By contrast, a report by the Network Economics Consulting Group (NECG) prepared for the independent wholesaler, Metcash Trading Ltd, claims that the Australian grocery industry is one of, if not the, most concentrated in the world’, with the ‘two vertically integrated chains supplying over around 76 per cent of groceries across the country’.³⁹

4.46 In the context of this report, the Committee has not sought to choose between these different measures of the concentration of the sector. The Committee’s role is not to try to determine whether this concentration is inappropriate. Rather its concern is whether the existing provisions of the Trade Practices Act are adequate to deal with the issue of creeping acquisitions, if they are found to be a threat to competition.

37 See Submissions 41, National Association of Retail Grocers of Australia, and 42, Metcash; by contrast, Submission 47, Master Grocers’ Association of Victoria opposed the prohibition on creeping acquisitions.

38 *Transcript of Evidence*, Corbett, 30 October 2003, p.2.

39 Submission 42, Metcash Trading Ltd, Annexure 1: NECG, ‘Creeping Acquisitions in the Australian Grocery Industry: a report to the ACCC prepared on behalf of Metcash Trading Ltd’, August 2003, p.91.

Current arrangements

4.47 Section 50(1) of the Act prohibits corporations from acquiring ‘shares in the capital of a body corporate’ or ‘any assets of a person’ if the acquisition ‘would have the effect, or be likely to have the effect, of substantially lessening competition in a market’.

4.48 In considering whether proposed mergers or acquisitions are likely to lessen competition, the ACCC must first define the relevant market which, in this section, means ‘a substantial market for goods or services’ in Australia, a state, a territory or a region of Australia.⁴⁰ The ACCC then determines whether the acquisition is likely substantially to lessen competition in the light of the following (non-exhaustive) list of factors:

- (a) the actual and potential level of import competition in the market;
- (b) the height of barriers to entry to the market;
- (c) the level of concentration in the market;
- (d) the degree of countervailing power in the market;
- (e) the likelihood that the acquisition would result in the acquirer being able to significantly and sustainably increase prices or profit margins;
- (f) the extent to which substitutes are available in the market or are likely to be available in the market;
- (g) the dynamic characteristics of the market, including growth, innovation and product differentiation;
- (h) the likelihood that the acquisition would result in the removal from the market of a vigorous and effective competitor;
- (i) the nature and extent of vertical integration in the market.⁴¹

4.49 An example of the application of this section of Act to the grocery industry was the ACCC’s treatment of the sale of the Franklins chain in 2001. In a recent speech to the Food and Grocery Council of Australia, Mr Graeme Samuel noted that the ACCC’s primary concern at the time was that a ‘collapse of the chain would see

40 TPA s.50(6); Graeme Samuel, ‘Competition and the nation’s supermarket trolley: a perspective of the Australian Competition and Consumer Commission’, Speech to the Food and Grocery Council of Australia, 16 September 2003, p.6.

41 TPA s.50(3).

the bulk of stores go to the major supermarket chains, and fewer stores available for independents and new entrants'.⁴²

4.50 The Commission authorised the merger of Franklins and Woolworths on condition that 200 stores were sold to independent retailers and a maximum of 67 stores sold to Woolworths. Mr Samuel said that:

Approval of the agreement was conditional on the parties to the acquisition providing the Commission with enforceable undertakings to transfer stores that were designated to independents to those independent chains. In addition, to address concerns about local competition, the Commission required the divestiture of some Woolworths stores.⁴³

The problem of creeping acquisitions

4.51 Mr Alan McKenzie, Director, NARGA, outlined what he described as the problem of creeping acquisitions in the following terms:

Section 50 has shown itself to be unable to deal with a series of small acquisitions undertaken by a company with a large market share over a period of time. While each individual acquisition does not have the effect of substantially lessening competition, the overall impact is one that potentially can substantially lessen competition. So, for example, if a major chain were to buy out 100 stores in one go, that would very much come under the ACCC's spotlight. But, if they make those same acquisitions over a period of years, piecemeal and one by one as part of a strategic plan to acquire that same level of market share, it is very difficult for the commission to find that each acquisition on its own represents a substantial lessening of competition. That is the problem.⁴⁴

4.52 Mr John Hunter, General Counsel for Metcash Trading Ltd, claimed that the cumulative impact of creeping acquisitions by the major chains in the retail grocery sector is anticompetitive. That is not only because the 'ongoing duopolisation' of the grocery sector means that price competition offered by a 'third full service player' is at risk, but also because the competitive ability of wholesalers who supply independent grocery retailers is under threat.⁴⁵

42 Graeme Samuel, 'Competition and the nation's supermarket trolley: a perspective of the Australian Competition and Consumer Commission', Speech to the Food and Grocery Council of Australia, 16 September 2003, p.5.

43 Graeme Samuel, 'Competition and the nation's supermarket trolley: a perspective of the Australian Competition and Consumer Commission', Speech to the Food and Grocery Council of Australia, 16 September 2003, p.6.

44 *Transcript of Evidence*, McKenzie, 7 November 2003, pp.55-56.

45 *Transcript of Evidence*, Hunter, 7 November 2003, p.62.

4.53 In support of this claim, Metcash submitted to the inquiry a report prepared on its behalf by the Network Economics Consulting Group.⁴⁶ The NECG report analysed the volume of business expected to be lost by Metcash as a result of ‘an expected current round of creeping acquisitions involving 16 stores’ as 1.77 per cent. It considered a range of scenarios relating to further losses in sales volume of up to 10 per cent as a result of possible future acquisitions.

4.54 The report concluded that:

If cost increases are not passed through to consumers, the viability of Metcash and/or its independent retailers will be threatened well before a ten per cent loss of volume is reached. With as little as a six per cent loss of volume, we estimate that Metcash would no longer be able to raise equity finance. Well before this, Metcash’s ability to provide retail support services would be squeezed, which would flow through to deteriorating customer service at the retail level.⁴⁷

4.55 In his speech to the Food and Grocery Council of Australia, Mr Samuel said that the commission recognised ‘that detriment to independent operators could result from creeping acquisitions’. He noted that the potential for loss of sales volume at the wholesale level could give rise to a loss of economies of scale, in turn generating cost pressures on the entire independent grocery sector.

4.56 NARGA proposed a number of measures that, it argued, could ameliorate what it sees as the problem of creeping acquisitions. These measures include amending the Act to include the insertion of an additional factor in s.50(3) referring to the impact of previous (or creeping) acquisitions on the level of competition, and the addition of a new s.50(7). The new section would provide that where ss.50(1) and (2) do not prevent the acquisition, yet the cumulative effect of the proposed and previous acquisitions is a substantial lessening of competition in the market, the proposed acquisition is not to proceed unless authorised or subject to an enforceable undertaking.⁴⁸

4.57 The Government of Victoria proposed examination of:

The feasibility and net benefits of amending the section 50 ‘statutory factors’ to allow the ACCC to take into consideration previous mergers and acquisitions by an acquirer. This would allow the ACCC to consider the

46 Submission 42, Metcash Trading Ltd, Annexure 1: NECG, ‘Creeping Acquisitions in the Australian Grocery Industry: a report to the ACCC prepared on behalf of Metcash Trading Ltd’, August 2003.

47 Submission 42, Metcash Trading Ltd, Annexure 1: NECG, ‘Creeping Acquisitions in the Australian Grocery Industry: a report to the ACCC prepared on behalf of Metcash Trading Ltd’, August 2003, p.4.

48 Submission 41, National Association of Retail Grocers of Australia, pp.159-163.

aggregate effect of previous mergers and assess the resultant state of competition in any relevant market.⁴⁹

4.58 Finally, the Committee noted a proposal discussed in the Dawson report, which merits further consideration:

Another proposal envisaged the declaration of highly concentrated industries by the Government. Once an industry was declared, acquisitions taking place within the industry would be required to be notified to the ACCC and examined by it.⁵⁰

Other considerations

4.59 Not all representatives of the independent grocery sector supported NARGA's proposals in relation to creeping acquisitions.

4.60 While it recognised the need 'for a sufficient number of members to preserve the economies of scale that operate in that sector', the Master Grocers' Association of Victoria informed the Committee that it opposed the attempt to stop creeping acquisitions by amending section 50. It argued that the proposed amendments could confine the ability of independent grocers to sell their businesses to particular purchasers, thus limiting the value of such businesses and restricting the funds available to them through investment or lending.⁵¹

4.61 In response to this argument, NARGA noted that a partial solution may be a 'transparent bidding process'. Mr McKenzie said that currently, when an independent retailer is negotiating the sale of a business with Coles or Woolworths, the negotiations will be covered by a confidentiality agreement. He suggested that if the process could be 'opened up', perhaps at the point where agreement in principle had been reached but before contracts were exchanged, that would allow other bidders to come into the process.⁵² His view was that a level of transparency may allow independent retailers to bid for such stores, and thus keep them within the independent fold.

4.62 Nevertheless, he said, since the major chains are in a position to 'outbid' independent retailers, transparency in the bidding process would not make a difference to the final outcome in most cases.⁵³

49 Submission 35, Victorian Government, p.7.

50 *Review of the Competition Provisions of the Trade Practices Act*, January 2003, p.67.

