

MTAA



***Motor Trades Association of
Australia***

SUPPLEMENTARY SUBMISSION TO THE

***SENATE ECONOMICS REFERENCES
COMMITTEE***

***INQUIRY INTO THE EFFECTIVENESS OF THE
TRADE PRACTICES ACT 1974 IN PROTECTING
SMALL BUSINESS***

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1. INTRODUCTION

The Motor Trades Association of Australia (MTAA) would like to take this opportunity to respond to some of the issues raised by the Law Council of Australia (LCA) in its submission to the Senate Inquiry into the *Trade Practices Act 1974*. MTAA believes that the concerns about changes to the Trade Practices Act in support of small business expressed in the LCA submission are unfounded or misplaced or both.

MTAA would like to reiterate that small business is not seeking increased “protection” to shield it from the effects of an efficient competitive market. Small businesses do not require such protection – they are, in general, efficient, viable and competitive players in the markets in which they participate. MTAA acknowledges that inefficient businesses, regardless of their size, may fail when subjected to the forces of competition and MTAA is not seeking to protect such businesses from these market forces. Instead, the Association and many others in the small business community are seeking amendments to the Trade Practices Act that will ensure all businesses can compete fairly and equitably. MTAA believes that a strong, competitive small business sector is in the interests of Australian consumers, competition and economic efficiency. It is widely recognised that the small business sector is at the heart of any “healthy” competitive market and that, in many markets is one of the driving forces behind competition. It is also widely recognised that markets which are dominated by only a few large players are significantly more susceptible to economically inefficient and anti-competitive behaviour.

MTAA would like to restate its view that the *Trade Practices Act 1974* is not currently providing effective redress against certain forms of anti-competitive behaviour. This view is not held solely by the small business sector but by the ACCC, members of the legal community, and some parliamentarians. Therefore, it would appear that it is widely accepted and acknowledged that certain provisions of the Trade Practices Act are not working as it was intended they should and that that needs to be addressed.

MTAA’s response to the specific issues raised in the LCA submission is set out in more detail in the following sections.

2. MISUSE OF MARKET POWER (SECTION 46)

The Law Council of Australia raises a number of issues relating to the current operation of section 46 that MTAA believes require further comment. These issues, along with some comments on them, are set out below.

- **Objectives of s 46:** *“the section is designed to protect consumer welfare through competition...Section 46, as interpreted by the High Court, appears to be doing precisely what it was intended to do ie, protect competition.”¹*

MTAA believes that section 46, as well as fostering competition, is designed to provide redress for smaller, more vulnerable firms against the anti-competitive conduct of firms with substantial market power. However, there is now concern that such redress is not available because the High Court, in *Boral*², recently interpreted section 46 very narrowly. MTAA would argue that s 46 is not now available to provide that redress and that the provision is not operating as Parliament intended.

The Attorney-General, the Hon. Lionel Bowen MP, made the intentions of Parliament in relation to s 46 very clear in his Second Reading Speech for the Trade Practices Revision Bill 1986 (which gave s 46 its current form) when he said,

*“A competitive economy requires an appropriate mix of efficient businesses, both large and small. Whilst large enterprises may frequently have advantages of economies scale, **there are many occasions when large size does not of itself mean greater efficiency. However, a large enterprise may be able to exercise enormous market power.....to the detriment of its competitors and the competitive process.** Accordingly an effective provision controlling the misuse of market power is most important **to ensure that small businesses are given a measure of protection from the predatory actions of powerful competitors.....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*
[emphasis added]

MTAA believes that the Speech strongly supports the view that s 46 is not solely about the protection of competition at all costs. Additionally, the wording of the section refers specifically to damaging competitors – there is no mention of damage to consumers, competition, or the competitive process –

¹ Law Council of Australia Submission at 11.

² *Boral Besser Masonry (now Boral Masonry Ltd) v Australian Competition and Consumer Commission* [2003] HCA 5 (7 February 2003).

