

MTAA



Motor Trades Association of Australia

SUBMISSION TO THE

SENATE ECONOMICS REFERENCES COMMITTEE

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

SEPTEMBER 2003

Table of Contents

Summary and Recommendations	i
1. Introduction.....	1
1.1 The Motor Trades Association of Australia	1
1.1.1 Range of Member Activities.....	3
1.2 Interest in Inquiry.....	3
1.3 Fair Trading Coalition.....	4
2. Object of the Trade Practices Act.....	5
3. Background to the Current Sections 46 and 51AC of the Trade Practices Act	8
3.1 The History of Debate in Relation to Section 46.....	8
3.1.1 Swanson Committee	9
3.1.2 Trade Practices Consultative Committee – Blunt Report.....	9
3.1.3 The Trade Practices Revision Act 1986 (No. 17 of 1986)	10
3.1.4 The Griffiths Report	11
3.1.5 The Cooney Report	11
3.1.6 The Hilmer Report.....	11
3.1.7 Dawson Committee Review of the Trade Practices Act	11
3.1.8 The s46 ‘Boral’ Decision.....	12
3.2 Background to Section 51AC	14
3.2.1 Swanson Committee	14
3.2.2 The 1984 Green Paper	14
3.2.3 The Trade Practices Revision Act 1986 (No. 17 of 1986)	14
3.2.4 Griffiths’ Report – May 1989	14
3.2.5 TPC Rural Guideline – August 1989.....	15
3.2.6 TPC Discussion Paper – November 1989	15
3.2.7 Beddall Report – January 1990.....	15
3.2.8 TPC Discussion Paper – October 1990	15
3.2.9 TPC Report to Ministers 1991	16
3.2.10 Cooney Report 1991	16
3.2.11 Amendments to the Trade Practices Act 1992.....	17
3.2.12 Section 51AA Ministerial Working Party 1995.....	17
3.2.13 Trade Practices Amendment (Better Business Conduct) Bill 1995	18
3.2.14 Finding a Balance: Towards Fair Trading in Australia 1997 (the Reid Report).....	18
3.2.15 Trade Practices Amendment (Fair Trading) Bill 1997	19
3.2.16 Review of the Trade Practices Act (the Dawson Review) 2002.....	19
3.3 Section 51AC Court Cases	19
3.4 Deficiencies in the Current Legislation.....	20

4.	(In)Effectiveness of the Misuse of Market Power Provision and Proposals for Change	21
4.1	Introduction	21
4.2	The Problems with Section 46.....	22
4.3	Proposal for Amendment of Section 46.....	23
5.	The Case for Proscribing Unfair Conduct	26
5.1	Introduction	26
5.2	Unilateral Behaviour	28
5.3	Franchised Motor Vehicle Dealers - Issues.....	30
5.4	Enforcement.....	31
5.5	Recommendations for Amendment to s51AC.....	32
6.	Codes of Conduct	34
6.1	Introduction	34
6.2	Retail Motor Trades and Codes of Conduct.....	34
6.3	Raising Standards of Business Conduct.....	36
7.	In Support of Small Business.....	37
7.1	Collective Negotiation	38
7.2	Creeping Acquisitions.....	39
7.3	Other Measures.....	40
	7.3.1 Appointment of a Second Small Business Commissioner at the ACCC	40
	7.3.2 A Small Business as Consumers Division of the ACCC.....	41
	7.3.3 A Complaints Investigation Role for the ACCC.....	41
	7.3.4 A Small Business Ombudsman.....	41
8.	Are Overseas Laws Relevant to Australia?	42
9.	Conclusion	44

Attachment 1: Size of the Retail Motor Trades

Summary and Recommendations

The Motor Trades Association of Australia notes that in relation to the Trade Practices Act there has been a long history of inquiry into, and debate over the issues of misuse of market power, unconscionable conduct, fair trading and the standing and rights of small business. MTAA firmly believes that the Trade Practices Act should contain an effective provision which prevents the misuse of market power; many markets in Australia are already highly concentrated and large corporations should not be able to misuse their significant market power to remove, through anti-competitive behaviour, competitors from the market, and that the Act should proscribe conduct which is unfair and harsh as well as unconscionable.

MTAA believes that the Trade Practices Act should give greater recognition to society's broader values and features. In proposing that, MTAA is not suggesting that there should be in the Act any provision for the guarantee of survival of any particular sector of our economy or any one business. It should though be recognised that both small and large businesses offer benefits to our society and in particular that the benefits provided by a vibrant and competitive small business sector should not be overlooked. Section 2 of the Act does not, in MTAA's view, sufficiently recognise the role that small business plays in our society. Nor does section 2 recognise that the participation of small business in the Australian economy provides benefits to society. Small business keeps big business competitive and honest.

MTAA believes that:

- the Trade Practices Act is about creating a society where consumers have the maximum of choice and access to services;
- there must be strong competition at both wholesale and retail. Such competition should focus on a broad range of matters including price, variety of goods, availability and after sales service;
- weaker and exploitable parties should have legislated rights and protections;
- trade practices regulation is not about ensuring unwarranted business survival; and
- the largest, most 'efficient' competitor should not have the power or right to exclude others, except by normal commercial dealings.

The Motor Trades Association of Australia therefore recommends that the Trade Practices Act be amended as proposed in this submission to enhance competition and fair trading for the welfare of all Australians. The package of reforms necessary to achieve this are:

1. an effective misuse of market power provision (s46) – as outlined in section 4.3;
2. an effective fair trading provision (s51AC) – as outlined in section 5.5;
3. greater emphasis by Government on the use of mandatory codes of conduct to regulate particular sectors of the economy to raise business standards of conduct – as proposed in section 6;

4. an accessible and meaningful notification process for small business collective bargaining – as proposed in section 7.1;
5. that the Act be amended to address concerns about creeping acquisitions as proposed in section 7.2; and
6. a number of other measures as outlined in section 7.3.

1. Introduction

1.1 The Motor Trades Association of Australia

The Motor Trades Association of Australia (MTAA) is the largest 'stand alone' small business association in the country, representing 83,000 businesses and 250,000 employees in a trade with an \$88 billion annual turnover. The Motor Trades Association of Australia is the national representative organisation of the retail, service and repair sectors of the Australian automotive industry. The Association is a federation of the motor trades associations and the automobile chambers of commerce in each state and territory as well as the NSW based Service Station Association Ltd (SSA Ltd) and the Australian Automobile Dealers Association (AADA). The Association is an unlisted public company having limited liability.

MEMBERS OF THE MTAA FEDERATION

The Australian Automobile Dealers Association (AADA)

The Motor Trades Association of the ACT (MTA ACT)

The Motor Traders Association of NSW (MTA NSW)

The Motor Trades Association of the Northern Territory (MTA NT)

The Motor Trade Association of South Australia (MTA SA)

The Motor Trades Association of Queensland (MTA Q)

The Motor Trade Association of Western Australia (MTA WA)

The Service Station Association Limited (SSA Ltd)

The Victorian Automobile Chamber of Commerce (VACC) [incorporating the Tasmanian Automobile Chamber of Commerce]

The Association's affairs are directed by a Board on which each of the Member bodies is represented. The role of the Association is to:

- raise awareness in the community of the trade's significant contribution to Australia's economy through its more than \$88 billion dollar turnover (see attachment 1) and its employment of over 250,000 Australians;
- convey and promote to governments the interests of the trades;
- promote improved working relationships and practices with motor trades' unions;
- provide information about the trades on behalf of the Members of the Association, to governments, the public and the trades' employees;

- work with governments in planning the future of the retail motor trades and their role in the economy and other areas of national planning;
- extensively enhance training and to develop work opportunities within the trades in co-operation with education and training authorities, the unions and government generally; and
- promote and enhance the reputation of the trades with their customers as well as with the general public.

Under its Memorandum and Articles of Association, the Association has a number of Affiliated Trade Associations (ATAs) which represent particular aspects or activities of the retail motor trades. These ATAs are as follows:

Australian Motor Body Repairers Association (AMBRA)
Australian Motorcycle Industry Association (AMIA)
Australian National Radiator Repairers Association (ANRRA)
Australian National Towing Association (ANTA)
Australian Service Station and Convenience Store Association (ASSCSA)
Australian Tyre Dealers and Retreaders Association (ATDRA)
Automotive Repairers Association of Australia (ARAA)
Automotive Transmission Association of Australia (ATAA)
Engine Reconditioners Association of Australia (ERA of A)
Farm Machinery Dealers Association of Australia (FMDAA)
National Brake Specialists Association (NBSA)
National Heavy Vehicle Repairers Association (NHVRA)
National Rental Vehicle Association (NRVA)
National Steering and Suspension Association (NSSA)
National Vehicle Airconditioning Association (NVAA)

All of the ATAs referred to are composed of the relevant sections of each of the MTAA Member bodies and are represented nationally, as national entities, by MTAA.