51 Submission 47, Master Grocers' Association of Victoria, p.8.

52 *Transcript of Evidence*, McKenzie, 7 November 2003, p.57.

53 Additional Information, National Association of Retail Grocers of Australia, 10 November 2003.

ACCC view

4.63 When the Senate Economics Legislation Committee sat in consideration of Estimates in June 2003, outgoing ACCC Chairman Professor Allan Fels described the difficulty the ACCC encounters in dealing with creeping acquisitions:

no-one would want to disguise the difficulties of dealing with creeping acquisitions. The issue comes up most often in regard to big acquisitions of retail stores one by one. It is more the case that, while we feel uneasy about this part of the Act, we have not been able to come up with a proposal that would in our view solve our concerns. When a big retailer, say, is going to buy a very large number of outlets at a given time, if they bunch them all together it is possible for us to look at them as a whole and say, 'This could substantially lessen competition.' But most often acquisitions are made in small parcels or one at a time, so each case as you look at it does not seem to amount to a substantial lessening of competition. It has to be a substantial lessening of competition in a market.⁵⁴

4.64 Professor Fels noted that the major retail chains already advise the ACCC of their proposed acquisitions, and that they have consented when the ACCC has opposed an acquisition or required them to sell another site, in order to restrain their influence over local markets. However the ACCC's powers at law remain unclear, and this piecemeal approach does not allow the ACCC to consider the impact of these acquisitions on *national* market concentration:

On the more general steady increase in market share of the big supermarkets, the more typical scenario is that the supermarket will move into a town where it is not represented, take over from an independent and often offer better prices, service and range and quality of goods than the independent may have done. For that reason and others, it is rather difficult to argue that this is going to substantially lessen competition in that town. But the accumulation of these acquisitions means that the national market share of these players has steadily been increasing. That has had some repercussions, including on their buying power.⁵⁵

4.65 Mr Brian Cassidy, Chief Executive Officer, ACCC, informed the Committee that the ACCC was doing 'a fair bit of work on the economic analysis of creeping acquisitions'. He noted that there is significant debate about whether or not creeping acquisitions do lead to economic detriment, saying:

the economics of it has not been easy, and we have had various bits of work commissioned as well as doing our own internal work, and we are still in the process of working our way through that.⁵⁶

54 Senate Economics Legislation Committee, *Hansard*, Fels, 6 June 2003, p.620.

55 Senate Economics Legislation Committee, *Hansard*, Fels, 6 June 2003, p.621.

56 *Transcript of Evidence*, Cassidy, 31 October 2003, p.94.

4.66 He noted further that, assuming that there is deemed to be economic detriment, the next step for the ACCC would be ‘to undertake the legal analysis of whether section 50, as it is currently structured, would allow us to deal with the creeping acquisitions at the source of the identified problem’.⁵⁷

4.67 Mr Samuel commented further that the issue under consideration was not necessarily confined to a ‘simple’ issue of creeping acquisitions, but is expanding to include questions about the competitive impact of the chain stores moving into the retail petroleum and pharmacy sectors. He said:

It all impacts upon the broad economic issue of whether there is a potential for a substantial lessening of competition in a market and, if so, in which market. Ultimately, if we were to determine that was arising as an economic issue then we would have to examine the question of the legal capacity to deal with it.⁵⁸

Committee view

4.68 The Committee finds the arguments presented by the independent retailers convincing, and considers, as a matter of logic, that creeping acquisitions must, if continued indefinitely, at some point result in a very concentrated market. Current merger law does not effectively address this issue. Section 50 of the Act should be strengthened to take account of the cumulative effects of acquisitions which over time may substantially lessen competition.

4.69 The Committee notes that the ACCC is continuing its work in this area. The Committee does not make a judgment on whether creeping acquisitions have been anti-competitive in any particular sector. However, the Committee believes the ACCC should have the power to act in cases where it believes creeping acquisitions have resulted in a substantial lessening in competition.

4.70 The Committee considers that suggestions such as those by NARGA, the Victorian Government and the Fair Trading Coalition may offer possible solutions to this difficulty. In the Committee’s view, these proposals should receive detailed consideration as possible solutions for the problem of creeping acquisitions.

Recommendation 12

The Committee considers that provisions should be introduced into the Act to ensure that the ACCC has powers to prevent creeping acquisitions which substantially lessen competition in a market.

57 *Transcript of Evidence*, Cassidy, 31 October 2003, p.94.

58 *Transcript of Evidence*, Samuel, 31 October 2003, p.94.

Divestiture powers

4.71 Divestiture powers are powers which enable a court to order that a dominant corporation be broken up into several smaller corporations in order to prevent the anticompetitive domination of a market by one player.

4.72 Divestiture powers are widely available to authorities in Europe and the USA.⁵⁹ Probably the most famous US divestiture occurred in 1984 when the US Federal Court ordered the break-up of monopolist telecommunications provider AT&T. Divestiture was also threatened against Microsoft in its recent antitrust dispute. Although rarely used, the threat of divestiture forms the heart of US antitrust law – it provides a legal remedy which is considered highly undesirable by large companies, and which therefore stimulates compliance with the antitrust laws.

4.73 International experience indicates that where the threat of divestiture fails, the implementation of divestiture provisions can be effective. The United States Federal Trade Commission's 1999 study of the divestiture process found that about three-quarters of divestitures appear to have created viable competitors in the relevant market.

4.74 Australian trade practices law currently lacks the access to divestiture powers enjoyed by overseas jurisdictions; as a result, our competition authorities are limited in their ability to use divestiture either as a threat or as a remedy. Section 81 of the *Trade Practices Act 1974* does allow the court to order divestiture, but only in the case of an offence against Section 50 (Prohibition of acquisitions that would result in a substantial lessening of competition). The Committee considers that the application of s.81 should be expanded, so that divestiture becomes a remedy for other breaches of the Act, including section 46 (Misuse of market power) and any new section introduced in line with the majority report's recommendation 12 (relating to the regulation of creeping acquisitions).

Application to creeping acquisitions

4.75 The rationale for regulation of creeping acquisitions, as described above, is that such acquisitions have the same anticompetitive effect as any acquisitions which currently fall within the authority of s.50. It therefore follows that since what (in the legal sense) might be described as the 'mischief' of creeping acquisitions is the same as the 'mischief' in s.50, the remedies (including divestiture) should also be the same.

4.76 As divestiture is a quite severe remedy, it is appropriate to provide 'warning mechanisms' to ensure that a corporation which is expanding its business is able to comply with its obligations under the Act. A suitable warning mechanism could be based around a 'trigger' market concentration.⁶⁰

59 See, for instance, 15 USC 21(b).

60 Such as that contained in the *Fair Trading Act 1973* (UK) ss.64(2) and (3).

4.77 This trigger should not operate as a *de facto* cap on market share. Rather it would require companies proposing acquisitions in concentrated industries to notify the ACCC. The Commission would then assess whether the acquisition would result in a substantial lessening of competition. The Committee notes that this already occurs in the retail grocery industry.

Application to s.46

4.78 The rationale for the extension of divestiture powers to s.46 is also quite straightforward. If a corporation with substantial market power is found to be abusing that power, it seems entirely reasonable to respond by depriving the corporation of substantial market power. Such an approach could increase the competition within the relevant market by creating additional competitors. More likely, of course, the existence of divestiture powers would cause companies to be more careful in their compliance with the section.

4.79 The Committee noted that in its submission to the current inquiry, NARGA proposed the extension of divestiture powers to s.46:

The Courts should also have the power to order divestiture for repeated and intentional breaches of s 46. Divestiture as a remedy should be available in instances where a large and powerful corporation is repeatedly engaging in abuses of market power as the corporation's obvious contempt for existing penalties means that a more potent remedy is needed.⁶¹

4.80 The ACCC, in both its submission to the Dawson review and in its submission to a 2002 Senate Legal and Constitutional Committee inquiry into the Trade Practices Act, also favoured extension of divestiture powers to s.46:

The ACCC does not support an open-ended divestiture remedy, but reiterates its previous position of support for a limited extension of the existing power by providing the Court with the option to order divestiture where there is a contravention of section 46 of the Trade Practices Act, noting it is unlikely that the power would often be invoked.⁶²

Recommendation 13

The Committee recommends that s.81(1) of the Act be amended so that s.81 can be applied where a corporation is found to have contravened section 46, section 46A, or any new section introduced to regulate creeping acquisitions.

61 Submission 41, NARGA, p.7.

62 Senate Legal and Constitutional References Committee Inquiry into the *Trade Practices Act 1974*, April 2002, submission 21, ACCC, p.2.

CHAPTER FIVE

ENFORCEMENT OF THE ACT

5.1 Several submissions and witnesses raised issues which related to the roles of the courts and the ACCC in adjudicating disputes under the Trade Practices Act, and particularly under sections 46 and 51AC. The most prominent of those issues were:

- whether the ACCC's roles as a regulator and as a litigant are in conflict;
- whether the ACCC should obtain 'cease and desist' powers under the Act;
- whether the ACCC's powers under s.155 of the Act should be extended;
- whether the ACCC is sufficiently resourced to undertake the litigation required under the Act; and
- whether cases under sections 46 and 51AC should be handled, in the first instance, by the Federal Magistrates Court.