³ House of Representatives Hansard, 19 March 1986.

which further supports the argument that s 46 is not purely about protecting competition. As Professor Stephen Corones notes, this extrinsic material supports the view that Parliament intended s 46 would protect and promote “*equal competitive opportunity for small business competitors*”, which would mean that “*s 46 differs from the other substantive prohibitions in Part IV of the TPA: it is not concerned solely with the promotion of competition.*”⁴

The High Court has on a number of occasions stated that the section 46 is purely concerned with protecting competition, not competitors.⁵ MTAA is concerned that the Court appears to have interpreted the section in a manner that is at odds with the intentions of Parliament’s amendment of the section in 1986. In MTAA’s view the section must now be amended by the Parliament so that it can achieve what the Parliament sought in 1986.

- **“While the law in relation to s46 is unquestionably still developing, it is currently workably clear”⁶**

MTAA disputes this proposition and notes the significant divergence of judicial opinion on the section, even with the majority in *Boral*. MTAA notes that of the eleven judges who heard the *Boral*, seven held that s 46 had not been breached while the other four (including the Full Court of the Federal Court) held otherwise⁷. In the *Safeway* case, which is on appeal to the High Court, four judges have heard the case so far and two have found breaches of s 46 while the other two have not.⁸ If the provision was “workably clear” surely there would not be such a divergence of views among the top echelons of Australia’s judiciary?

As Professor Stephen Corones states,

“Section 46 gives no guidance as to the categories of conduct that may be caught. It has proved notoriously difficult to interpret and apply.

⁴ Corones, “Section 46 of the Trade Practices Act: *Boral*, the Dawson Committee and the protection of small business”, (2003) 31 *Australian Business Law Review* 210 at 211.

⁵ See *Queensland Wire Industries Pty Ltd v Broken Hill Proprietary Co Ltd* (1989) 167 CLR 177 at 191 (per Mason CJ and Wilson J) and 194 (per Deane J); *Melway Publishing Pty Ltd v Robert Hicks Pty Ltd* (2001) 205 CLR 1 at 13[17] per Gleeson CJ, Gummow, Hayne, and Callinan JJ; *Boral Besser Masonry (now Boral Masonry) v Australian Competition and Consumer Commission* [2003] HCA 5 (7 February 2003) at [87], [160] (per Gleeson CJ and Callinan J), [260], [261] and [280] (per McHugh J).

⁶ Law Council of Australia Submission at 55.

⁷ The trial judge at first instance, Heerey J, held that there had been no breach: *ACCC v Boral Ltd and Boral Besser Masonry Ltd* [1999] FCA 1318 (22 September 1999); this decision was unanimously overturned on appeal to the Full Federal Court by Beaumont, Finkelstein and Merkel JJ: *ACCC v Boral Ltd and Boral Besser Masonry Ltd* [2001] FCA 30 (27 February 2001); the Full Federal Court’s decision was subsequently overturned by the High Court, with six members of the High Court finding that there was no breach of s 46 (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ) and one justice, Kirby J, finding a breach of s 46.

⁸ Goldberg J found no breach of s 46: *ACCC v Australian Safeway Stores Pty Limited (No 2)* [2001] FCA 1861 (21 August 2001); Heerey and Sackville JJ found breaches of s 46 (Emmett J dissenting) in *ACCC v Australian Safeway Stores Pty Limited* [2003] FCAFC 149 (30 June 2003).

Eminent judges have reached starkly opposing views as to what section 46 means and how it applies.”⁹

- ***“There is no evidence on the current state of the law that the 1986 amendments are not effective”¹⁰***

In its submission to this inquiry, the LCA states that, *“there is no evidence on the current state of the law”¹¹* that the 1986 amendments, which were designed to lower the threshold from one of substantial control to a ‘substantial degree of market power’, are ineffective. MTAA argues otherwise.

The narrow and restrictive interpretation that the High Court appears to have afforded s 46 implies that only dominant firms will have sufficient market power to fall within the ambit of the section.¹² The Explanatory Memorandum that accompanied the Bill which amended s 46 in 1986 indicates that the amendments were intended to lower the threshold applying to s 46. Additionally, the Explanatory Memorandum makes it clear that the ‘substantial degree of market power did not mean that a firm had to be completely free from the constraints of its competitors (as such a requirement would amount to a dominance threshold) nor did it mean that the firm needed to be in a position *“to substantially control a market”* or be able to *“determine the prices of a substantial part of the goods in a market.”¹³*

⁹ Corones, “Section 46 of the Trade Practices Act: Boral, the Dawson Committee and the protection of small business”, (2003) 31 *Australian Business Law Review* 210 at 211.