1.1.1 Range of Member Activities

The range and depth of the activities of the membership of the Association can be seen from the following list of recognised trades, skills and tasks in our sector of the automotive industry:

Air Conditioning Technicians	Dynamometer Operators
Auto Electricians	Engine Fitters
Automotive Accessory Retailers	Engine Performance Specialists
Automotive Dismantlers	Engine Reconditioners
Automotive Engineers	Exhaust System Specialists
Automotive Glass Fitters	Farm Machinery Dealers
Automotive Parts Cataloguers	Fuel Injection Specialists
Automotive Radio and Stereo Specialists	Gas Fitters
Automotive Service Managers	Hire and Rental Vehicle Operators
Automotive Trimmers	Marine Automotive Engineers
Automotive Upholsterers	Motor Boat and Marine Dealers
Automotive Transmission Specialists	Motor Cycle Dealers
Battery Makers and Reconditioners	Motor Cycle Mechanics
Body Builders	Motor Mechanics
Brake Specialists	Panel Beaters
Car Alarm Fitters	Petrol Pump Attendants
Caravan Dealers	Radiator Repairers
Car Dealers	Spray Painters
Car Salesmen	Tow Bar and Trailer Fitters
Car Wash Operators	Tow Truck Operators
Chassis Builders and Repairers	Truck Builders and Operators
Commercial Vehicle Body Fabricators	Tuning Specialists
Detailers	Tyre Fitters
Diesel Engineers	Tyre Retreaders
Diesel Injection Technicians	Wheel Alignment Specialists

1.2 Interest in Inquiry

MTAA represents a significant number of franchised and non-franchised small businesses and a characteristic of nearly all of these businesses is their contractual arrangements with (significantly) larger suppliers. In many instances these suppliers also compete at the retail level. Therefore, the matters being dealt with by this inquiry are very pertinent to the day to day survival of the businesses that MTAA represents.

1.3. Fair Trading Coalition

Some of the issues raised here have been addressed in quite some detail, though perhaps in a broader small business context, in the submission prepared and submitted to the Inquiry by the Fair Trading Coalition (FTC). The Fair Trading Coalition an informal group of 22 small business organisations which was formed to present the views of small business to the Dawson Review of the Trade Practices Act. MTAA is a founding member and the Convenor of that Coalition and fully supports the submission made by the FTC. This submission has been made in support of the FTC submission but also canvasses matters specific to the retail motor trades.

2. Object of the Trade Practices Act

In 1995 the Trade Practices Act was amended to include the current section 2 of the Act. That section, the Object of the Act, states that:

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

MTAA believes, and has always believed, that the Trade Practices Act 1974 is about more than such things as defining markets or assessing the marginal cost or average cost of production of any firm. In the Object of the Act there is, we would submit, a strong social objective which should not be ignored. That means that all businesses should be given equal opportunity to survive and grow in our economy to ensure that the community is provided with the maximum diversity of goods and services.

Those small operators who buy from or supply to large companies should be able to expect to be treated fairly and equitably by larger corporations. Equally where small business is competing against a larger business, the small business would expect that the larger business would not engage in anti-competitive behaviour.

That, MTAA believes, is what the Trade Practices Act and its enforcement agency, the ACCC, should be seeking to ensure; amongst other things. Unfortunately, MTAA and its retail motor trader members do not believe that the Act is sufficiently able to ensure that there is a role in our economy and society for all businesses; particularly small business. The Act, in particular the misuse of market power and unconscionable conduct provisions, must be strengthened and small businesses must be given the right to collectively negotiate. The alternative is the likelihood of an economy dominated by a few large, probably multi-national, companies whose over-riding concern is share price and shareholder returns, where the interests of Australian consumers are rarely a priority. In such circumstances there is every likelihood that ultimately there will be a narrowing of consumers' choice and a lessening of the range of goods and services produced (especially those locally produced) by, and available to, the Australian community.

Immediately prior to the 2001 Federal election, MTAA produced a Small Business Charter of Fairness. That Charter set out 10 points that the Association believed needed to be achieved in order to address the unfair and anti-competitive conduct engaged in by big business in its dealings with small business. A paper, *'Combating the Effects of Concentrated Market Power'* published at the same time provided support for the 10 points set out in the Charter.

The Small Business Charter of Fairness also provided the framework for the MTAA submission to the 2002 Dawson Review of the Trade Practices Act and also the submission of the Fair Trading Coalition, of which MTAA is a founding member and Convenor.

MTAA remains committed to the achievement of the 10 points in the Charter (which is set out below).

MTAA Small Business Charter of Fairness

1. STRENGTHEN THE TRADE PRACTICES ACT TO DEAL WITH ABUSES OF MARKET POWER AND TO ALLOW SMALL BUSINESS THE RIGHT OF COLLECTIVE NEGOTIATION

To curb the abuse of market power by big business the Australian Government must amend the law to enable:

- * small businesses to collectively negotiate with their suppliers and franchisors;
- * the ACCC to issue a cease and desist order where big business infringes the rights of others;
- * the ACCC to more closely monitor and deal with creeping acquisitions; the courts to order the divestiture of assets where the Act has been breached;
- * a simplification of the 'test' relating to abuse of market power so that if the effect of behaviour is to reduce competition, that behaviour is regarded as an abuse;
- * criminal sanctions to apply where corporations deliberately engage in price fixing;
- * the Act to be applied to all Government agencies; and
- * a dedicated Parliamentary Committee be established to oversee more closely each of the ACCC's activities.

2. RETURN TO FIRST PRINCIPLES OF THE NATIONAL COMPETITION POLICY

It was the original intention of National Competition Policy that the public interest must be the sole determining factor in any decision relating to national competition policy. A return to this imperative is absolutely essential.

3. NO 'TAKE IT OR LEAVE IT' CONTRACTS

Too many small businesses are only offered 'take it or leave it' contracts. This practice must be prohibited.

4. A PROHIBITION ON SELLING AT UNREASONABLY LOW PRICES

Australia's service station operators are frequently victims of predatory pricing by the oil majors. Independent operators are sold fuel at wholesale prices above what is charged at retail by others. Unfair commercial behaviour of this sort is forbidden in Germany and Canada and MTAA supports the introduction of similar rules in Australia.

5. NO UNILATERAL VARIATION OF FRANCHISE OR TENANCY AGREEMENTS

Small business should not be forced to sign contracts which allow for unilateral variation. The law should also prohibit the bringing into existence of documents or policies after a contract has been signed which are binding and are used to unilaterally vary the contract.

6. NO TERMINATION OF CONTRACTS AT WILL WITHOUT DUE CAUSE

The Act must be amended to prohibit at will termination of contracts, particularly franchise agreements, where there has been no breach of contract. However it is not intended that the rights of parties to repudiate a contract be removed.

7. CREATION OF A SMALL BUSINESS AS CONSUMERS DIVISION OF THE ACCC

To ensure fairness in dealings between small and big business, small businesses must be given the same protection as is now given to consumers in their dealings with business. A Small Business as Consumers Division of the ACCC would focus small business activities within the Commission, take small business representative actions and generally act as a small business advocate within the ACCC, within the ambit of the Trade Practices Act.

8. APPOINTMENT OF A SMALL BUSINESS OMBUDSMAN

A Small Business Ombudsman should be established whose role it would be to investigate complaints by small business against the conduct of Government agencies. Such an Ombudsman would be a champion for small business and must be adequately resourced by the Commonwealth.

9. NO BURDENSOME TAXATION CHANGES

No new tax measures should be introduced unless they are simple, are easy to comply with, are neutral in their revenue effect on each sector of the economy and have no capacity for increasing revenue by stealth.

10. REDUCTION OF RED TAPE FOR SMALL BUSINESS

Further measures are needed to reduce the compliance burden of taxation and other regulation.

MTAA believes that the Trade Practices Act should give greater recognition to society's broader values and features. In proposing that, MTAA is not suggesting that there should be in the Act any provision for the guarantee of survival of any particular sector of our economy or any one business. It should though be recognised that both small and large businesses offer benefits to our society and in particular that the benefits provided by a vibrant and competitive small business sector should not be overlooked. Section 2 of the Act does not, in MTAA's view, sufficiently recognise the role that small business plays in our society. Nor does section 2 recognise that the participation of small business in the Australian economy provides benefits to society. Small business keeps big business competitive and honest.

The Fair Trading Coalition has recommended that section 2 of the Act be amended to include specific reference, as there is in the Canadian Competition Act, to small business and effective competition. MTAA fully supports that recommendation. The amended section 2 would thus read as follows:

'The object of this Act is to enhance the welfare of all Australians through the promotion of effective competition and fair trading in order to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Australian economy and in order to provide consumers with competitive prices and product choices.'

The Fair Trading Coalition has also proposed that a similar provision to section 12 of the Canadian Interpretation Act which states that *'every enactment is deemed remedial and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects'* should be included in the Trade Practices Act.