The roles of the ACCC

5.2 The ACCC is responsible for the general administration of the Trade Practices Act, and is responsible for maximising compliance with the Act. It is also able to prosecute for breaches of the Act. Woolworths suggested to the Committee that these two powers may be in conflict, and that it may be difficult for one organisation to successfully undertake both tasks:

I think the ACCC has a real fundamental conflict of responsibilities. On the one hand, it is a compliance organisation seeking compliance and cooperation and getting the law to work. On the other side of the coin, it is a conviction organisation. For instance, the previous chairman said: 'We should have a far more cooperative attitude. You should tell us what your problems are, and we should work with you on trying to get compliance.' But when we did that we found many of the officers really wanted to know the facts only to see if you had committed a breach. In my view, it is too hard for one body to do the two roles, because in actual practice on many occasions these matters tend to be a matter of judgment in application and sometimes you have to make a judgment. Sometimes the ACCC's view and your own legal advice are at variance. Those two roles are very complex roles to be performed by the one organisation.¹

5.3 The Committee agrees that the two roles imply quite different relationships between corporations and the ACCC. Successful compliance programs require a cooperative relationship, while a prosecution will inevitably involve an adversarial relationship. Further, it appears reasonable for corporations, contemplating that they may in future be forced to take an adversarial approach towards the ACCC, to manage risks by limiting their cooperation as partners in the compliance process.

1 *Transcript of Evidence, Corbett, 30 October 2003, p.9.*

5.4 The ACCC, however, appears to manage this process effectively. The Committee noted, in particular, the ACCC statement ‘Cooperation and Leniency in Enforcement’ which addresses the issues raised by Woolworths, stating that the ACCC will be lenient in considering potential prosecutions where corporations have cooperated in increasing their compliance level. Part of the statement reads:

Leniency is most likely to be considered for a corporation which:

- comes forward with valuable and important evidence of a contravention of which the Commission is otherwise unaware or has insufficient evidence to initiate proceedings;
- upon its discovery of the breach, takes prompt and effective action to terminate its part in the activity;
- provides the Commission with full and frank disclosure of the activity and all relevant documentary and other evidence available to it, and cooperates fully with the Commission’s investigation and any ensuing prosecution;
- has not compelled or induced any other corporation to take part in the anti-competitive agreement and was not a ringleader or originator of the activity;
- is prepared to make restitution where appropriate;
- is prepared to take immediate steps to rectify the situation and ensure that it does not happen again, undertakes to do so and complies with the undertaking; and
- does not have a prior record of Trade Practices Act, or related, offences.²

5.5 The Committee considers that while the fundamental tension identified by Woolworths does exist, experience indicates it is not an insurmountable difficulty, and the ACCC has set in place processes to manage this difficulty. In particular it appears that corporations who are concerned that they may have breached the Act, inadvertently or otherwise, have more to gain by cooperating with the ACCC than by adopting an adversarial position from the outset.

Cease and desist powers

5.6 During the Dawson inquiry, the ACCC argued that it should be given the power to issue ‘cease and desist’ orders to corporations which in the Commission’s view were engaging in anti-competitive conduct of the type proscribed by s.46. These orders, the ACCC argued, would be simpler and quicker than interim injunctions under the Act. The ACCC argued:

2 ACCC, *Cooperation and Leniency in Enforcement*, http://www.accc.gov.au/fs_compliance.html

Cease and desist orders provide interim administrative orders restraining corporations from engaging in specified anti-competitive conduct. A decision to issue an order would be based on the Commission's reasonable satisfaction of prima facie anticompetitive use of market power, if urgent action was required in the public interest. Judicially imposed penalties and injunctions would be available for breach of a cease and desist order.³

5.7 The Dawson report did not support the introduction of cease and desist powers for the following reasons:

- No material was placed before the Committee to demonstrate that the existing process of obtaining an interim injunction is cumbersome or overly difficult, either in the context of section 46 or generally.
- As in previous reviews, the case for giving the ACCC cease and desist powers has not been substantiated.
- Under the Constitution, the exercise of federal judicial power is confined to properly constituted courts. There is a real risk that any use of the proposed cease and desist powers, by any body other than a court, would be unconstitutional.
- It is not clear that the proposed cease and desist powers, were they to be provided to the ACCC, would be any speedier or more efficient than the existing process of obtaining an interlocutory injunction.⁴

5.8 The Government accepted the Dawson report's recommendations in relation to cease and desist powers.⁵

5.9 The ACCC did not argue for cease and desist powers before this inquiry, concentrating instead on seeking an extension to its powers under s.155 of the Act (considered in the next section). However, a number of other submissions did support the ACCC's earlier call for cease and desist powers. The Fair Trading Coalition, for instance, argued as follows:

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

3 Dawson Review submission 56, ACCC, p.95.

4 *Review of the Competition Provisions of the Trade Practices Act*, January 2003, p.108.

5 *Commonwealth Government Response to the Review of the Competition Provisions of the Trade Practices Act 1974*, p.5.

As the potential damage to competitors and markets can be significant, it is argued that the ACCC, where a company has substantial market power, and is thought to be engaging in conduct which breaches Part IV of the Act, should be able to issue a ‘cease and desist’ order. This would mean that the conduct of concern would have to cease whilst it is investigated by the Commission (and if appropriate, its legality or otherwise determined by the courts). If necessary the ACCC could have the ‘cease and desist’ order enforced by the Federal Court.⁶

The New Zealand model

5.10 The Committee does not agree with the Dawson report on the issue of ‘cease and desist’ powers. The Committee, in considering term of reference *e* (approaches in other OECD economies) noted that the New Zealand’s *Commerce Act 1986* provides cease and desist powers to the Commerce Commission of New Zealand in relation to a far wider range of anticompetitive conduct than was proposed by the ACCC.⁷

5.11 The ACCC, in its submission to the Dawson inquiry, suggested that the New Zealand legislation might provide a suitable model for Australian legislation.⁸ The New Zealand Commerce Commission describes its cease and desist powers as follows:

Under section 74A of the Commerce Act, the Commission can seek a Cease and Desist Order, in certain circumstances and on specific terms, from a Cease and Desist Commissioner.

A Cease and Desist Order may require a person or business to stop doing something or to not start doing something. A Cease and Desist Order may alternatively require a person or business to do something if the Commission is satisfied that simply restraining the person from the behaviour will not restore competition in a market.

The procedures for issuing a Cease and Desist Order, which reflect the principles of natural justice, are set out in the Commerce Act. Specific Cease and Desist Commissioners are appointed under the Commerce Act to consider applications from the Commission for such orders. A Cease and Desist Commissioner has no other powers or role within the Commerce Commission.⁹

5.12 The Committee noted that a Cease and Desist Commissioner, in granting such an order, must provide the person against whom the order is made, an opportunity to make a written submission.¹⁰ The Commissioner’s reasons for issuing the cease and

6 Submission 5, Fair Trading Coalition, p.34.

7 *Commerce Act 1986* (NZ) s.74A(1)(a).

8 Dawson Review submission 56, ACCC, p.95.

9 Commerce Commission of New Zealand, *The Commerce Act – Anti-competitive Practices under Part II of the Commerce Act* p.19.

10 *Commerce Act 1986* (NZ) s.74B(d).

desist order must be ‘in writing with the facts and reasons for it clearly set out’¹¹ and the cease and desist order is also appellable.¹² It is also worth noting, with respect to the Dawson report findings, that the New Zealand Commerce Commission also has recourse to injunctions under the Act¹³ yet despite this power, cease and desist orders have still proven useful.

5.13 Issues of natural justice are dealt with in section 74C of the Commerce Act, which includes the following provisions:

At every hearing for a cease and desist order, the Commissioner presiding over the hearing –

- (a) must provide for as little formality and technicality as the requirements of this Act and a proper consideration of the matter permits:
- (b) must permit the Commission and the person against whom an order is sought to appear and give evidence, to be represented by counsel, to call witnesses, and to cross-examine witnesses.¹⁴

[...]

5.14 One important feature of the New Zealand model is that a Cease and Desist Commissioner cannot have other roles within the Commission. This suggests that the New Zealand model would not experience difficulties due to the possible conflict between the Commission’s regulatory and prosecution roles, as discussed above.

Constitutional issues

5.15 The Committee noted that the ACCC has identified the potential constitutional difficulty of providing quasi-judicial powers to a regulatory body. This difficulty was compelling for the Dawson Committee members, who stated, as noted above, that ‘there is a real risk that any use of the proposed cease and desist powers, by any body other than a court, would be unconstitutional.’¹⁵

5.16 The Committee noted the ACCC’s view, in its Dawson submission, that:

The Commission has carefully considered these issues and consulted with the Australian Government Solicitor’s Office of General Counsel. [...] The Commission takes the view that a cease and desist power can be drafted in

11 *Commerce Act 1986* (NZ) s.74A(3)(b).

12 *Commerce Act 1986* (NZ) s.74A(3)(c).

13 *Commerce Act 1986* (NZ) s 81.

14 *Commerce Act 1986* (NZ) ss.74C (a) and (b).