¹⁰ Law Council of Australia Submission at 4.

¹¹ *ibid.*

¹² This view is supported by a number of other parties. See ACCC Media Release, “High Court Decision Highlights Difficulties in Establishing Misuse of Market Power” (7 February 2003) in which Professor Allan Fels stated *“The Court’s interpretation as to the existence of market power raises questions as to the operation of s 46 in concentrated markets, with few players”*; ACCC Media Release, “Dawson Report – Preliminary Response: Criminal Sanctions Major Step Forward for Competition Policy (16 April 2003) in which Professor Fels stated, *“So this part of the law [s 46] works poorly and the [Dawson] committee has failed to come up with any useful suggestions for change.....Following the recent High Court ruling on Boral, there is further ongoing uncertainty as to the effectiveness of this provision as the court has adopted a restrictive interpretation. A further debate will be necessary on what to do about Section 46. It is an important element of the TPA which is not working well and the committee has not provided any answers”*; See also Smith and Trindade, “The High Court on Boral: A return to the past?”, (2003) 10 *Competition & Consumer Law Journal* 1; the Hon Ron Boswell, Senator for Queensland, Media Release (4 March 2003) in which the Senator stated, *“Following the High Court Boral decision, section 46 of the Act which aims to prevent abuse of market power by large corporations is a [sic] dead and buried.”*

¹³ The Explanatory Memorandum stated:

[37] The test of whether a corporation has a ‘substantial degree of power in a market’ is substituted for the previous test of a corporation ‘being in a position substantially to control a market’. **The new test is intended to provide a lower threshold for the operation of s 46.** The new section may be invoked in relation to a corporation that has a lesser degree of market power than is currently required under the present provision.

[41]However, in the context of s 46, ‘substantial’ is intended to signify ‘large or weighty’ or ‘considerable, solid or big’.....

[42] The word imports ‘a greater rather than less’ degree of power.....At the same time, **‘substantial’ in this context is not intended to require the high degree of market power connoted by the reference in the existing s 46(1) to being in a position substantially to**

However, despite the Explanatory Memorandum making it clear that it was not intended that a firm would have to be completely free from constraint to fall within s 46, the High Court has stated that the essence of market power in a supplier “*is absence of constraint from the conduct of competitors or customers. This is reflected in the terms of s 46.*”¹⁴ Such views, as expressed by the majority in *Boral*, tend to indicate that the Court believes that an absolute freedom from constraint is required to establish a substantial degree of market power.¹⁵ As only monopolists or near-monopolists can realistically operate completely unrestrained by their competitors, the *Boral* decision implies that the High Court has effectively returned s 46 to the pre-1986 substantial control threshold test. MTAA believes that such an outcome is clearly contrary to the intentions of Parliament and also effectively negates the 1986 amendments. As Smith and Trindade observe,

*“The High Court [in Boral] has introduced what amounts to a threshold dominance test and failed to provide a proper framework for distinguishing between conduct which the Act is designed to foster and that which the community expects it to prevent. Indeed...the majority [in Boral] have effectively created a cogent case for reform of s 46.”*¹⁶

MTAA makes the point that the threshold test does not by itself create an offence, it only casts the net.

- **The Parliament should take a ‘wait and see’ approach to s 46**¹⁷

MTAA is aware that s 46 cases invariably take a long time to work their way through the court system. MTAA notes that waiting for the High Court to hear further cases may probably mean a time period of another five to ten years. Small business cannot afford to wait that long for the reduction of uncertainty.

MTAA is concerned that a ‘wait and see’ approach will never result in change to the Act; when change is needed now.

control a market, or by reference in existing s 46(3) to the power to determine the prices of a substantial part of the goods in a market.’

[45] A corporation having a ‘substantial degree of market power’ may have a lesser degree of market power than that of a corporation which ‘would be, or be likely to be, in a position...to dominate a market’ as provided for in s 50. ‘Dominance’ connotes a greater degree of independence from the constraints of competition than is required by a ‘substantial degree of market power’. Whatever the position in regard to ‘dominance’, more than one firm may have a ‘substantial degree of market power’ in a particular market.

¹⁴ [2003] HCA 5 at [121] per Gleeson CJ and Callinan J.

¹⁵ See [2003] HCA 5 at [121], [137], [146], [264], [287], [289] and [293].