In supporting those recommendations, MTAA proposes that it is now timely that the objects of the Act reflect more specifically the role that smaller enterprises can have in competition and the delivering of goods and services to consumers. That is particularly so as our markets become more increasingly dominated in many sectors by a few large corporations and in some circumstances who might be described as engaging in parallel as distinct from competitive behaviour.

MTAA also notes that this Inquiry is being held at a time when Australia's two largest retailers are further expanding their operations into sectors of the economy which have traditionally, though not exclusively, been the domain of small business; petrol retailing, newsagencies, convenience stores, liquor stores and on the part of Woolworths an announced desire to operate pharmacies inside its supermarkets. These have been to butcheries, delicatessens and specialist bakeries, which were once the exclusive domain of small local businesses, serving local communities.

This Inquiry is therefore an important one for small business. The question is, whether Australia's economy should continue along its current path to, what might be described as, 'duopolisation' or whether there is an opportunity for a more balanced structure to be achieved.

3. Background to the Current Sections 46 and 51AC of the Trade Practices Act

The Motor Trades Association of Australia notes that in relation to the Trade Practices Act there has been a long history of inquiry into, and debate over the issues of misuse of market power, unconscionable conduct, fair trading and the standing and rights of small business. MTAA firmly believes that the Trade Practices Act should contain an effective provision which prevents the misuse of market power; many markets in Australia are already highly concentrated and large corporations should not be able to misuse their significant market power to remove, through anti-competitive behaviour, competitors from the market, and that the Act should proscribe conduct which is unfair and harsh as well as unconscionable.

This section of MTAA's submission describes the history of debate in relation to misuse of market power and the drive to secure a fair trading environment and the legislative changes that have occurred as a result of that debate. That the issues have been debated for so long and that they continue to be of concern to both the regulator, many members of the Parliament and to certain sectors of the economy suggests that we do not yet have adequate safeguards against misuse of market power and that we have not yet secured a fair trading environment. Proposals for achieving both those aims are addressed in the following sections of this submission.

It will be argued of course by those opposed to any change to either s46 or s51AC that the long history of debate over the two provisions and the changes that have been made since the introduction of the Trade Practices Act in 1974 have seen sufficient debate on the issues and that calls for further debate are simply attempts to secure a protected environment for small business and perhaps even an attempt to guarantee the survival of small business.

From MTAA's perspective nothing could be further from the truth; neither outcome is achievable and could not therefore be seriously proposed. Small business operators recognise that to survive they must operate their businesses efficiently and effectively. However, what small business does seek is that large businesses not use their market power in an anti-competitive manner and that the vulnerability of small businesses not be exploited by larger parties with whom they have contractual arrangements.

3.1 The History of Debate in Relation to Section 46

Although restrictive trade practices law has included some form of anti-monopoly or wider provision since the introduction of the Restrictive Trade Practices Act in 1965 (and in fact earlier if the 1906 Australian Industries Preservation Act (which was declared unconstitutional by the High Court in 1912) is included) this section covers the debate on section 46 since 1974.

3.1.1 Swanson Committee

In making its recommendations on the Trade Practices Act 1974 the 1976 Swanson Committee noted that submissions made to it accepted the concept underlying section 46 which went to the abuse by monopolies of their power in relation to competitors. The Committee considered that at the time within the Australian conditions, that system of dealing with monopolies was appropriate.

The Committee did though at the time make some recommendations for amendment of s 46 which included that:

- * an intent to monopolise be required (purposive test); and
- * that monopolisation did not occur by reason only of investment in new capital and equipment¹.

Following those recommendations the Act was amended in 1977 to make it clear that only purposive conduct by a market-dominating concern came within the prohibition.

3.1.2 Trade Practices Consultative Committee – Blunt Report

In 1979 the Trade Practices Consultative Committee chaired by RG Blunt (the Blunt report) identified and examined some major problems that small business had in respect of trade practices regulation, including the then section 46 which dealt with ‘monopolisation’. Blunt considered and rejected as unnecessary a change to the ‘purpose’ test, but did recommend that the word ‘use’ replace ‘take advantage of’.

However the main recommendation in relation to section 46 was that the threshold test should be amended so as to make certain that the provision applied to all firms that had a substantial degree of market power².

In making that recommendation the Committee said that:

‘... the primary thrust of the competition provisions of the Act should be towards efficiency. However there should be protection of small firms from the predatory conduct of other firms with any substantial degree of market power to support such conduct, irrespective of their size. Whilst small business preservation is not necessarily a desirable economic end in itself it may well be desirable for social, economic or political reasons. Without some protection firms possessing substantial market power may well be able to insulate themselves from competition from smaller firms by driving them from markets or by preventing them from entering markets. The diminution of competition consequent upon small businesses being denied the opportunity to compete may well work, in the long term, against efficiency because the firms with market power would eventually be free of the disciplines of the market place.

¹ *Trade Practices Consultative Committee report on Small Business and The Trade Practices Act, Volume 1, December 1979, Australian Government Publishing Service Canberra, 1979 at p 66.*

² As in footnote 1 at p.71-72.

Small firms are an important source of innovation; indeed experience from overseas and in Australia has shown that small firms are often more innovative than larger firms. Small firms should not be prevented from entering markets or expanding. They should not be at risk of being blocked or driven out by existing firms. Existing firms should not be able to freeze market forces and to arrest structural adjustment by removing firms they find troublesome. Small firms are a vital source of competition and keep large businesses 'on their toes'. It is obviously public policy that they should not be removed from the market place by the predatory abuse of economic power.³

The Blunt Committee went on to recommend the adoption of a 'substantial degree of market power' test noting that:

'The market position of small business would be improved upon adoption of our recommendation because:

- (a) small businesses will more readily perceive that this section rather than section 49 [the now repealed section dealing with price discrimination] is designed to protect them from predatory price discrimination, price cutting and other conduct amounting to abuse of power.*
- (b) section 46 will regulate the predatory conduct of a wider class of the more powerful firms.*
- (c) the effect of only focusing on the behaviour of the firms which have greater market power than the alleged victim ought to make it clear that the section is aimed at the abuse of market power rather than the acquisition of market power.*
- (d) the changes are not radical so that their introduction should not cause confusion and small business and the Commission [the then Trade Practices Commission] should be able to make better use of the section now that its meaning (hopefully) has been clarified.⁴*

3.1.3 The Trade Practices Revision Act 1986 (No. 17 of 1986)

It was not until 1986 that the Blunt report recommendations were adopted when the Trade Practices Revision Act 1986 (No. 17 of 1986) introduced amendments to section 46 in an attempt to make it more effective. The test for the application of the section was reduced from that of a corporation being in a position to '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, was to 'apply to major participants in an oligopolistic market and in some cases, to a leading firm in a less concentrated market'. The amendment also made it clear that a court could infer the requisite predatory purpose from the conduct of the corporation or from the surrounding circumstances⁵.

³ Trade Practices Consultative Committee, *Small Business and the Trade Practices Act*, 1979 p67

⁴ Trade Practices Consultative Committee, *Small Business and the Trade Practices Act*, 1979 p72

⁵ Bowen, the Hon Lionel MP, Second Reading Speech, *Trade Practices Revision Bill 1986*, Hansard 19 March 1986

3.1.4 The Griffiths Report

The 1989 House of Representatives Standing Committee on Legal and Constitutional Affairs (the Griffiths Committee) recommended that there be no change to section 46, and in particular that an ‘effects’ test should not be introduced. In part the justification for that view was that section 46 had only recently (1986) been amended and that it was too soon to propose further changes to the section.

3.1.5 The Cooney Report

In 1991 the Senate Standing Committee on Legal and Constitutional Affairs (the Cooney Committee) in its report *Mergers, Monopolies & Acquisitions: Adequacy of Existing Legislative Controls* also considered the question of whether section 46 should be strengthened. The Committee concluded that ‘an effects test might unduly broaden the scope of conduct captured by section 46 and challenge the competitive process itself’⁶.

3.1.6 The Hilmer Report

The Independent Committee of Inquiry into Competition Policy in Australia⁷ (the Hilmer Inquiry, 1993) considered the operation of section 46. The Committee reported that it was not satisfied that ‘*any perceived difficulties with the current operation of section 46 were sufficient to warrant an amendment*’. The Committee stated that any amendment to the section would only serve to introduce further uncertainty for business and potentially deter competitive activity. The Committee also felt that none of the proposed amendments to section 46 offered ‘*demonstrable improvement over the current regime*’ that would justify introducing increased uncertainty. Finally, the Committee felt that the biggest issue was how to distinguish between ‘*socially unacceptable behaviour and socially beneficial conduct*’ and recognised that this was inherently difficult to do.

In relation to an ‘effects’ test, the Committee thought that such a test may be too broad in its application and potentially deter competition rather than promote it. Additionally, the Committee was of the opinion that an effects test would not result in dramatically different outcomes to that achieved under the existing interpretation. In relation to proscribing specific types of conduct, the Committee felt that this would probably increase uncertainty and result in ‘*the exclusion of conduct which should be caught, either because litigants are less likely to bring actions or because courts are more reluctant to find a contravention where the relevant conduct does not occur in the proscribed list*’.