15 *Review of the Competition Provisions of the Trade Practices Act*, January 2003, p.108.

accordance with the High Court's approach to Chapter III issues and that such legislation is likely to withstand Constitutional challenge.¹⁶

5.17 Finally, the Committee noted that the operation of cease and desist powers has not given rise to particular difficulties in New Zealand. The Committee recognises that New Zealand's constitutional arrangements do not reflect the separation of judicial and legislative functions in the same way that s. 71 of the Commonwealth Constitution does.¹⁷ However Australia and New Zealand do share similar notions of judicial power, natural justice and the independence of the judiciary. To that extent, the operation of cease and desist powers in New Zealand gives the Committee confidence that similar provisions could successfully operate in Australia.

Committee's view

5.18 The Committee acknowledges that constitutional issues must be carefully considered. However the Committee remains convinced that cease and desist powers are a vital tool for the ACCC if it is to prevent anti-competitive conduct from resulting in substantial damage to small business. The ACCC requires a tool which will enable it to act in 'real business time' yet which will protect the rights of companies against whom the cease and desist orders are sought. The Committee therefore recommends that such provisions should be drafted.

Recommendation 14

The Committee recommends that the Act be amended to provide for cease and desist orders, modelled on the orders provided for in sections 74A to 74D of the *Commerce Act 1986* (NZ), appropriately modified to conform with Australian constitutional law.

ACCC powers under s.155

5.19 Section 155 of the Act, 'Power to obtain information, documents and evidence', provides the ACCC with powers, under certain circumstances, to obtain information relevant to its decisions under the Act, by issuing a notice requiring a person:

- (a) to furnish to the Commission ... within the time and in the manner specified in the notice, any such information;
- (b) to produce to the Commission ... in accordance with the notice, any such documents; or

16 Dawson Review submission 56, ACCC, p.99.

17 See , for instance, Joseph, *Constitutional and Administrative Law in New Zealand*, Law Book, 1993, p.237: 'In New Zealand, the principle of separation of powers has no formal role in constitutional law.'

- (c) to appear before the Commission at a time and place specified in the notice to give any such evidence, either orally or in writing, and produce any such documents.¹⁸

5.20 These powers are similar in nature to powers available to the Australian Securities and Investments Commission, the Australian Prudential Regulation Authority, the Australian Customs Service, and the Australian Taxation Office under their various Acts.

5.21 Currently, the courts have established that the ACCC's powers under s.155 cease once legal proceedings have commenced. This view is based on the notion that executive government agencies should not interfere in judicial proceedings, once such proceedings are underway.¹⁹

5.22 Before the Dawson inquiry, the ACCC requested the extension of s.155 powers, but did so only in passing. Its submission stated:

Legislation should also confirm that the Commission retains s. 155 powers in the period after a cease and desist order is issued and before any contravention proceedings are instituted in the court.²⁰

5.23 That submission contained no supporting evidence, and the Dawson report dismissed the request as follows:

No case has been made out for the Act to be amended to continue the ACCC's powers under section 155 after the commencement of court proceedings. The existing court processes for compelling the disclosure of evidence are adequate. An extension of the section 155 powers would intrude upon the court's ability to control the pre-trial process and maintain the balance of fairness.²¹

5.24 The Dawson report also included a chapter relating to the ACCC's use of its powers under s.155. It found that those powers are extensive, and recommended that the Act be amended to 'require the ACCC to seek a warrant from a Federal Court Judge or Magistrate for the exercise of these powers.'²² Under those circumstances, however, the Dawson report recommended extending the powers available under s.155 to include 'the power to search for and seize information.'²³

18 *Trade Practices Act 1974*, s.155(1).

19 *Brambles Holdings Ltd. v TPC & Anor* (1980) ATPR 40-179.

20 Dawson Review submission 56, ACCC, p.98.

21 *Review of the Competition Provisions of the Trade Practices Act*, p.108.

22 *Review of the Competition Provisions of the Trade Practices Act*, p.199.

23 *Review of the Competition Provisions of the Trade Practices Act*, p.199.

5.25 The Government accepted the substance of these recommendations, but expressed the view that such a warrant should be capable of issue by a State or Territory Judge or Magistrate.²⁴

5.26 Before this inquiry, the ACCC renewed its argument in favour of extending its powers under s.155, and provided this Committee with a substantially more detailed case than was provided to the Dawson Committee.

5.27 The ACCC argues that in some cases, the current interpretation of s.155 deters it from seeking interim injunctions against companies undertaking anti-competitive behaviour, because once those injunction proceedings have commenced, its powers under s.155 cease. The ACCC argued:

At the moment, we have a trade-off between either getting an interim injunction and therefore losing the ability to use our section 155 powers thereafter, or not getting an interim injunction until the point where we have more or less, if you like, got our case together and finished using our 155 powers. But that can be a reasonable way down the track and the conduct continues in the meantime.²⁵

5.28 The Committee is concerned by this ‘trade-off’, and wishes to enable the ACCC to utilise its s.155 powers after the commencement of injunctive proceedings, but wishes to do so without interfering in processes properly the business of the courts. In the Committee’s view, the best way to achieve this is to amend the Act to enable the ACCC to seek, from the court in which injunctive proceedings are brought, an order to enable the continued operation of its powers under s.155. If the requirement for a warrant is introduced (as foreshadowed by the Government in its response to the Dawson Inquiry), then the Committee considers that the ACCC should be able to apply for such a warrant after the commencement of injunctive proceedings, but before the commencement of substantive proceedings.

5.29 The Committee recognised that, in some cases, the use of cease and desist powers may make this extension of s.155 unnecessary. However in cases where the ACCC seeks an injunction rather than a cease and desist order, this power remains necessary.

Recommendation 15

The Committee recommends that s.155 of the Act should be amended to enable the ACCC to seek the permission of the court (whether as part of a warrant application or otherwise) for the continued use of its powers under s.155 after the commencement of injunctive proceedings. The use of s.155 powers should cease prior to the commencement of substantive proceedings.

24 *Commonwealth Government Response to the Review of the Competition Provisions of the Trade Practices Act 1974*, p.14.

25 *Transcript of Evidence*, Cassidy, 31 October 2003, p.91.

Resources of the ACCC

5.30 The effectiveness of sections 46 and 51AC are underpinned, as noted above, by the potential for the ACCC to prosecute corporations which engage in conduct proscribed by those sections. The likelihood of prosecution, in turn, relies upon the ACCC being sufficiently resourced to pursue legal action against large companies which may, themselves, have access to significant legal resources. The Government recognised this in its response to the Reid Report, *New Deal: Fair Deal*, which stated:

Once the amendments to the Trade Practices Act are in operation, the Government will issue a direction under section 29 of that Act requiring the ACCC to initiate test cases under the new unconscionability provision at the earliest possible opportunity. This will send a strong message to the business community that the Government is serious about improving the standard of business conduct affecting small business. Additional funding of \$480 000 each year for the next four years has been committed to fund precedent setting test cases to be taken by the ACCC on behalf of small business.

5.31 In its submission, the Law Council of Australia recommended that this funding be extended for another four years since (as this report has noted) s.51AC is still in a relatively early stage of development. The Law Council stated:

If the ACCC needs more resources by way of specific funding to continue to bring a sufficient number of cases under s51AC in order to clarify its scope, then the Trade Practices Committee would support a Senate Committee recommendation that the specific funding program first introduced in 1998 be reintroduced in order to provide additional funds for such prosecution.²⁶

5.32 When questioned by the Committee, the ACCC acknowledged that resourcing can be a constraining factor on its ability to prosecute. The ACCC informed the Committee that the cost to the ACCC of pursuing the *Boral* case was in the order of \$3 Million²⁷, or in other words, more than the entire amount of extra funding obtained under the *New Deal: Fair Deal* package. This figure does not include Boral's costs.

5.33 The ACCC went on to state:

one of the reasons we are having financial problems is that, even if we are successful in the case and we would therefore recover part of our costs from the other party, with the way our funding works, those recovered costs go straight to consolidated revenue; we do not retain them.²⁸

5.34 The impact of this financial situation on the ACCC's ability to pursue cases was also made clear:

We are ... having to think fairly carefully about new section 46 cases that we take on at the moment. They are inevitably very expensive. They are

26 Submission 18, Law Council of Australia, p.31.

27 *Transcript of Evidence*, Cassidy, 7 November 2003, p.11.

28 *Transcript of Evidence*, Cassidy, 7 November 2003, p.11.

also very long cases, which is probably another issue in itself, and by the time we make our way through the court processes it takes us several years to obtain an outcome in section 46 cases, simply because of the complexity and the appeals and so forth. But we are having to think fairly carefully about new section 46 cases, both because of the state of the law and also because of our financial position at the moment.²⁹

5.35 These statements were a cause for concern for the Committee. If a situation emerges where the ACCC's ability to fund prosecutions becomes extremely restricted, then both sections 46 and 51AC – and other sections of the Trade Practices Act – lose much of their effectiveness. If there is little likelihood of the ACCC pursuing a matter in the courts, there is little incentive for large companies to resolve matters out of court, and indeed, little incentive for them to comply with the Act at all.