¹⁶ Smith and Trindade, “The High Court on Boral: A return to the past?”, (2003) 10 *Competition & Consumer Law Journal* 1 at 1.

¹⁷ Law Council of Australia Submission at 15 and 16.

MTAA also notes that the majority in *Boral* was of the view that Boral did not have substantial market power. If the majority of the High Court believes that as currently worded, the s 46 threshold is to be interpreted in the manner of Boral then waiting for more cases to be heard will not change matters. If the High Court is not able to interpret s 46 as the Parliament intended then the Parliament probably needs to clarify its intentions; that is, the legislation needs to be more specific and/or prescriptive.

- **Boral does not mean that two corporations cannot have market power**¹⁸

Whilst the decisions of the majority do not expressly state that two or more corporations cannot have market power, the interpretation of the majority in that case tends to suggest that only ‘dominant’ firms will fall within the ambit of s 46 (see discussion above). This is because the reasoning of the majority implies that a firm’s conduct will be constrained so long as there is at least one other significant player in the market and, therefore, such a firm would not be able to possess a ‘substantial degree of market power’.¹⁹

Clearly, such an interpretation raises serious concerns as to whether a duopoly or oligopoly would be caught by s 46 as, in reality the behaviour of these firms is always likely to be partially constrained by their competitors even though such firms would still be able to exercise a substantial degree of market power.

Therefore, MTAA believes that the decision in *Boral* raises serious concerns about whether any misuse of market power by duopolistic or oligopolistic firms would fall within the ambit of s 46. Such firms should fall within the ambit of section 46.

- ***“The impact of the High Court’s recent decision in Boral is being exaggerated”***²⁰

In relation to this proposition, MTAA notes that the *Boral* decision has generated an enormous amount of concern about the operation and effectiveness of s 46 amongst not only the small business community, but a wide cross-section of the Australian community including the ACCC, the legal community and elected representatives. As Professor Alan Fels noted in an ACCC Media Release²¹,

*“This judgment [Boral] raises concerns as to the ability of the misuse of market power provision of the Trade Practices Act to protect **viable small businesses and efficient new entrants from anti-competitive behaviour targeting by larger and better resourced competitors, thereby undermining the benefits of competition**”* [emphasis added].

¹⁸ *ibid.* at 4, 14 and 15.

¹⁹ Smith and Trindade, “The High Court on Boral: A return to the past?”, (2003) 10 *Competition & Consumer Law Journal* 1 at 7.

²⁰ Law Council Of Australia Submission at 3. Also see p. 15 of the LCA Submission.

²¹ ACCC Media Release, “High Court Decision Highlights Difficulties in Establishing Misuse of Market Power” (7 February 2003).

MTAA also notes that *Boral* has created a great deal of uncertainty as to the behaviour that is covered by s 46 and the point at which a company's behaviour will fall within the ambit of s 46. Considering that the concerns raised above go to the heart of the effectiveness and operation of s 46, MTAA does not believe that the impact of the *Boral* decision has been overstated in the submissions to this inquiry of the Senate. If anything, the LCA submission would appear to downplay the impact of the *Boral* decision on the operational effectiveness of the section.

MTAA believes that it is now time for the Parliament to clarify its intentions and remove a significant proportion of the ambiguity surrounding the operation of s 46.

Therefore, as proposed earlier, MTAA believes that the Parliament needs to take a more prescriptive approach to ensure that s 46 is interpreted in a manner that is consistent with the intentions of Parliament.

- **Boral does not mean that s 46 does not cover predatory pricing**²²

Whilst the *Boral* decision, in itself, does not mean that s 46 does not cover predatory pricing, the case does raise significant concerns in relation to the effectiveness of the section to deal with such matters. As McHugh J noted in *Boral*,

“...the terms and structure of s 46 suggest that it is not well suited for dealing with claims of “predatory pricing”. In the context of a “predatory pricing” claim, s 46 seems under – and may be over – inclusive. Conduct that is predatory in economic terms and anti-competitive may not be captured by s 46 simply because the predator does not have substantial market power at the time of the predatory conduct. In cyclical industries such as construction and building materials, firms may have no substantial market power at the bottom of the economic cycle when competition is fierce and margins are slender. As demand increases, however, some firms may acquire a substantial degree of market power. Section 46 is ill drawn to deal with claims of predatory pricing under these conditions²³.....As I have already indicated, one of the difficulties in forcing a “predatory pricing” claim into the straight jacket of s 46 is that its terms may fail to catch conduct that ultimately has anti-competitive consequences.”²⁴

Given these comments by McHugh J, MTAA believes that the issue of whether predatory pricing is or is not to be covered by s 46 needs to be clarified by Parliament.