3.1.7 Dawson Committee Review of the Trade Practices Act

The Dawson Committee Review of the Trade Practices Act arose directly from a commitment given by the Prime Minister, the Hon John Howard MP, during the course of the 2001 Federal

⁶ Review of the Competition Provisions of the Trade Practices Act 1974, Report by the Dawson Committee, January 2003, as reported at page 83

⁷ *National Competition Policy*, Report by the Independent Committee of Inquiry into Competition Policy in Australia, August 1993

election campaign that a re-elected Coalition Government would 'hold an independent review of both the competition provisions of the Trade Practices Act and their administration'. The Government's decision to commission the Review was based in part on the concern of small business and its representatives about the impact of National Competition Policy on them and on rural and regional communities. Small business had also, in the last decade or so, become increasingly concerned about growing disparity in market power as between it and big business and the seeming inability of the current regulatory framework to deal with those concerns. Dawson examined proposals for change to section 46. Both small business and the Australian Competition and Consumer Commission urged the introduction of an 'effects test' to section 46; a proposition which was ultimately not accepted by the Dawson Review.

The Dawson Committee concluded:

*'Not only would the introduction of an effects test alter the character of section 46, but it would also render purpose ineffective as a means of distinguishing between legitimate (pro-competitive) and illegitimate (anti-competitive) behaviour... An effects test, which would disregard purpose, would make it even more difficult to draw a distinction between pro-competitive and anti-competitive behaviour than is currently the position under section 46 where purpose can be called in aid.'*⁸

The Dawson Committee argued that there should be no change to the current misuse of market power provision and reaffirmed that view when asked by the Government to take into consideration the then recent High Court decision in *Boral*. The Government, in its response to the Dawson Committee's recommendation accepted that there should be no change to section 46.

3.1.8 The s46 'Boral' Decision

In this case the ACCC instituted proceedings against Boral Besser Masonry Ltd (BBM) alleging predatory or below cost pricing contrary to s 46. The ACCC argued that BBM had a substantial degree of power in the market for concrete masonry products in the Melbourne metropolitan area. It argued that BBM took advantage of its market power when a small business, C&M Bricks, entered the market. The Commission alleged that BBM reduced its prices, selling at below cost to drive C&M out of the market⁹. The Commission did not succeed at first instance, with Heerey J concluding that there had been no misuse of market power, and appealed the case to the Full Court of the Federal Court.

Heerey J found that, although Boral had held an anticompetitive purpose, even if it had possessed substantial market power he would not have found a taking advantage of that power, as Boral was simply engaging in conduct that it would have engaged in, in a competitive market. According to Heerey J, Boral was simply attempting to survive a price war, and this was legitimate business conduct that should not be punished¹⁰.

⁸ Corones S, *Section 46 of the Trade Practices Act: Boral, the Dawson Committee and the protection of small business* (2003) 31 ABLR 210 at p 224.

⁹ Corones S, *Section 46 of the Trade Practices Act: Boral, the Dawson Committee and the protection of small business* (2003) 31 ABLR 210 at p. 215.

¹⁰ Edwards G, *The Perennial Problem of Predatory Pricing* Australian Business Law Review, Volume 30, June 2002 at p. 177.

In the Full Court Merkel J concluded that BBM had substantial market power in the concrete masonry products market and that it misused that power when it engaged in its predatory pricing scheme. His Honour supported his argument by looking at the:

‘...results from the 1986 amendments which, as stated in the Second Reading speech, lowered the s 46 threshold to “ensure that small businesses are given a measure of protection from the predatory actions of powerful competitors...”¹¹.

The Full Court unanimously overturned the finding of the primary Judge. That decision was in turn appealed to the High Court.

The High Court held that Heerey J was correct in concluding that BBM’s conduct did not contravene s 46. Heerey J held that BBM did not have a substantial degree of market power and accordingly, the threshold test for the application of s 46 was not satisfied. Heerey J also stated that selling below avoidable cost, even for a prolonged period, can be a rational business decision and does not necessarily depend on the possession of market power¹².

The High Court relied primarily on market structure rather than market conduct in deciding that BBM did not have substantial market power. The ACCC argued that even though barriers to entry were low, it was possible to infer that BBM had market power by looking at its predatory conduct towards BBM. This line of argument was approved by two judges only, the remaining did not find it necessary to express a view.

The reason why the majority reached its conclusion was that BBM *‘did not have a substantial degree of power in the relevant market because it was constrained by the power of its customers and structural barriers to entry were low’*.¹³

After Boral the Court’s interpretation of ‘substantial degree of market power’ now approximates that of a market ‘dominance’ test.

The solution however to the difficulties of s 46 cannot be solved by awaiting the outcome of more cases. In ACCC v Safeway Stores Pty Ltd, the majority of the Full Court of the Federal Court has not clarified the legal interpretation of section 46 and it is likely that Woolworths will seek leave to appeal to the High Court. In the Federal Court it was held that *‘the factors relied on by the primary judge do not compel a finding that Safeway exercised a substantial degree of market power in the wholesale market’*¹⁴, though the case is still being pursued as both parties have now sought leave to appeal to the High Court.

MTAA makes the point that in Boral, of the 11 Judges that heard the case, four found that Boral had misused its market power and seven found it had not. In the Safeway case, which has been heard by four Judges thus far, two have found that Safeway did not misuse its market power and two have found that it did in some of the circumstances argued by the Commission.

¹¹ Corones S, *Section 46 of the Trade Practices Act: Boral, the Dawson Committee and the protection of small business* (2003) 31 ABLR 210 p. 215.

¹² Corones S, *The Characterisation of Conduct under Section 46 of the Trade Practices Act* Australian Business Law Review, Volume 30, December 2002 at p. 415.

¹³ Corones S, *Section 46 of the Trade Practices Act: Boral, the Dawson Committee and the protection of small business* (2003) 31 ABLR 210 at p 219.

¹⁴ *Australian Competition & Consumer Commission v Australian Safeway Stores Pty Ltd* [2003] FCAFC 149 (30 June 2003).

There is thus in MTAA's view very great judicial uncertainty as to how the provision should be interpreted, notwithstanding the Parliament's intentions. That uncertainty needs to be remedied.

3.2 Background to Section 51AC

The introduction of section 51AC of the Trade Practices Act in 1998 was preceded by almost as many years of discussion and debate on unconscionable conduct as there has been in relation to the effectiveness of section 46. That discussion and debate has included a number of Parliamentary inquiries, a green paper, a statutory report to Ministers by the Trade Practices Commission and extensive public discussion.

3.2.1 Swanson Committee

The 1976 Swanson Committee also considered the question of proscribing unconscionable conduct and recommended the introduction of a provision to prohibit such conduct.

3.2.2 The 1984 Green Paper

The 1984 Green Paper proposed that the Trade Practices Act be amended to incorporate an unconscionable conduct provision that would provide protection for consumers and businesses alike, along the lines that had been recommended by the Swanson Committee.

3.2.3 The Trade Practices Revision Act 1986 (No. 17 of 1986)

The Trade Practices Revision Act 1986 (No. 17 of 1986) introduced section 52A into the Trade Practices Act. The section prohibited unconscionable conduct by suppliers in relation to the supply of goods or services to consumers. The draft bill originally covered both commercial and non-commercial contracts but the section as enacted was limited to consumer transactions after the business community expressed concerns that such a provision would introduce uncertainty into business dealings.

3.2.4 Griffiths' Report – May 1989

The House of Representatives Standing Committee on Legal and Constitutional Affairs (the Griffiths Committee) considered a supplementary submission by the then Trade Practices Commission (TPC) that the unconscionable conduct provisions in section 52A of the Trade Practices Act to be extended to commercial situations. The Committee rejected the Commission's proposal and stated that the Commission would need to develop persuasive arguments to counter the concerns of the business community and the legal profession if it wished to pursue the proposal.

3.2.5 TPC Rural Guideline – August 1989

In its Rural Guideline issued in August 1989 the TPC stated that it was satisfied that there were strong arguments in favour of examining the possibility of extending section 52A to cover business transactions.

3.2.6 TPC Discussion Paper – November 1989

On 29 November 1989 Baker & McKenzie prepared a discussion paper for the TPC after being instructed to assist the TPC to develop a proposal to expand section 52A to cover ‘small business dealings’. In the discussion paper Baker & McKenzie identified a number of problem areas for small business including:

- landlords and tenants relationships;
- loan guarantees;
- franchising;
- manufactured goods – the exercise of buying power;
- competition from government bodies; and
- the petroleum industry.

In its conclusions to the discussion paper Baker & McKenzie stated that many of the problems of small business identified in the paper arise from the structure of markets, the use by stronger suppliers or buyers of market power and the forces of supply and demand. Baker & McKenzie concluded that an extended section 52A would not provide relief simply because those market forces may disadvantage a small business. The firm suggested that other solutions may need to be found within the context of Part IV of the Trade Practices Act. In summary, Baker & McKenzie concluded that an extended section 52A would provide an important but incomplete solution to the various problems identified.