5.36 As a result, the Committee considers that the Government should reconsider the ways in which recovered costs are handled, in cases where the ACCC is successful. The most obvious potential solution would be to allow the ACCC to retain its costs. However the ACCC itself raised several potential problems with this approach:

I think the public policy issue for governments, if an agency like the ACCC were able to retain costs, is that there could be a worry on the part of some that it would skew us away from pursuing the sorts of cases where we realise right at the outset that we would probably never be able to recover our costs. What the cases are really about is stopping the behaviour and stopping the particular entities undertaking that behaviour from operating. So, while I very much agree with the chairman's reaction that we would certainly like to be able to keep the costs that we are able to recover, I would have to flag that there is a public policy issue lurking around in that as well.³⁰

5.37 The Committee accepts this warning. However, if the ACCC is having difficulty funding its own legal costs, this too may result in the ACCC skewing away from pursuing the sorts of cases where it would probably never be able to recover its costs. While the Committee does not wish to propose a particular model for the funding of the ACCC's litigation under the Act, it is clear that current resources provide an unacceptable constraint on the ACCC's role as a litigant.

Recommendation 16

The Committee recommends that the ACCC should be adequately funded to undertake its role as the principal litigant in s.46 and s.51AC cases.

29 *Transcript of Evidence*, Cassidy, 7 November 2003, p.12.

30 *Transcript of Evidence*, Cassidy, 7 November 2003, p.14.

Judicial arrangements

5.38 Judicial arrangements relating to the Trade Practices Act are set out in s.163 of the Act, which states that ‘the Federal Court has jurisdiction to hear and determine prosecutions for offences [against the Act], and no other court has such jurisdiction’.

5.39 Some evidence before the Committee suggested that the current judicial arrangements are extremely expensive, and that small businesses are therefore unable to access the protection and remedies which the Act seeks to provide:

For the Trade Practices Act to be effective for small business it requires access and small business does not have the resources to have access. Australian law maintains a view that we are all equal under the law; it is the FCA’s view that small business does not have the benefit of this principle and breach of the Act is sometimes determined by affluence rather than merit.³¹

5.40 The National Association of Retail Grocers of Australia (NARGA) suggested to the Committee that it should not be necessary for cases under s.46 and s.51AC to commence in the Federal Court. NARGA suggested that s.46 cases should commence in the Australian Competition Tribunal, and s.51AC cases should commence in the Federal Magistrates Court.

5.41 The Committee is reluctant to remove jurisdiction for s.46 cases to the Australian Competition Tribunal. Presently, the Tribunal’s jurisdiction is principally concerned with authorisations and notifications under the Act, and jurisdiction for s.46 matters would be a significant change in its responsibilities.

5.42 However, the Committee can see a great deal of merit in extending the jurisdiction of the Federal Magistrates Court to allow it to hear matters under sections 46 and 51AC. The Federal Magistrates Court was established to provide a simpler and more accessible alternative to litigation in the superior courts and to relieve the workload of those courts. It also focuses heavily on alternative dispute resolution methods, which can be much quicker and less expensive than fully contested court hearings. The Federal Magistrates Court already has jurisdiction for Trade Practices Act matters under Part V (Consumer Protection) Division 1A (Product safety and product information).

5.43 The merits of extending the jurisdiction of the Federal Magistrates Court to cover s.51AC were outlined by NARGA as follows:

If you extrapolate that out into a federal magistrates context, where there is an emphasis on alternative dispute resolution such as mediation, we are comforted that there would be a low-cost and user-friendly forum where these players can get together at a minimal cost. In many cases it may not be a technical issue about what ‘unconscionable’ means that is causing the problem but, rather, a communication breakdown between the parties. That

31 Submission 26, Franchise Council of Australia, p.5.

facilitates that, and often you will not see endless appeals in those cases, because the parties are often close in terms of bargaining power or, if they are not, the issues are best dealt with in that forum anyway. These are ongoing relationships. These are contractual relationships where the parties have an interest in continuing their good relations. We believe that that is a great, low-cost forum to deal with these issues expeditiously.³²

5.44 The Committee also noted that, while s.83 of the Trade Practices Act aims to make it easier for companies to bring cases, by relying on findings in other (presumably, ACCC) proceedings as evidence, the provision has been little used. The ACCC in evidence³³ could not name any cases in which s.83 had been used, moving one Committee member to note that the section has ‘been a bit of a dead letter’.³⁴

5.45 The Committee considers that one reason for the lack of use of s.83 is likely to be the cost of bringing a case in the Federal Court. The Committee therefore considers that the Federal Magistrates Court is the most appropriate court to consider ‘piggyback’ cases where companies are likely to rely primarily on Federal Court of High Court findings to substantiate their own cases. In the Committee’s view, most s.46 cases are likely to be very complex, and will probably be argued in the Federal Court at first instance. However, cases in relation to s.46 which rely on s.83 may well be suitable for consideration in the Federal Magistrates Court.

5.46 The Committee further notes that, since such actions are likely to be brought under s.82 of the Act (Actions for damages), section 86AA (Limit on jurisdiction of Federal Magistrates Court in proceedings under section 82) will apply, effectively limiting the Federal Magistrates Court’s jurisdiction to matters where the damages sought do not exceed \$200,000.

5.47 Overall, the Committee considers that extending the jurisdiction of the Federal Magistrates Court to allow it to consider matters under s.46 and Part IVA will increase the opportunities for small businesses to seek and obtain redress against companies which misuse market power or engage in unconscionable conduct.

5.48 Finally, the Committee considered the view expressed by the Franchise Council that access to justice was a substantial issue for many franchisees, who are regulated by a mandatory Code of Conduct prescribed under Part IVB. In the Committee’s view, the arguments expressed above in favour of extending the jurisdiction of the Federal Magistrates Court to s.46 and s.51AC cases, also support allowing the Court to hear s.51AD (Contravention of industry codes) matters. This would not replace a prescribed Code’s own dispute resolution procedures, but would mean that disputes which cannot be resolved by such procedures could then be considered by the Federal Magistrates Court rather than proceeding to the Federal Court.

32 *Transcript of Evidence*, Zumbo, 7 November 2003, p.50.

33 *Transcript of Evidence*, Cassidy, 7 November 2003, p.13.

34 *Transcript of Evidence*, Senator G. Brandis, 7 November 2003, p.13.

Recommendation 17

The Committee recommends that the jurisdiction of the Federal Magistrates Court be extended to enable it to deal with Misuse of Market Power (s.46 and s.46A, where cases rely upon s.83), Contravention of Industry Codes (s. 51AD) and Unconscionable Conduct (Part IVA).

SENATOR URSULA STEPHENS

Chair

GOVERNMENT SENATORS' REPORT

Misuse of Market Power – s.46

The Approach to s.46

1. Government Senators are persuaded that there is a clear case for legislative reform of s.46 of the *Trade Practices Act 1974*. In particular, they are of the view that recent judicial decisions, in particular the decision of the High Court in *ACCC v Boral*, have narrowed the already limited operation of s.46, and thereby restricted to an undesirable degree its capacity to deal with anticompetitive conduct, in particular the difficult issue of 'predatory pricing'. Therefore, Government Senators agree that it is desirable to reform the section to ensure that the Act achieves its core objective of promoting competition.

2. Government Senators accept that the purpose of s.46 is to protect competition, not competitors. It is not the purpose of the Act, nor would it be good policy, to protect any particular section of the economy, or to create artificial distortions in markets by sustaining uncompetitive firms. In fact, to do so would defeat the very object of the Act. The Act promotes competition by protecting markets from anticompetitive conduct, not by protecting uncompetitive firms.

3. Nevertheless, it is axiomatic that unless there are competitors there will be no competition. By the very fact of prohibiting anticompetitive conduct, and thereby protecting competition, the operation of the Act has the effect of giving protection to genuine competitors. If the Act works effectively to achieve its objective of protecting markets from anticompetitive conduct, the consequence of its successful operation will be to protect firms which *but for that anticompetitive conduct* would be competitive.

4. Government Senators therefore find themselves in complete agreement with the approach to the Act expressed by the Chairman of the ACCC, Mr. Graeme Samuel:

It is essential that all businesses in Australia understand that the Act is built upon a foundation stone of vigorous lawful competition between small, big and medium sized businesses right across the board. Competition enables businesses that can innovate, be creative, provide choice, provide convenience and provide quality and lower prices to consumers to thrive. Vigorous lawful competition will enable that to occur. Anticompetitive conduct will do harm not only to consumers but to businesses that are attempting to behave and operate within the confines, the purview, of the trade practices law. Anticompetitive conduct ought to be stopped, but vigorous lawful competition ought to be promoted.

Promotion of competition does not involve the protection of any sector of the economy from competition. It does not involve the protection of small or

medium business or any individual big businesses from the normal processes of vigorous competition. Small business has a range of protections available under the act. It has the fundamental protection that if it is an innovative, creative small business then it should be able to thrive in a vigorous, competitive economy; thus Part IV of the Act, which promotes vigorous competition between all businesses, has an inherent protection for small business.¹

The effectiveness of s 46

5. In considering the need for legislative reform of s.46, it is relevant to consider the operation of the section historically. If the policy of the section is sound, then the section should be effective to achieve that policy.