²² Law Council of Australia Submission at 16.

²³ [2003] HCA 5 (7 February 2003) at [269] per Mc Hugh J.

²⁴ *ibid.* at [319].

MTAA notes that the ACCC submission to this Inquiry proposes that section 46 be amended to clarify that it is not necessary to find an expectation or likely ability to recoup losses in order to establish a predatory pricing case under section 46.

- ***“Price discrimination should not be prohibited, other than to the extent that it is already regulated by s 46”²⁵***

One of the difficulties with s 46 is that it is unclear if and when pricing issues will be covered by the section. As McHugh J noted in *Boral*,

“...the terms and structure of s 46 suggest that it is not well suited for dealing with claims of “predatory pricing”. In the context of a “predatory pricing” claim, s 46 seems under – and over – inclusive²⁶...As I have already indicated, one of the difficulties in forcing a “predatory pricing” claim into the straight jacket of s 46 is that its terms may fail to catch behaviour that ultimately has anti-competitive consequences.”²⁷

We must unavoidably ask then at what point then does price discrimination become predatory pricing which will be caught by s 46? Section 49 of the Trade Practices Act was repealed on the basis that the conduct covered by section 49 would be covered by section 46; that has proved not to be so.

- **Effects Test**

MTAA remains of the view that an effects test should be included in s 46. Prior to the *Boral* High Court decision, small business was of the view that the section did not provide effective redress against misuse of market power. Few cases were argued before the courts and in MTAA’s experience, one of the reasons for that was generally difficulty in obtaining evidence; a ‘smoking gun’ document for example, which proved that conduct had been engaged in for an anti-competitive purpose – as set in s 46(1)(a) to (c).

- **Amending s 46 will introduce uncertainty and reduce competition**

MTAA notes that there is a significant amount of uncertainty surrounding the operation of s 46 in its current form. Amending the section to clarify Parliament’s intention may reduce some of this ambiguity and uncertainty. Clarifying the ambit of s 46 should be seen by all parties as a positive development as it will provide all businesses with a clearer indication of the types of behaviour that will breach s 46 and those that will not and will remove some of the uncertainty currently surrounding the operation of the section, including that relating to the required threshold and recoupment. To that extent uncertainty is unchanged but is more equitably distributed in quantum.

²⁵ Law Council of Australia Submission at 26.

²⁶ [2003] HCA 5 (7 February 2003) at [269] per McHugh J.

²⁷ *ibid.* at [319].

The argument that there should be no change to the Act because such change would introduce uncertainty and reduce competition has been unsuccessfully raised in the past by those opposed to change. Changes to the Act have been introduced and commerce has continued unabated.

3. UNCONSCIONABLE CONDUCT (SECTION 51AC)

The Trade Practices Act impacts on all members, and elements of our society. It provides rights and protections to consumers and sets out, among other matters, how businesses should deal with each other both in competitive and acquirer/supplier situations. As the Act has such an important role in our society, it is MTAA's experience that governments propose changes to the Act only after very careful consideration of all aspects of the proposed problem to be addressed, alternative solutions and the likely impact of the proposed change.

In 1996 and 1997 when it was proposed by small business that s 51AA was not, and could not, provide redress against unconscionable behaviour by larger businesses and that the provision needed amending, the view expressed by those opposed to such change then was that it could not be done because changing the Act would cause too much uncertainty. MTAA notes that since the introduction of s 51AC trade and commerce has continued. MTAA also notes that issue of 'uncertainty', along with other matters, has again been raised as a reason for not amending s 51AC. In relation to the case for 'no change' proposed by the LCA, MTAA offers the following comments:

- **There is “no justification for the further amendment of Part IVA and/or s 51AC in the absence of evidence that these sections fail to protect small business from unconscionable conduct”²⁸**

MTAA disagrees with this proposition and believes that amendments to s 51AC can be justified on the basis that they will clarify the scope of the section and remove some of the ambiguity surrounding the term 'unconscionable'.