3.2.7 Beddall Report – January 1990

The Small Business Report of the House of Representatives Standing Committee on Industry, Science and Technology (the Beddall Report) recommended that the unconscionable conduct provisions of the Trade Practices Act (section 52A) be amended to apply to transactions, including retail/tenancy agreements, where a small business is disadvantaged in the same way as a consumer in its dealings with other parties.

3.2.8 TPC Discussion Paper – October 1990

In October 1990 the TPC issued a discussion paper on the extension of section 52A. The discussion paper stated that the TPC had received many complaints that had raised questions of unconscionable conduct and that cases of unconscionable conduct could ‘*involve considerable detriment to the business concerned*’.

3.2.9 TPC Report to Ministers 1991

In July 1991 the TPC provided the Attorney-General and the Minister for Small Business and Customs with its report on the possible extension of the unconscionable conduct provision of the Trade Practices Act to cover commercial transactions. In its conclusions to the report the TPC stated that section 52A should not be extended simply to cover commercial transactions as a means of assisting the position of small business. Instead, the TPC recommended that a new part of the Trade Practices Act should be created to deal with unconscionable conduct in commercial transactions. In its report the TPC stated that:

‘The major reason for this conclusion is that small business is not considered to be in a bargaining position similar to that of consumers in cases of unconscionable conduct.’

As a concluding point the TPC stated that it was *‘strongly of the view that any potential benefits to be gained from regulating unconscionable conduct in commercial transactions may be neutralised unless there is reasonable and not prohibitively expensive access for small business to the legal remedies available.’*

The recommendation contained in the report was somewhat surprising given the TPC’s previous support for an extended section 52A, and given its statement in its October 1990 discussion paper that even some of the problem examples being considered by the TPC *‘may not amount to a breach of an extended section 52A.’*

In other words, the TPC believed that *‘parties to commercial transactions are generally capable, or should be capable, of protecting their interests’.*

3.2.10 Cooney Report 1991

The Cooney Report noted that section 52A had rarely been used as a remedy since its introduction and that it did not enhance the protection afforded by the common law. Accordingly, the Committee considered that it would be of greater benefit to those who suffer from the unconscionable conduct of others if their remedy were left to the common law but that the TPC be given the power to bring actions on their behalf and bear the burden of any costs arising in relation to any such action.

In a submission to the inquiry the TPC suggested that the remedy for unconscionable conduct be extended to business transactions. According to the TPC this suggestion *‘would give the Commission the right to pursue such matters on behalf of business (via representative actions, for instance) and, if a commercial tribunal were allowed to apply the section in private suits, better small business access may result.’*

3.2.11 Amendments to the Trade Practices Act 1992

In late 1992 the Trade Practices Act was amended to extend the prohibition of unconscionable conduct to conduct not covered by section 52A. The amending legislation created Part IVA of the Act which prohibits unconscionable conduct in consumer transactions (section 52A was renumbered section 51AB and moved to Part IVA) and in other commercial conduct (section 51AA). Section 51AA was primarily enacted to address the disparity in bargaining power between small and big business which could result in the unfair treatment of small business and a reduction in competition in the market.

Section 51AA proscribed corporations engaging in conduct that was ‘unconscionable within the meaning of the unwritten law, from time to time, of the States and Territories’.

3.2.12 Section 51AA Ministerial Working Party 1995

The Commonwealth Minister for Small Business appointed a private sector working party to assess the operation and effectiveness of section 51AA of the Trade Practices Act in response to numerous and extensive complaints received and put to the Small Business Forum in relation to the ineffectiveness of the 1992 Trade Practices Act amendment.

The Working Party released its first report in February 1995 and the report highlighted the substantial legal limitations of section 51AA, in particular the inability of the provision to provide an effective remedy in relation to substantive unfairness of contracts. The Working Party also noted that the codification of existing common law principles of unconscionable conduct in the Trade Practices Act only provided for procedural fairness. Additionally, the Working Party recognised section 275 of the Industrial Relations Act 1991 (NSW) and section 9 of the Contracts Review Act 1980 (NSW) were examples of effective mechanisms for relief against unfair or harsh commercial conduct.

The Working Party also noted that no section 51AA actions had been commenced and cited the prohibitive financial burden of such an action and urged the TPC to take a representative action to test the section. The Working Party recommended that the scope of section 51AA of the Trade Practices Act be widened to include conduct that is unconscionable, harsh or oppressive.

The Small Business Minister subsequently gave an undertaking to provide avenues for redress for those subjected to unconscionable commercial conduct. On 21 September 1995, the Minister for Small Business announced a package of measures that were designed to create a better business environment for all sectors of the Australian economy by promoting fair competition and enabling firms to compete on their own merits. The Government announced a number of measures that were intended to establish a fair and equitable trading environment including:

- a strengthening of the Trade Practices Act to improve standards of business conduct;
- the establishment of a small business unit within the Australian Competition and Consumer Commission to provide a focus for small business issues; and
- the provision of Government funding to the Franchising Code Council to improve the operation and effectiveness of the Code.

3.2.13 Trade Practices Amendment (Better Business Conduct) Bill 1995

On 29 November 1995, the Government introduced the Trade Practices Amendment (Better Business Conduct) Bill 1995. In the second reading speech the then Minister for Small Business stated:

“Small businesses have long argued that they are not getting a fair go, and that the protections offered by the Trade Practices Act 1974 do not give relief from a range of unfair practices. Many of the concerns raised by small business are simply the result of competitive forces in the market place and thus do not justify a legislative response.

There remains, however, some practices of legitimate concern which are not prohibited by the Trade Practices Act 1974. Circumstances can arise where a firm cannot, due to the actions of another, protect their interests and are subject to exploitation in a manner unsustainable in a competitive and open market. The exploitation of small firms in existing commercial relationships denies many firms the capacity to develop and is an impediment to growth in this important sector of the economy. This Bill seeks to remove such impediments.”¹⁵

The end of the Parliamentary session and the calling of the 1996 Federal Election meant that Bill was not debated or voted upon.

3.2.14 Finding a Balance: Towards Fair Trading in Australia 1997 (the Reid Report)

Following a commitment given to MTAA immediately prior to the 1996 Federal election, the Government after the election referred the issue of fair trading to a House of Representatives Committee for inquiry and report. On 26 May 1997, the House of Representatives Standing Committee on Industry, Science and Technology tabled its report *‘Finding a Balance – towards fair trading in Australia’*. The Committee, comprising members of the Liberal, National and Labor parties, unanimously recommended, among other matters, that:

- new franchising legislation be enacted;
- codes of conduct be underpinned by the Trade Practices Act; and
- the existing section 51AA of the Trade Practices Act be repealed and that a new section 51AA, which would proscribe unfair conduct, be inserted in its place.

On 30 September 1997 the Government announced its response to the Reid Report. The Government undertook, among other matters, to:

- insert a new provision into the Trade Practices Act that would provide business with the same type of protection against unconscionable conduct as was afforded to consumers under section 51AB;

¹⁵ Minister for Small Business, Trade Practices Amendment (Better Business Conduct) Bill 1995, Second Reading Speech, House of Representatives, 29 November 1997.

- amend the Trade Practices Act to provide for the mandatory or voluntary prescription of industry codes (it was intended that there would be new mandatory codes for the oil industry and the franchising sector), with the ACCC responsible for the enforcement of mandatory codes.

3.2.15 Trade Practices Amendment (Fair Trading) Bill 1997

On 30 September 1997, the Government introduced the Trade Practices Amendment (Fair Trading) Bill 1997 into the House of Representatives. The Bill provided for the mandating of industry codes of conduct and created a new provision, section 51AC, which proscribed unconscionable conduct in relation to commercial dealings with small business. The Bill was passed on 2 April 1998.

Section 51AC was introduced into the Trade Practices Act “*to better protect the legal rights of small businesses, to ensure that small business can confidently deal with large firms in the knowledge that the rules under which they are operating are fair, and that there will be proper redress available when those rules are broken.*”¹⁶

3.2.16 Review of the Trade Practices Act (the Dawson Review) 2002

On 15 October 2001, the Prime Minister announced that there would be an independent review of the competition provisions of the Trade Practices Act and their administration. The Dawson Review did not examine section 51AC, determining instead that it was outside the terms of reference of the inquiry.

3.3 Section 51AC Court Cases

There has been very little litigation on (and therefore very little judicial interpretation of) section 51AC since its inclusion in the Trade Practices Act. The High Court has yet to decide a case on the issue and only one case has proceeded to the Federal Court for trial and judgement. Six cases have also been settled without trial after the parties applied to the Federal Court for consent orders.¹⁷ The matter which proceeded to Court involved extreme conduct and the ACCC has yet to pursue litigation which would assist in determining the ambit of the section.