6. It is now almost 30 years since s.46 (in its various forms) has been part of Australian law and a fact of Australian commerce. In that time, only 28 cases taken under s.46 have proceeded to final determination after a full hearing. Of those 28 cases, 5 have been taken by the regulator (the ACCC or its predecessor the Trade Practices Commission) and 23 have been commenced by private litigants.

7. Of those 28 cases, 24 have failed, 3 have succeeded, and one (*ACCC v Safeway*) has been successful at the intermediate appellate level (ie, the Full Federal Court), but is currently subject to a special leave application pending before the High Court. Other than *Safeway*, all of the ACCC's s.46 cases have failed. 20 of the 23 private actions have failed. Predatory pricing has been the principal issue in only 4 of the 28 cases. All 4 have failed.²

8. Those statistics do not, however, include a number of s.46 cases which have been resolved at the stage of interlocutory determination. Nor, of course, do they take account of the effectiveness of the section in establishing a norm or standard for commercial conduct. The ultimate test for the efficacy of a law is not how often it is breached, but how commonly it is observed.

9. Nevertheless, the history of s.46 cases is revealing. It would, in Government Senators' view, be naïve to think that the striking lack of success of s.46 cases demonstrates that anticompetitive behaviour is seldom if ever engaged in in the Australian economy. The relative success of the ACCC in enforcing s.45 demonstrates

1 Senate Economics Legislation Committee, *Hansard*, 19 February 2004 , p.24.

2 Information supplied by ACCC. The five TPC/ACCC cases were *TPC v CSBP & Farmers Ltd* (1980) 53 FLR 135; *ACCC v Universal Music* (2001) 115 FCR 442; *ACCC v Boral* [2003] HCA 5 ; *ACCC v Rural Press Limited* (2002) ATPR 41-883; and *ACCC v Safeway Limited* (No. 2) (2002) ATPR 46-215. The three successful private actions were *Pont Data v ASX Operations Pty Ltd* (1990) 21 FCR 385; *Queensland Wire Industries v BHP* (1989) 167 CLR 177; and *Mark Lyons Pty Ltd v Bursill Sports Gear Pty Ltd* (1987) 75 ALR 581.

that that is not so. A more realistic explanation is that it reflects the formidable difficulties of proof, the expense and complexity of such proceedings, and the high hurdles which the section, as currently drafted, raises.

10. The fact that s.46 proceedings have so seldom been successful also causes Government Senators to view with some scepticism evidence which the Committee heard from certain interest groups – in particular the Business Council of Australia – sounding *in terrorem* warnings against the reform of the section. It can hardly be said that the section has been a threat to free enterprise. Nor can it credibly be said that, if the section were made more efficacious in its operation, it would be an unreasonable restraint upon commerce. Free enterprise is damaged by anticompetitive practices, not by laws which seek to protect competition by prohibiting anticompetitive practices.

The Dawson Report and the ‘effects test’

11. For many years, much of the debate about s.46 has centred on the issue of whether its operation should be enlarged by extending the varieties of prohibited conduct to conduct which merely has the effect (as opposed to the purpose) of eliminating or substantially lessening competition. Under the section as it currently stands, the only prohibition is upon conduct having an anticompetitive purpose.

12. This issue was raised before the Dawson Inquiry, which was the most recent review of the operation of the Act. The Dawson Report recommended against amending the Act by including an effects test.³ Before this Senate Committee, some witnesses sought to raise the effects test again. Significantly, however, the ACCC, which had for years been one of the principal proponents of the effects test, did not submit that an effects test should be introduced into s.46.⁴

13. Government Senators do not support an effects test, and welcome the fact that the Majority Report of the Committee makes no recommendation to introduce one. The significance of the fact that the debate has moved beyond the effects test issue is that the matters of principal concern to this Committee, and which form the subject of the Majority Report’s recommendations, are in most cases of a declaratory, operational or technical character. With certain exceptions (notably recommendation 4), they do not recommend fundamental or in-principle changes to the scope of s.46, but incremental or definitional changes to facilitate its more effective operation, substantially in its existing form.

14. In short, the substantial disappearance of the effects test question as an issue of controversy before this Committee means that the debate about s.46 is now more focused on its operation than its scope.

3 *Review of the Competition Provisions of the Trade Practices Act*, January 2003, p.88.

4 *Transcript of Evidence*, 31 October 2003, Samuel, pp.89-90.

The Boral case and predatory pricing

15. Much of the evidence before the Committee was concerned with the impact of the decision of the High Court in *ACCC v Boral*, and in particular the question of whether the effect of the decision was to narrow the operation of s.46 and make it less effective against predatory pricing. Witnesses offered different views as to the impact of the decision. The ACCC was among several witnesses which considered that the decision had narrowed the operation of the section. Several other witnesses asserted that it had not. Ms. Louise Castle, the representative of the Trade Practices Committee of the Business Law Section of the Law Council of Australia (the body of both practitioners and academics which represents specialist trade practices lawyers and economists), while arguing that the decision did not significantly change the law, conceded that other members of her organisation had a different view.⁵

16. Government Senators do not consider it is appropriate – or even practicable – for this Committee to enter into that debate. We would rather approach the issue pragmatically. The evidence from the ACCC was that, of the 15 s.46 cases which it was pursuing at the time the *Boral* decision was delivered, it abandoned 4 as a direct result of the decision.⁶ In view of that reality, it is a little difficult to maintain that the decision had no effect, or merely turned on its own facts. At least, the decision demonstrated the great difficulties in proving the practice of predatory pricing under the existing s.46. (Government Senators also note that, although of course the decision of the High Court has settled the law on this matter, the three eminent specialist trade practices judges – Justices Beaumont, Merkel and Finkelstein - who heard the *Boral* case in the Full Court of the Federal Court found that the conduct was a violation of s.46.⁷)

17. The High Court's decision in the *Boral* case was delivered on 7 February 2003, after the hearings of the Dawson Inquiry had concluded, but before it had delivered its Report to Government. The *Boral* decision is referred to in Chapter 3 of the Report, which deals with s.46 and misuse of market power. However, it is quite clear from a reading of Chapter 3 that the issue in controversy before Dawson was the desirability of introducing an effects test (see above) – not the question of predatory pricing. Chapter 4 of the Dawson Report, which deals with the closely related issue of price discrimination, does not mention the *Boral* case.

18. Government Senators support the recommendations of the Dawson Inquiry concerning s.46. However, they do not consider that those recommendations cover the same ground which this Committee is required to consider. In particular, it is clear from the Dawson Report that it does not address the issue of whether, in light of

5 *Transcript of Evidence*, 7 November 2003, Castle, p.24.

6 *Transcript of Evidence*, 31 October 2003, Cassidy, p.82.

7 *ACCC v Boral Ltd* (2001) 106 FCR 328.

Boral, s.46 adequately deals with predatory pricing. It addresses, as we have said, a quite different issue, ie, the desirability of an effects test.

Unconscionable conduct – s.51AC

19. Government Senators are broadly satisfied that s.51AC operates to provide effective protections against unconscionable conduct. They do not consider that a persuasive case has been made for significant amendment to the section. They note that, since the section was only introduced in 1998, it is relatively early for a body of case law to have developed to define the section's meaning and limits. Nevertheless, they do agree with certain minor recommendations for change.

20. Government Senators welcome the fact that the Majority Report makes no recommendation for the introduction of vague new statutory language into s.51AC ('harsh', 'unfair' etc.). It is our belief that the consequence of doing so would make the meaning of the section so open to a variety of different interpretations that it would be inimical to the development of a coherent and relatively clear body of law. Furthermore, the transactional uncertainty which the introduction of such language would produce would have undesirable consequences for commerce, the social cost of which is difficult to assess. Paradoxically, it is likely to be the very persons whom the section is designed to protect (ie, persons in a position of relative weakness in a transaction) who would suffer most from such transactional uncertainty.

Recommendations

21. We now deal with the 17 recommendations made by the Majority Report and indicate our response.

Misuse of Market Power

Recommendation 1

22. The current threshold test for market power ('substantial degree of power in a market') was introduced by the *Trade Practices Revision Act 1986*, in substitution for the earlier test ('in a position substantially to control a market'). It is clear from the second reading speech of the Minister when s.46 was amended in 1986 that the legislative intention in changing the test from substantial control to substantial degree of power was to give the section a wider operation. He said:

As well as monopolists, section 46 will now apply to major participants in an oligopolistic market and in some cases, to a leading firm in a less concentrated market.⁸

23. Substantial power in a market is, in our view, plainly a different thing from substantial control of a market, since a firm may possess the former without the latter.

8 The Hon. L. Bowen MP, House of Representatives, *Hansard*, 19 March 1986, p.1627.

24. The majority's recommendation is intended to make that clear. In doing so, it substantially follows the submission made by the ACCC, which lists a number of principles which it recommends be incorporated into the section in order to clarify its meaning.⁹

25. As Government Senators understand the ACCC's submission, it is not intended to change the meaning or scope of the expression 'substantial degree of power in a market'; merely to make abundantly clear that substantial power in a market is a different concept from substantial control of a market.