MTAA believes that laws such as section 51AC have to evolve and that often requires change within the overall framework of the law.

Since the introduction of s51AC in 1998 there have been a large number of complaints to the ACCC, but very few cases have been taken. MTAA believes that, at least in part, the reason for that is that the test of unconscionability is too difficult to prove.

- **Amending Part IVA of the Act risks contractual uncertainty²⁹**

MTAA believes that such concerns are unfounded. Small business is currently subjected to significant contractual uncertainty in its commercial dealings with big business. Terms which allow for the unilateral variation and termination at will (without breach) are frequently included in contracts regulating commercial dealings, to the advantage of big business. The inclusion of these terms means that small business frequently has little certainty concerning the key aspects of its contractual relationships with big business as such terms effectively allow big business to alter or avoid its contractual responsibilities if

²⁸ Law Council of Australia Submission at 29.

²⁹ Law Council of Australia Submission at 31.

and when it suits them. In reality, these terms do nothing else other than transfer the inherent risks faced by big business in being party to the contract to the weaker party to the contract. They do not add something to “competition” or “economic efficiency”. Proscribing these terms under s 51AC would merely prevent big business from unfairly transferring the majority of its contractual uncertainty in relation to a contract to the small business party.

Additionally, to suggest that small business, in its dealings with big business, has the ability to negotiate any meaningful terms or is “free to enter into contracts of their choice” belies commercial reality. Many small business operators have invested significant capital and resources in their businesses but are economically captive of their big business suppliers or buyers. Often small businesses simply cannot afford to refuse to enter into a contract with their supplier/buyer, regardless of whether the small business believes the terms of the contract are unfair or not in its best interests.

To refuse to sign such a contract would most likely result in the proprietor of the small business in question losing their livelihood. MTAA is concerned to ensure that big business is not able to exploit that circumstance unfairly by imposing unfair and unconscionable terms upon small business.

In any event, state and territory legislation prohibiting unfair contracts has not resulted in contractual uncertainty. In MTAA’s view concerns about that issue are consistently overstated and exaggerated.

- ***“Any extension of Part IVA would counteract the general principles of market competition and efficiency protected under Part IV of the Act”***³⁰

Small business is seeking amendments to Part IVA that promote fair dealing within an efficient, competitive market. It is not seeking to protect inefficient competitors from healthy market competition. Again, MTAA reiterates that terms which allow for the unilateral variation and termination at will (without breach) of contracts have no place in a fair trading environment, and serve no purpose other than to advantage big business by shifting much of their contractual uncertainty to small business. In fact, MTAA strongly believes that an extension of s 51AC will encourage competition by creating a fair trading environment in which efficient firms, regardless of their size, can compete vigorously.

³⁰ *ibid.* at 32.

- **Any extension of Part IVA “would create an economic disincentive for big business to deal with small business”³¹**

MTAA considers this to be a ‘red herring’ proposition. There will always an imbalance of bargaining power between big and small business. Whilst the proposed amendments to Part IVA seek, to some degree, to redress that imbalance, they will not eliminate it. What is being sought is a regulatory environment which ensures that all businesses are treated in a fair and equitable manner. MTAA is of the view that the current regulatory arrangements do not achieve that and that they allow big business to disadvantage small business unfairly. To take this proposition further would see big business not dealing with consumers; as consumers have similar protection.

- **Additional protection for small business – amendments to Part IVA of the Act would ignore the significant developments in state legislation and industry codes³²**

MTAA believes that it is questionable as to whether Part IVA adequately protects small business against unconscionable conduct. It certainly does not “protect” small business against unfair business practices. While MTAA believes that the Franchising Code of Conduct has been of assistance in removing some of the totally unacceptable practices engaged in by some franchisors prior to its introduction, the Code itself has significant weaknesses and requires strengthening, including providing for minimum tenure, prohibiting termination at will and so on. The Government has passed legislation allowing the draw down into state and territory legislation of the New Deal : Fair Deal amendments and some of the changes in state and territory legislation have reflected that. However, MTAA does not believe that that has negated the need for a strengthening of section 51AC.