The one section 51AC case to have been determined by the Federal Court is ACCC v Simply No-Knead (Franchising) Pty Ltd¹⁸. In that case, the ACCC sought a declaration from the Federal Court that a franchisor had breached the Franchising Code of Conduct and engaged in

¹⁶ Minister for Workplace Relations and Small Business, the Hon. Peter Reith MP, Trade Practices Amendment (Fair Trading) Bill 1997, Second Reading Speech, House of Representatives, 30 September 1997.

¹⁷ Those cases are – ACCC v *Leelee*; ACCC v *Suffolke Parke Pty Ltd*; ACCC v *Avanti Investments Pty Ltd*; ACCC v *Australian Industries Group (Half Price Shutters)*; ACCC v *Cheap as Chips Franchising Pty Ltd*; and ACCC v *Daewoo Heavy Industries and Machinery Pty Ltd & Daewoo Australia Pty Ltd*.

¹⁸ [2000] FCA 1365 (Sundberg J).

unconscionable conduct. The ACCC made a number of allegations against the franchisor including that the franchisor had:

- sold products in breach of a non-compete clause;
- distributed advertising and promotional material that omitted the names of the franchisees;
- refused to deliver products to various franchisees;
- deleted the telephone numbers of several franchisees without their consent or knowledge; and
- had refused to provide disclosure documents in response to written requests from franchisees.

The Federal Court held that *'the accumulation of incidents discussed.....discloses an overwhelming case of unreasonable, unfair, bullying and thuggish behaviour in relation to each franchisee'*.¹⁹

3.4 Deficiencies in the Current Legislation

While section 51AC applies to circumstances beyond the equitable doctrine of unconscionability, the parameters of the section fall well short of the concept of 'unfairness' that was unanimously recommended by the Reid Committee in its 1997 Report²⁰ and embodied in section 106 of the Industrial Relations Act 1996 (NSW). Even allowing for the additional indicia of unconscionability that the Court may take into account in determining whether the alleged behaviour is unconscionable, Mr Robert Gardini (and Senior Counsel at the Sydney bar) is of the view that the threshold test of unconscionability imposed by the section will be too difficult to establish except for the most blatant forms of conduct.²¹

Additionally, MTAA is concerned that the High Court's narrow interpretations of sections 46 and 51AA of the Trade Practices Act, exemplified in cases such as *Boral*²² and *CG Berbatis Holdings*²³, are likely to act as a deterrent to the taking of legal proceedings under section 51AC. The judicial view that a 'hard bargain' will not amount to unconscionable conduct, even if the weaker party is economically captive of the stronger party (for example, a tenant may, in reality, have no choice but to renew a commercial tenancy agreement even though the new agreement significantly increase rents or requires the tenant to relocate; failure to sign the renewal would mean that the tenant has no business to operate or sell, and their livelihood will disappear), means that oppressive and opportunistic behaviour by corporations with greater bargaining power or which are the economic captors of tenants and franchisees will continue unabated unless section 51AC is amended to incorporate 'unfair conduct'.

¹⁹ supra, para 51.

²⁰ *Finding a Balance – Towards fair trading in Australia*, Report by the House of Representatives Committee on Industry, Science and Technology, May 1997.

²¹ Robert Gardini, Gardini & Co Solicitors, *'The Dawson Review – A Small Business Perspective'* University of NSW Law Journal, Forum on the Dawson Review, August 2003

²² *Boral Besser Masonry Limited v ACCC* [2003] HCA 5

²³ *ACCC v CG Berbatis Holdings Pty Ltd* [2003] HCA 18

4. (In)Effectiveness of the Misuse of Market Power Provision and Proposals for Change

4.1 Introduction

In any market it is competitors who provide competition. A competitor may be an owner/operator, with no employees or it may be an outlet of a major multi-national corporation, or of course a firm of any size in between those two extremes. Some competitors will be vertically integrated, others will operate in different sectors of the same market (horizontally integrated), others will be neither and will be discrete enterprises, operating in a particular sector of a market.

The protection of competition is important and Part IV of the Trade Practices Act seeks to do that. Those engaged in commercial activities are not allowed to enter into agreements to fix prices, to engage in resale price maintenance, to engage in exclusive dealing or to enter into merger arrangements that would lead to a significant reduction in competition in the market concerned. In certain circumstances some of that behaviour can be 'authorised' by the Australian Competition and Consumer Commission, where it is found that the public benefit of such behaviour outweighs any public detriment.

However, the language of one provision in Part IV of the Act, section 46, stands out. The language of s46 is all about competitors; in fact the word 'competition' does not appear in s46. This has always been the case in section 46 and its predecessor section in the 1965 Act. Parliament, it would seem, intended that section 46 recognise the importance of competitors and that they should not be subject to anti-competitive behaviour by larger corporations. As noted earlier in this submission, the Second Reading Speech for the 1986 amendments to s46, makes it clear that the focus of the section is to be the inappropriate conduct by powerful corporations towards those with less market power. It was suggested that the types of behaviour that might be covered by section 46 would be predatory pricing and refusal to supply.

It should also be noted that with the 1986 amendments, the section was to apply to '*major participants in an oligopolistic market and in some cases, to a leading firm in a less concentrated market*', rather than as previously had been the case to that '*corporation being in a position to substantially control a market*'.²⁴

It is MTAA's firm view that the focus of s46 was intended to be, and should remain on, competitors. The Association also believes that the recent High Court decision in *Boral*²⁵ has resulted in the threshold of substantial market power being equated to something near dominance of a market; an interpretation which if correct means that there are very few companies to whom s46 could potentially apply. In MTAA's view, section 46 needs to be strengthened to ensure that

²⁴ Bowen, the Hon Lionel MP, Second Reading Speech, *Trade Practices Revision Bill 1986*, Hansard 19 March 1986

²⁵ *Boral Masonry Ltd v ACCC* [2003] HCA 5

the focus of the section remains on harm to competitors and that any threshold ensures that it applies to more than just a near to dominant firm.

A recent article by Professor Stephen Corones²⁶ noted that:

'Section 46 gives no guidance as to the categories of conduct that may be caught. It has proved to be notoriously difficult to interpret and apply. Eminent judges reach starkly opposing views as to what s46 means and how it applies.'

Professor Corones noted that *'two broad approaches have emerged'*. He reports that *'[u]nder the first approach, s46 is seen as protecting and promoting equal competitive opportunity for small business competitors. According to this approach, s46 protects small business competitors from aggressive conduct by firms with substantial market power that makes it more difficult for them to survive in the market place. Harm to competition is equated with harm to small and medium-sized firms. Support for this approach is to be found in the extrinsic materials that accompanied the 1986 amendments to the TPA which gave s46 its current form.'*

Corones in his article goes on to state that *'[a]ccording to the second approach, s46 is not about providing equal opportunity for small and medium-sized competitors; rather it is about promoting competition with a view to achieving economic efficiency for the benefit of consumers. Under this approach, harm to competition is equated with harm to consumers.'*

4.2 The Problems with Section 46

MTAA believes that there are a number of problems with the current section 46. Those problems are that:

- there is confusion, it seems, as between the parliament and the judiciary as to whether the focus of the section should be competitors or competition;
- the judiciary cannot agree on an interpretation of 'substantial degree of market power';
- there seems some doubt as to whether 'take advantage' means 'use' or something more;
- it is unclear whether predatory behaviour, including predatory pricing, can be captured by the section;
- in many circumstances, finding 'purpose' is extremely difficult; and
- the influence that judicial decisions, particularly those of the High Court, have on advice provided by legal representatives to their clients as to the merits or likely success of any particular claim under s46.

MTAA, together with the Fair Trading Coalition, does not believe that these problems can be overcome unless section 46 is amended to clarify its scope and application. Unless that happens section 46 will remain ineffective in dealing with the misuse of market power by large corporations.

²⁶ Corones, Professor Stephen, *'Section 46 of the Trade Practices Act: Boral, the Dawson Committee and the protection of small business'*, (2003) 31 ABLR 210

The solution to the current difficulties with section 46 is not to await further judgements. It is clear from the conflicting decisions that have been delivered in misuse of market power cases and the fact that all cases are being appealed to the High Court that there is significant confusion as to how the section should be interpreted. MTAA submits that in that case the solution is that the Parliament amend the section so that the intent be made clear as it had intended it should be; and if necessary it should be prescriptive in so doing.

4.3 Proposal for Amendment of Section 46

The Fair Trading Coalition has recommended that section 46 be amended to clarify its operation, by amending s46(1) and by the addition of new subsections 46(1AA), (1AB) and (1AC) as follows:

“Section 46

‘(1) A corporation that has a substantial degree of market power in a market or any other market in Australia shall not ~~take advantage of~~ use that power for the purpose, or which has the effect, of:

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

(1AA) Without limiting the generality of this section, a corporation shall be deemed to have a substantial degree of market power where:

- (a) the combined market share of the four (or fewer) largest firms is 75 per cent or more and the corporation supplies at least 15 per cent of the relevant market; or*
- (b) the corporation supplies 15 per cent or more of the relevant market.*

(1AB) In determining the effect of conduct referred to in 46(1), a corporation shall not be in breach of 46(1) if the longer term effect of its conduct did not lessen competition in any market and did not have the effect referred to in 46(1)(a), (b) or (c). (Note: This is a defence clause – onus is on the defendant to prove no long term harm to competition; on the balance of probabilities that a particular outcome in the longer term is more likely to occur than not to occur.)