26. Of the four principles recommended by the ACCC to be included in s.46, the first is not really a test at all: it states that the existing statutory language has a different meaning from the earlier statutory language. Government Senators doubt its appropriateness or utility. The second, third and fourth principles would not, in our view, change the scope of s.46, but may be of utility in clarifying the meaning of the expression 'substantial degree of power in a market'.

Recommendation 2

27. Recommendation 2 proposes, following the submission of the ACCC, to give statutory guidance as to the circumstances which constitute 'taking advantage' of market power for the purposes of s.46. It thus adopts a similar method, in relation to the 'taking advantage' element, as does recommendation 1 in relation to the 'substantial degree of power' element.

28. However, while 'substantial degree of power in a market' requires a characterisation of market conditions, which is usually a sophisticated and complex issue, the words 'take advantage' merely require the existence of a causal or functional relationship between market power (in the relevant sense) and proscribed purpose. As the High Court said in *Queensland Wire Industries v BHP* (the most significant of the few successful s.46 cases), the term does not connote any predatory intent. In effect, it merely means 'use'.

29. In our view, the current interpretation of the expression by the courts does not hinder the operation of the section, nor is there any significant ambiguity about its meaning or difficulty in applying it. Therefore, Government Senators do not consider any such amendment to be necessary.

Recommendation 3

30. This recommendation deals with predatory pricing, which Government Senators consider to be the key issue for legislative reform of s.46, particularly in view of what we believe to be the more restricted operation given to the section in *Boral*.

9 Majority Report para.2.16.

31. One of the problems for legislative reform is a definitional one: ‘predatory pricing’ means different things to different people, and a variety of criteria or formulae have been suggested to determine whether price-cutting market behaviour is a misuse of market power, or merely symptomatic of healthy competition. The formula most commonly favoured by both academic writers and practitioners to distinguish genuine price competition from predatory pricing is pricing below variable cost.

32. Pricing below variable cost does not always, however, indicate misuse of market power. As the Committee heard from several witnesses, below-cost pricing is a commonplace marketing strategy and may be a perfectly reputable one.

33. One thing, however, is quite clear: not all price-cutting is pro-competitive or beneficial to consumers. While it is obviously true that consumers will benefit from lower prices in the short term, if price-lowering market behaviour is engaged in strategically by a firm taking advantage of its market power for one of the purposes proscribed by s.46, the long-term consequence will be anticompetitive if that conduct results in the removal from the market of smaller competitive firms. The assertion which the Committee frequently heard that ‘lower prices benefit consumers’ will only remain true if the market remains competitive. If it does not, prices will not stay low for long.

34. Government Senators therefore agree with the first part of recommendation 3. They suggest that the effect sought might be achieved by amending s.46 to include the following words:

In determining for the purposes of this section whether a corporation

- (a) has a substantial degree of power in a market; and
- (b) has taken advantage of that power for a purpose proscribed by s.46(1)

the Court may have regard, so far as is relevant, to the capacity of the corporation, relative to other corporations in that market, to sell in the market a good or service at a price below the cost to the corporation of producing or acquiring the good or supplying the service.

35. The language we suggest is permissive (‘may’), not prescriptive.

36. Government Senators do not agree with the second part of recommendation 3. In our view, its effect, when taken together with the first part of the recommendation, would be to expose legitimate price-cutting to unreasonable constraint. The issue of recoupment is important, in particular because it often provides the best test of whether price-cutting is a genuine exercise in competition or has a predatory intent. (A firm which is genuinely competing on price does not plan to recoup its foregone revenue from the elimination of its competitor; a firm which is engaged in a predatory pricing strategy almost invariably will.) Rather, Government Senators consider that recoupment *should* be one of the criteria to which the court may (and ordinarily will) have regard in determining whether price-lowering behaviour is predatory.

Recommendation 4

37. If the other amendments which we have suggested are made, Government Senators do not consider recommendation 4 to be necessary to make the operation of s.46 effective. Nor do we consider it appropriate: were it to be adopted, the operation of s.46 could extend considerably beyond its current scope to an extent which we regard as both uncertain and undesirable.

Recommendation 5

38. The purpose of this recommendation is to reverse the effect of the decision of the High Court in the *Rural Press* case,¹⁰ which narrowed the operation of s.46 by deciding that the section was not infringed when a corporation with substantial power in one market took advantage of that power to engage in proscribed conduct in *another* market.

39. Government Senators agree with the views of the ACCC (set out in s.2.62-2.71 of the Majority Report) that this decision leaves a significant and undesirable gap in the operation of s.46, which should be legislatively reformed. They accordingly agree with this recommendation.

Recommendation 6

40. In the view of Government Senators, recommendation 6 merely restates the existing law, as decided by Lockhart J. in *Dowling v Dalgety Australia*.¹¹ Although the recommendation does not in our view change the law, we consider that it is appropriate that such an important principle be expressed in the statute itself. Therefore Government Senators support this recommendation.

Unconscionable Conduct

Recommendation 7

41. Sub-sections 51AC(9) and 51AC(10) of the Act impose statutory ceilings on s.51AC (currently \$3 million). The legislative intention of the sub-sections is to ensure that the operation of the section is confined to smaller firms and individuals.

42. Government Senators are not persuaded of the need to lift the ceilings so as to extend the protections in the section to all firms, irrespective of size. On the other hand, we are concerned that the current statutory ceiling may be unrealistically low, given the size of transactions which some small businesses undertake. Accordingly, we recommend that the government consider prescribing \$10 million as the relevant amount for the purposes of the section.

10 *Rural Press Ltd v ACCC* [2003] HCA 75.

11 (1992) 34 FCR 109.

Recommendation 8

43. Government Senators are persuaded by the arguments of the ACCC, set out at paragraph 3.49 of the Majority Report. The additional conduct which these amendments would bring within the operation of s.51AC is of a similar character to the types of conduct already proscribed, and savours of unconscionable conduct. Government Senators therefore support this recommendation.

Recommendation 9

44. Government Senators can see no reason why the provisions of Part IVA of the Act should not apply to governments, and accordingly support this recommendation. We believe it is desirable for the Commonwealth to take leadership on this issue and seek to bring about complementary legislation by the States and Territories binding themselves and local government.

Recommendation 10

45. Government Senators are not persuaded that the unconscionability provisions of the *Trade Practices Act* should be extended to prohibit secrecy provisions in retail leases. The regulation of retail leases is, in any event, entirely a matter for the State and Territory governments. Accordingly, Government Senators do not support this recommendation.

Collective bargaining

Recommendation 11

46. Government Senators note that collective bargaining by small businesses was one of the key recommendations of the Dawson Report, and that the Government has already announced its intention to legislate for it. Accordingly, Government Senators support this recommendation.

Creeping acquisitions

Recommendation 12

47. Government Senators do not support this recommendation. In our view, the existing provisions of Part IV, subject to the amendments we have recommended above, adequately deal with such competition issues which ‘creeping acquisitions’ might raise. They point, in particular, to the existing provisions of s.50.

Enforcement

Recommendation 13

48. Government Senators do not support this recommendation. They note that the question was considered by the Dawson Inquiry, which recommended against it. They agree with the reasons set out in the Dawson Report for that conclusion:

Section 46 of the Act prohibits the taking advantage of substantial market power for a proscribed purpose. A corporation with substantial market power does nothing illegal through the simple possession of shares and other assets. The prohibited conduct is the taking advantage, for a proscribed purpose, of that market power. Conceptually, divestiture is inappropriate in this context because there is no clear nexus between the assets to be divested and the contravening conduct. For example, identifying the specific assets to be divested to preclude a corporation from taking advantage of its market power for a proscribed purpose would be difficult at best and arbitrary at worst.¹²

Recommendation 14

49. Government Senators do not support this recommendation. In our view, the power of the ACCC to seek interim or interlocutory orders from the Federal Court is sufficient in its current form. We have heard no persuasive evidence that conduct proscribed by Part IV of the Trade Practices Act cannot be sufficiently dealt with, in an urgent case, under the existing powers under s. 80 and the *Rules of Court*.

50. We note that the Dawson Inquiry arrived at a similar view.¹³

Recommendation 15

51. Government Senators support this recommendation, subject to appropriate safeguards and provided that s.155 powers cease once substantive proceedings have commenced. Although the recommendation would have the effect of further expanding the investigative powers of the ACCC, we are of the view that the circumstances in which the additional power would be usable would be highly circumscribed. The recommendation goes well short of the extension of s.155 powers sought by the ACCC in its submission to the Committee.

Recommendation 16

52. Government Senators accept that the ACCC must be adequately resourced. We do not accept that it is not.

Recommendation 17

53. Government Senators support this recommendation, subject to any relevant limits to the monetary jurisdiction of the Federal Magistrates Court. In our view, dealing with smaller cases under Part IVA would be an appropriate and efficient use of the resources of the Federal Magistrates Court, rather than the Federal Court. Similarly, we are of the view that hearings under s.83 of the Act are appropriate matters for Federal Magistrates. However we believe that substantive proceedings

12 *Review of the Competition Provisions of the Trade Practices Act*, January 2003, p.162.