- **There is no need for s 51AC to be extended to cover ‘unfair’ conduct at this stage³³**

In relation to proposals to amend s 51AC to cover ‘unfair’ behaviour, MTAA notes that this change would be in accordance with the original recommendations of the Reid Report³⁴. New South Wales already has a provision proscribing unfair contractual terms. That provision, section 106 of the *Industrial Relations Act 1996* No 17 (NSW) has been a part of NSW law in some form or another since 1950. The existence in law of that provision has not created an increased risk of contractual uncertainty nor has it impeded competition or disadvantaged consumers. In addition, this provision has been the subject of extensive judicial interpretation and while this precedence would not be binding on a court exercising federal jurisdiction, it would be

³¹ Law Council of Australia Submission at 32.

³² *ibid.*

³³ *ibid.* at 33.

³⁴ *Finding a Balance – Towards Fair Trading in Australia*, Report by the House of Representatives Standing Committee on Industry Science and Technology, May 1997.

open to such courts to refer to this precedence to guide them in their interpretation of an expanded s 51AC.

- **Prohibition of unfair terms would lead to increased transaction costs, inefficiency and avoidance**³⁵

In its submission, the LCA states that,

*“...the Trade Practices Committee is concerned that the introduction of these per se prohibitions, and in particular, the proposed prohibition of standard form contracts, would significantly increase transaction costs. The impact of these of these additional costs would be particularly significant in relation to consumer and small business transactions where the size of the transaction itself is small. Indeed, standard form contracts are one of the only practical ways to contract with thousands of customers.”*³⁶

The issue of proscribing unfair terms under s 51AC has little to do with consumers or standard form contracts. Instead, it has more to do with how standard form contracts are presented to small business operators – that is, as a ‘take it or leave it’ proposition. As discussed earlier, many small business operators have invested significant capital and resources and realistically cannot refuse to enter into a contract with their supplier/buyer but a standard form contract presented on a ‘take it or leave it’ basis does not allow for negotiation of the terms of that contract.

MTAA also notes that any changes to s 51AC will not impact upon big or small business dealings with consumers, as the section only regulates business to business dealings. Therefore any prohibition on ‘take it or leave it’ standard form contracts in business to business dealings will not affect the use of such contracts in business’ dealings with consumers. This fact appears to have been misstated by the LCA in its submission.

The LCA also states that,

*“while the conduct highlighted by various small business organisations may, in practice, breach s 51AC, amending the Act to prohibit these specific forms of conduct would be likely to lead to inefficiency and avoidance.”*³⁷

MTAA seriously doubts that the proscribing of these terms will result in increased “avoidance” as the majority of big businesses are good corporate citizens who comply with the requirements of the law. As the LCA notes in its submission,

³⁵ Law Council of Australia Submission at 34.

³⁶ *ibid.*

³⁷ *ibid.*

“most large corporations have a significant component in their Trade Practices Act compliance activity addressing the impact of the Part IVA provisions on the way the organisations conduct their business...A number of members of the Trade Practices Committee have been involved in developing such programs and advising on the impact of the provisions.”³⁸

MTAA does not believe that unfair terms play any role in increasing economic efficiency, facilitating competition or creating positive benefits for Australian consumers. Instead, these unfair terms have adverse affects on economic efficiency and the competitive process as they enable big business to influence the behaviour of small business.

MTAA also notes that these unfair terms may force small businesses to restructure themselves or alter their behaviour and that this outcome may result in a loss of economic efficiency and reduce competition in a given market. Finally, MTAA notes that it is generally accepted that a healthy small business sector is at the heart of a “healthy” competitive market. MTAA seriously questions whether an economy dominated by a small number of duopolistic or oligopolistic firms is in the best interests of competition, economic efficiency and Australian consumers. This is especially the case when it is widely accepted that players in an oligopolistic or duopolistic market are more likely to engage in anti-competitive behaviour.

MTAA also notes that the then Minister for Workplace Relations and Small Business, the Hon. Peter Reith MP, recognised the importance of mitigating the imbalance of bargaining power that exists between small and big business when, in his second reading speech for the Trade Practices Amendment (fair trading) Bill 1997³⁹ he stated,

*“fairness in the commercial relationship is **critical** to the buoyant business environment.”*

MTAA makes the point that its proposals are not intended to stop the use of ‘standard form’ contracts. It is intended that the proposals will result in fairer terms being included in commercial arrangements between large and small business, as well as a willingness by the larger party to negotiate on terms.