(1AC) Without in any way limiting the matters to which the Court may have regard for the purpose of determining whether a corporation has contravened subsection (1), the Court shall have regard to the guidelines issued by the Commission on misuse of market power, including predatory behaviour by a corporation and below cost selling (other than as set out in section 98(3)).”

MTAA supports that proposal and recommends to the Senate Economics References Committee that it also adopt that proposal. MTAA is concerned that without a reasonably prescriptive definition of substantial market power, there will always be varying interpretations as to what equates to a substantial degree of market power. If factors such as vertical integration, a market share around 30 per cent, economic wealth, the ability to increase capacity in a market downturn are not individually (or collectively) thought to be indicators of market power then MTAA believes that a more formal framework for identifying market power needs to be established. That a firm is found to have market power does not of course mean that there has been a breach of s46, it merely establishes the fact that the firm is covered by s46.

MTAA is concerned, based on decisions in both the High Court and the Federal Court in the past two years or so, that the law as currently written, is becoming increasingly difficult, if not impossible, to enforce. Judicial interpretations of meaning of section 46 (and in particular of the wording of 46(1)) have varied considerably. Recent cases have seen decisions in one court overturned by another because of how particular phrases in the section have been interpreted. It has also been the case that the 'overturning' has been by a majority, rather than a unanimous, decision.

The ACCC, an experienced and well resourced litigator, which essentially pursues only the most worthy of cases, has never been ultimately successful in seeking to establish misuse of market power. Major misuse of market power cases have been lost (for example Boral and Universal Music. Safeway was lost at first instance, partially upheld on appeal to the Full Court of the Federal Court and is now on appeal to the High Court. Rural Press has recently been heard by the High Court. The Commission intervened in the private action against Melways and that case too was lost on appeal to the High Court.)

None of the companies mentioned in the previous paragraph are small companies. They are all large entities in their respective markets (groceries, newspapers, building supplies, music and street directories). If the ACCC with all its resources and experience is unable to win misuse of market power cases against these companies no small business operator is going to initiate a private action under s46. It now seems possible that when the current litigation comes to an end that under the law as it stands, there is no possibility of establishing abuse of market power.

The greater concern to MTAA is that following the Boral High Court decision, the Commission has announced that it has ceased its investigations into a number of alleged breaches of s46. Without successful public enforcement of s46 it would seem to MTAA that it will be even less likely that there would be any private actions commenced under that provision. A private litigant is unlikely to attempt to take legal proceedings given the insurmountable difficulties and the risk of an adverse costs order being made against it. In these circumstances, the public benefit of the Act in providing private rights is being eroded in relation to a cornerstone provision of the Act.

MTAA believes that the concepts embodied in s46 are extremely important for small business. Sub-sections 46(1)(a) to (c) proscribe certain types of behaviour. Under s46(1) it is not permissible for a corporation with market power to take advantage of that power to damage a competitor, to prevent entry to a market or to stop a person from engaging in competitive behaviour. Even though MTAA believes that s46 needs strengthening, it also believes that the concepts on which the section is based are extremely important for small business. Sub-sections 46(1)(a) to (c) provide important safeguards for individual small businesses against the misuse of the greater market power of their larger competitors. In advocating a strengthening of the misuse

of market power provision, MTAA is proposing that the language of s46 remain focussed on competitors.

It is not though proposed that there be any guarantee of survival for small business. What is proposed that is that there be an effective and well understood law dealing with the misuse of market power.

In his farewell speech to the National Press Club, Professor Allan Fels said in relation to section 46 that:

*'Unfortunately, despite a record of general vigour and success in litigation the Commission has won only one section 46 case since 1991. Does anyone believe that there has been only one instance in which an Australian business with substantial market power has misused it to harm competition in that period? Even if results were occurring – and the Commission has in fact lost a string of cases – cases typically take up to seven years or more. For that reason alone the law cannot be said to be effective. A faster remedy is required.'*²⁷

²⁷ Fels, Professor Allan, *'Competition Policy: A Report Card for the last 12 years and an Agenda for the Future'*, Speech to the National Press Club, 30 June 2003

5. The Case for Proscribing Unfair Conduct

5.1 Introduction

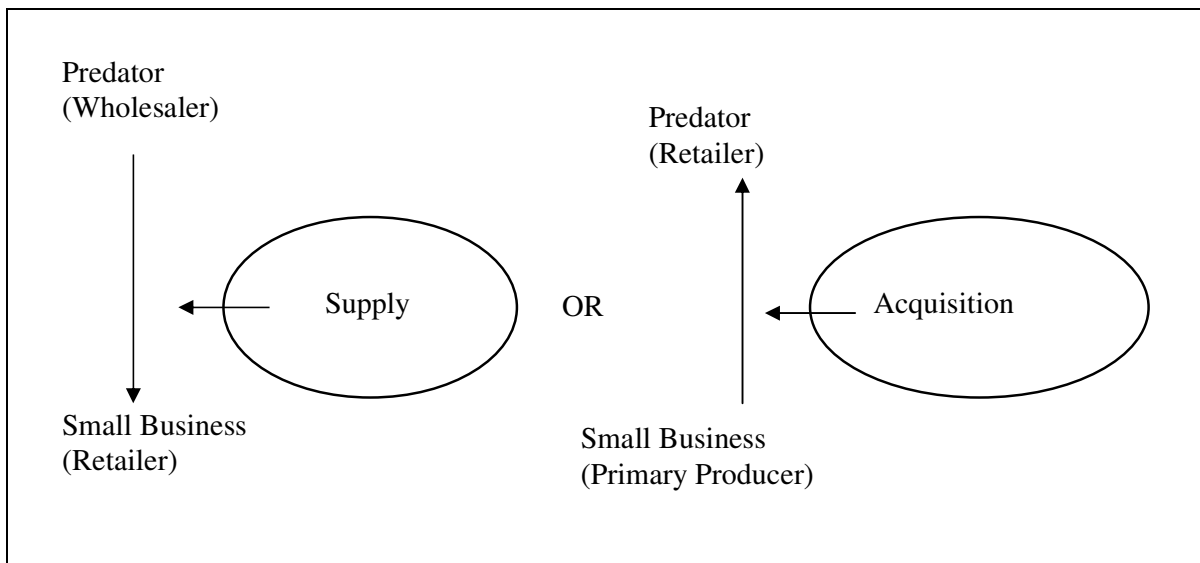
Section 51AC of the Trade Practices was, as stated earlier, included, in a new Part IVA, in the Act in 1998. It formed part of the Government's response to the Reid Committee inquiry into fair trading. The section states, in part, that:

- (1) A corporation must not, in trade or commerce, in connection with:*
- (a) the supply or possible supply of goods or services to a person (other than a listed public company); or*
 - (b) the acquisition or possible acquisition of goods or services from a person (other than a listed public company);*
- engage in conduct that is, in all the circumstances, unconscionable.'*

The section goes on to list 11 factors (non-exhaustive) which the Courts may have regard to in determining whether conduct is 'unconscionable' within the meaning of the section. The application of the section is though limited to transactions involving the supply or acquisition of goods or services under \$3 million.

Unlike s46, it is an essential element of s51AC that a corporation is engaged in supply or acquisition of goods or services. Usually but not necessarily, there is a contract between the corporation and the small business.

Examples of such relationships could be as follows:



The terms of reference for this inquiry in (1)(b) refer to consideration of whether Part IVA of the Act deals effectively with unconscionable or unfair conduct in business transactions.

In MTAA's view there is no doubt that Part IVA of the Act has been totally ineffective in dealing with what we would describe as unfair conduct (for example a refusal to negotiate on the terms of an agreement (particularly where the smaller party is 'economically captive' of the larger party, the unilateral variation of agreement, setting performance criteria without consultation with and the agreement of the franchisee and then making failure to reach the target a breach of an agreement which can then be grounds for termination). The Act does not proscribe unfair conduct; its focus is on the higher threshold of 'unconscionable' conduct.

Part IVA of the Act contains three provisions dealing with unconscionable conduct; s51AA, the codification of the unwritten law as it applies from time to time in the states and territories, s51AC prohibition on unconscionable conduct in business transactions (which applies to transactions under \$3 million and does not apply where the 'victim' is a publicly listed company) and s 51AB, the prohibition on unconscionable conduct in consumer transactions. Section 51AC was introduced into the Act after the Reid Committee Inquiry into Fair Trading found that the Trade Practices Act should be amended to '*provide a general statutory standard of fairness in commerce broader than the present equitable doctrine of unconscionability*'²⁸. However in the end the Government adopted what was not a standard of fairness, but what it hoped would be an expanded notion of unconscionability. Given that it has previously been found that the 'special disadvantage' hurdle in s51AA offers little assistance to small business seeking redress for unacceptable behaviour, the focus of this discussion on Part IVA is limited to the effectiveness or otherwise of s51AC in dealing with unconscionable or unfair conduct.