13 *Review of the Competition Provisions of the Trade Practices Act*, January 2003, p.108.

under ss.46 or 46A should not be dealt with by Federal Magistrates; such cases, due to their complexity, should always be a matter for the Federal Court.

SENATOR GEORGE BRANDIS
Deputy Chairman

SENATOR GRANT CHAPMAN

APPENDIX 1

SUBMISSIONS RECEIVED

- 1 Liquor Stores Association of Victoria
- 2 KPMG
- 3 Post Office Agents Association Limited (POAAL)
- 4 The Independent Liquor Group Distribution
 Co-operative Limited (ILG)
- 4a The Independent Liquor Group Distribution
 Co-operative Limited (ILG)
- 4b The Independent Liquor Group Distribution
 Co-operative Limited (ILG)
- 5 Fair Trading Coalition
- 6 National Federation of Independent Business (NFIB) Inc
- 7 Palmedia Limited
- 8 Shopping Centre Council of Australia
- 9 Independent Booksellers Network
- 10 Housing Industry Association Limited
- 10a Housing Industry Association Limited
- 11 Alan Edward Barnard
- 12 Office Choice Limited
- 13 Business Council of Australia
- 13a Business Council of Australia
- 13b Business Council of Australia

14	National Competition Council
14a	National Competition Council
15	Telstra Corporation Limited
16	Meridian Connections Pty Ltd
16a	Meridian Connections Pty Ltd
17	Drake Food Markets
18	Law Council of Australia
18a	Law Council of Australia
18b	Law Council of Australia
19	The Pharmacy Guild of Australia
20	Small Business Union of Australia Ltd
21	The Queensland Retail Traders & Shopkeepers Association
22	Coles Myer Ltd
23	Boral Limited
24	Small Business Development Corporation
25	The Council of Small Business Organisations of Australia Ltd (COSBOA)
25a	The Council of Small Business Organisations of Australia Ltd (COSBOA)
26	Franchise Council of Australia
27	Woolworths Limited
27a	Woolworths Limited
27b	Woolworths Limited
28	Motor Trades Association of Australia
28a	Motor Trades Association of Australia
28b	Motor Trades Association of Australia

- 28c Motor Trades Association of Australia
- 28d Motor Trades Association of Australia
- 28e Motor Trades Association of Australia
- 28f Motor Trades Association of Australia
- 29 Australian Retailers Association
- 29a Australian Retailers Association
- 30 Australian Competition and Consumer Commission (ACCC)
- 30a Australian Competition and Consumer Commission (ACCC)
- 30b Australian Competition and Consumer Commission (ACCC)
- 31 South Australian Government
- 32 Spier Consulting
- 32a Spier Consulting
- 33 Australian Chamber of Commerce and Industry (ACCI)
- 33a Australian Chamber of Commerce and Industry (ACCI)
- 34 Federal Chamber of Automotive Industries
- 35 Victorian Government
- 36 Australian Retail Lease Management
- 37 National Retail Association
- 38 Tasmanian Independent Retailers
- 38a Confidential
- 39 Real Estate Institute of South Australia
- 40 W.A. Independent Grocers Association (Inc.)
- 41 National Association of Retail Grocers of Australia
- 41a National Association of Retail Grocers of Australia
- 41b National Association of Retail Grocers of Australia
- 41c National Association of Retail Grocers of Australia

- 42 Metcash Trading Limited
- 43 National Farmers' Federation
- 43a National Farmers' Federation
- 44 T C Boxall
- 45 ACT Legislative Assembly
- 46 Queensland Lease Consultants
- 47 Master Grocers' Association of Victoria (MGAV)
- 48 Dr Evan Jones
- 49 A G Hayward
- 50 ARFRANC
- 51 Frank Zumbo, Associate Professor
- 52 Stones Investments Pty Limited
- 53 Lottery Agents Association of Victoria
- 54 New South Wales Farmers' Association
- 55 Form letters agreeing with sentiments expressed in the Small Business Union of Australia Ltd's Submission

APPENDIX 2

PUBLIC HEARINGS AND WITNESSES

FRIDAY, 10 OCTOBER 2003 – CANBERRA

Access Economics Pty Ltd

ABRAHAM, Dr Darryn Ross, Consultant

Independent Liquor Distribution Group Cooperative Ltd

BOURNE, Mr Robert James, Board Chairman

HICKEY, Mr John Joseph, Board Deputy Chairman

MULCAHY, Mr Richard John, Adviser

RAYMOND, Mr John Francis, Managing Director

Motor Trades Association of Australia; and Convenor, Fair Trading Coalition

DELANEY, Mr Michael, Executive Director

GARDINI, Mr Robert Charles, Partner, Gardini and Company, Legal Advisers

Australian Chamber of Commerce and Industry

JOHNSON, Mr Peter Andrew, Economist

KATES, Dr Steven Ian, Chief Economist

WILSON, Mr Burchell Steven, Economist

Australian Newsagents Federation

MURDOCH, Mr Peter Neil, Chairman

Liquor Stores Association of Victoria

O'BRIEN, Mr Antony Patrick, Secretary

Pharmacy Guild of Australia

PHILLIPS, Ms Wendy Margaret, Director, Strategic Policy

Tasmanian Independent Retailers

RICHARDSON, Mr Lionel James (Sam), Director

WISE, Mr Peter Charles, General Manager

Fair Trading Coalition

SPIER, Mr Hank, Consultant

Coles Myer

WILLIAMS, Mr Alan, Chief Operating Officer, Food, Liquor and Fuel

Friday, 17 October 2003 – Canberra

Shopping Centre Council of Australia

COCKBURN, Mr Milton Roy, Executive Director

SPEED, Mr Robin Roy, Lawyer

Housing Industry Association Ltd

GOODWIN, Mr Shane, Chief Executive, Operations

SIMPSON, Mr Glenn Ives, Executive Director, Industrial Relations and Legal Services

Australian Retailers Association

HUBBARD, Ms Melanie, Policy Adviser

LONIE, Mr Michael, Director of Tenancy

MOORE, Mr Stan, Chief Executive Officer

Telstra Corporation

LANDRIGAN, Dr Mitchell, Group Regulatory Manager

Thursday, 30 October 2003 – Canberra

Woolworths Ltd

CORBETT, Mr Roger, AM, Chief Executive Officer

JEFFS, Mr Rohan, Company Secretary and General Manager Corporate Services

PricewaterhouseCoopers Legal

LOOSLEY, Mr Stephen, Partner

Friday, 31 October 2003 – Melbourne

Australian Competition and Consumer Commission

CASSIDY, Mr Brian David, Chief Executive Officer

MARTIN, Mr John Edwin Charles, Commissioner

RIDGWAY, Mr Nigel Cameron, Deputy General Manager, Compliance Strategies Branch

SAMUEL, Mr Graeme Julian, Chairman

Franchise Council of Australia

EVANS, Mr Richard, Chief Executive Officer

GILES, Mr Stephen, Chairman

National Competition Council

FEIL, Mr Robert John, Executive Director

Boral Ltd

KENCH, Mr John, Legal Adviser

PEARSE, Mr Rodney Taunton, Managing Director and Chief Executive Officer

SCOBIE, Mr Michael Boyd, General Manager, Corporate Services, and Company Secretary

Liquor Stores Association of Victoria

MATTHEWS, Mr Peter Kevin, Member

McGRATH, Mr Philip James, Vice-President

O'BRIEN, Mr Antony Patrick, Secretary

WILKINSON, Mr Peter Julian, President

Business Council of Australia

MÜNCHENBERG, Mr Steven John, Director, Policy

Civil Contractors Federation

WILLIAMS, Mr Douglas Stanley, Chief Executive (National)

Friday, 7 November 2003 – Canberra

Australian Competition and Consumer Commission

ANTICH, Mr Robert Alan, General Manager, Compliance Strategies Branch

CASSIDY, Mr Brian David, Chief Executive Officer

KING, Mr Sean Patrick, Deputy General Counsel

MARTIN, Mr John, Commissioner

RIDGWAY, Mr Nigel Cameron, Deputy General Manager, Compliance Strategies Branch

SAMUEL, Mr Graeme Julian, Chairman

SMITH, Mr David F., Executive General Manager, Compliance Division

National Farmers Federation

BURKE, Mr Charles, Chair, Farm Business and Economics Committee

POTTER, Mr Michael James, Policy Manager, Economics

Law Council of Australia

CASTLE, Ms Louise, Chair, Business Law Section, Trade Practices Committee

REID, Mr William, Deputy Chairman, Trade Practices Committee

WILLIAMS, Dr Philip Laurence, Member, Trade Practices Committee,

Metcash Trading Ltd

HUNTER, Mr John, General Counsel

REITZER, Mr Andrew, Chief Executive Officer

TEMPANY, Mr Gary, National Group Manager, Merchandise and Marketing

National Association of Retail Grocers of Australia

McKENZIE, Mr Alan John, Director and National Spokesman

ZUMBO, Professor Frank, Consultant

Monday, 24 November 2003 – Canberra

Master Grocers Association of Victoria

COWLEY, Mrs Jean, Vice President

GLEDHILL, Mr Geoffrey, President

Abbott, Stillman and Wilson, Solicitors

PARSONS, Isabel Ann, Consultant