³⁸ Law Council of Australia Submission at 31.

³⁹ House of Representatives Hansard, 30 September 2003.

4. PART IVB OF THE ACT – CODES OF CONDUCT

MTAA would also like to comment briefly on the proposals put forward by the LCA in relation to Part IVB of the Act.

MTAA disputes that the consequences of mandatory codes are “potentially dramatic indeed” and notes that those businesses which engage in fair business practices and who adopt best practices should not be concerned about codes.

MTAA notes that the Trade Practices Committee of the LCA has “*always argued for the universal application of the Act. Legislating for a particular industry or section of industry, whether through Codes of Conduct or otherwise defeats the principle.*”⁴⁰ However, MTAA also notes that the LCA advocates the use of industry specific legislation/regulation numerous times throughout its submission.⁴¹ For example, the LCA states that,

*“major business conduct issues arise in the petroleum distribution industry because of the disparity in power between some distributors and major oil companies. The Petroleum Retail Marketing Franchises Act 1980 (Cth) and the Petroleum Retail Marketing Sites Act 1980 (Cth) were enacted to provide protection for petroleum distributors against abuses of market power by the oil companies. Any need for legislative intervention to improve protection against unconscionable conduct in this industry sector should be directed at amending these Acts rather than the [Trade Practices] Act.”*⁴²

The Motor Trades Association of Australia has been involved in the debate over oil industry reform for many years and it is has been the Association’s experience that the ultimate reform goal of all four of the major oil companies has been to secure repeal of both the retail petroleum industry specific Acts. MTAA notes that the LCA’s position on the petroleum industry appears to be inconsistent with current Government policy, which advocates the repeal of sector specific legislation and the use of industry codes of conduct (for example, the Government’s draft oil industry reform package proposes the repeal of two petroleum industry specific Acts and the imposition of a mandatory industry code of conduct (the OilCode)).

MTAA also notes that it appears to be widely accepted that legislation lacks the flexibility to adapt and respond to dynamic market conditions and that, once passed, legislation can be very difficult to repeal or amend. That outcome may result in reduced economic efficiency and will lead to markets being ‘locked-up in time’. Codes of conduct on the other hand are more flexible instruments which can be more easily amended to suit changed market conditions (when compared to legislation).

MTAA is aware of Mr Graeme Samuel’s comments on ACCC endorsed voluntary codes of conduct. However, the experience that MTAA has had with voluntary

⁴⁰ Law Council of Australia Submission at 35.

⁴¹ *ibid.* at 3, 5, 10, 20, 26, 38, 65 and 66.

⁴² *ibid.* at 66.

industry codes of conduct suggests that some caution should be exercised when adopting such codes as a solution to the problems faced by small business. Some of the concerns MTAA has include:

- the issue of ‘free-riders’ – some firms in the industry may gain an unfair competitive advantage by not complying with the Code;
- how to impose “strong” enforcement measures on code participants as industry participants can opt in and opt out of the Code as it suits them. If they are not a party to the Code then the enforcement measures will not apply;
- any voluntary code requires all members of the industry to recognise/accept that there is a problem. If one or more parties refuse to do so, the use of voluntary codes will never provide an effective solution to the problems faced by an industry; and
- it is not practicable to expect that a private body administering a voluntary code will be able to fully investigate (without statutory powers) or to properly enforce breaches in the public interest. The inadequacies and demise of the voluntary Franchising Code of Practice and the Franchising Code Council illustrate the weakness of voluntary codes.

5. CONCLUSION

MTAA firmly believes that it is not appropriate that a 'wait and see' approach be adopted in relation to current concerns about the Trade Practices Act; in particular sections 46 and 51AC.

MTAA believes very strongly that small businesses do not require protection from competition. As MTAA states in the introduction to this submission, small businesses are in general, efficient, viable and competitive players in the markets in which they participate. MTAA acknowledges that inefficient businesses, regardless of their size, may fail when subjected to the forces of competition and MTAA is not seeking to protect such businesses from these market forces. Instead, the Association and many others in the small business community are seeking amendments to the Trade Practices Act that will ensure all businesses can compete fairly and equitably.

MTAA believes that a strong, competitive small business sector is in the interests of Australian consumers, competition and economic efficiency.

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