MTAA in its Small Business Charter of Fairness has proposed that section 51AC of the Act be amended to additionally proscribe the following conduct:

- the presentation of take it or leave it contracts;
- unilateral variation of contracts;
- the bringing into existence of documents or policies after the contract has been signed with are binding and which are used to vary the terms of a contract; and
- termination of contracts at will, where there has been no breach of the contract (though it is not intended that this remove parties' rights to repudiate a contract).

MTAA is concerned that despite the introduction of both s51AC and the Franchising Code of Conduct it is common for agreements to be presented to retail motor traders by their suppliers on a take it or leave it basis. Many agreements have provisions for termination at will by motor vehicle suppliers where there has not been any breach of the contract. Franchise bulletins as issued from time to time, particularly those issued by motor vehicle suppliers, often advise of changes in franchisor policies and are binding on franchisees, irrespective of the impact that such policy changes might have on the business and the financial viability of the business. In 1998 it was hoped that the then new s51AC would be able to provide a remedy for small business harmed by such behaviour. Unfortunately it has not. MTAA now does not believe that it can.

²⁸ *Finding a Balance – Towards fair trading in Australia*, Report by the House of Representatives Committee on Industry, Science and Technology, May 1997, p176

5.2 Unilateral Behaviour

One of the issues that MTAA is concerned about in relation to s51AC is the presentation to, in particular, franchisees of 'take it or leave it' agreements. Notwithstanding the introduction of the Franchising Code of Conduct which contains provisions strongly recommending that prospective franchisees receive professional advice before entering into a franchise agreement, franchisors, in MTAA's experience, are not disposed to negotiating terms of franchise agreements with either franchisees or their representatives. This is particularly disturbing where the presentation of take it or leave it contracts involves existing franchisees who have already invested considerable capital in establishing and building their businesses over a period of time.

Set out below is an example of the difficulties that new vehicle franchisees often encounter in attempting to negotiate terms of a dealer agreement.

Frequently Requested Changes to Protect the 'Reasonable Interests' of Franchisees:

1. that the agreement be amended to include a clause relating to the specific obligations of the franchisor, such as:
 - * the provision of technical, product, marketing, customer, policy and procedure information to assist franchisees;
 - * regular consultation with the franchisee and the relevant franchisee advisory council on short and long term plans in relation to the franchise and the franchisee's business/territory;
 - * the provision of information and direction in relation to any product and/or parts defects;
 - * franchisee training;
 - * the provision of information on new developments, marketing initiatives and sales programs relevant to the franchisee's business; and
 - * the conduct of general advertising campaigns by the franchisor and the impact on the franchisee's business.
2. a minimum term of five years with an option to renew for five years where the franchisee is not in default of the franchise agreement
3. renewal clauses should provide that where there has been no breach of an agreement, where performance has been satisfactory and where there has been a satisfactory review of the business plan, then the franchisee should be entitled to a renewal of the agreement for a further term
4. there should be no alteration to a franchise prime market area unless the franchisee has been consulted and the change would not have an adverse financial impact on the franchisee
5. the franchisor should not be able to appoint additional franchisees in an established franchisee's prime market area
6. where the franchisor unilaterally sets minimum sales targets, it is unreasonable to include in the agreement a clause which says that a franchisee is in breach of the agreement if the minimum sales targets are not met. Franchisees should only be required to use their 'best endeavours' to reach such targets

7. stock should be allocated by franchisors in a manner that is 'fair and equitable' not at the franchisor's absolute discretion
8. franchisor's rights to access and audit franchisee's premises and books should be on the basis that reasonable notice is provided to the franchisee and that such visits and audits are carried out during normal business hours
9. clauses which allow for the termination of a franchise agreement at will (where there has been no breach of the agreement) should be deleted from the agreement
10. a period of 30 days to remedy breaches of an agreement, may not be sufficient time – particularly in circumstances where the 'breach' may relate to franchisor imposed minimum sales targets or customer satisfaction
11. where a franchise is terminated or not removed and the franchisee no longer has the right to use the franchisor's trademarks and other licences to sell unsold stock, the franchisor should be obligated (not just have the option) to repurchase stock and parts
12. where franchisors require franchisees to comply with bulletins or operations manuals, the changes required or imposed by the bulletins or manuals should not impose substantial adverse impact on the business of the franchisee; and
13. franchisors should include in their agreements a clause which requires them to act in good faith.

It is the experience of MTAA that few if any changes are agreed to by suppliers and in one instance, MTAA is aware that a supplier responded in very negative terms and left the franchisee concerned in no doubt that the agreement was being offered on a 'take it or leave it' basis.

MTAA believes that it is not unreasonable that a franchisee would wish to discuss the terms of a franchise agreement with a franchisor, particularly where some of the franchise agreement clauses would seem to offer an unfair advantage to the franchisor. For example, a franchisor unilaterally setting sales targets and including a provision in a franchise agreement which provides that if sales targets are not met the franchisee is in breach of the agreement.

MTAA considers it quite reasonable that franchisors protect their intellectual property and brand image. However, the Association considers that the increasing tendency for franchise agreements to be presented on a take it or leave it basis, for the inclusion of terms (particularly those relating to performance and rights to establish new outlet/grant new agreements) that unreasonably favour the franchisor and the insistence often of clauses which allow termination of agreements where there has been no breach of the agreement to be a serious threat to a franchisees ability to successfully operate and grow its business. MTAA considers such behaviour by franchisors to be unfair and quite unreasonable. The behaviour goes well beyond what is reasonably necessary to protect the interests of the franchisor.

However, the Federal Court recently determined that *'mere unreasonableness or unfairness may not be sufficient, at least in the absence of some moral fault'*²⁹ to be considered unconscionable.

²⁹ ACCC v 4WD Systems Pty Ltd [2003] FCA 850, at paragraph 185

In contrast, the Industrial Relations Commission of New South Wales (in court session) in a judgement delivered in December 2002 offered the following comments on determining unfairness:

'In A&M Thompson Pty Ltd and Others v Total Australia Limited [1980] 2NSWLR1 at 13, the majority of the Industrial Commission in Court Session considered the nature of the unfairness attracted by section 88F of the Industrial Arbitration Act 1940 as follows:

"It has been said that fairness is determined by the commonsense of a jurymen and that it is a moral and not a legal issue (Davies' case). Whether this be so or not it does seem that in distinguishing between what is fair and what is not fair the Judge must apply standards which appear to him to provide a proper balance or division of advantage and disadvantage between the parties who have made the contract or arrangement. In doing so, he would also have to bear in mind the conduct of the parties, their capability to appreciate the bargain they had made and their comparative bargaining positions when entering into the contract or arrangement".³⁰

MTAA believes that any concerns about introducing a prohibition on 'unfair' conduct into the Trade Practices Act are misplaced. The NSW Industrial Commission and its predecessors have been dealing with the concept of unfairness in contracts (both for employment and services) for over 40 years. Commerce in New South Wales has continued to flourish during that time.

5.3 Franchised Motor Vehicle Dealers – Issues

In addition to the type of behaviour outlined above, reports from MTAA's Member Associations indicates that there has been a marked increase in disputes between motor vehicle franchisors and their franchisees since 1999, with the conduct of two motor vehicle franchisors generating a significant number of disputes with their franchisees.

The major reasons for such disputes have consistently been identified as:

- non-renewal of franchise agreement;
- rights of assignment; and
- unilateral variation of franchise agreements.

In addition to those matters disputes about warranty issues, performance criteria, tenure and the failure of franchisors to negotiate terms of an agreement continue to be reported as matters of dispute.

While the occurrence of disputes has increased, the number of these disputes that have been resolved to the satisfaction of the dealer and member association concerned has substantially declined since 2001. In relation to the disputes that have been resolved, the most common method of resolution employed was mutual negotiation (with or without the assistance of MTAA Member Associations). Mutual negotiation was also the most common method of dispute

³⁰ Gough & Gilmour Holdings Pty Limited v Caterpillar of Australia Limited (No. 11) [2002] NSWIRComm 354 at paragraph 785

resolution for those disputes which are currently in the process of being resolved. It is not necessarily the case that the referral of a dispute to the Office of the Mediation Advisor, under the Franchising Code of Conduct, results in satisfactory resolution of the dispute.

5.4 Enforcement

In a recently published preliminary research report on its Compliance and Enforcement Project, which focuses on the ACCC and TPA enforcement, the Centre for Competition and Consumer Policy finds from its research that *'the four types of conduct least frequently enforced – unconscionable conduct, misuse of market power, resale price maintenance and exclusive dealing – are also the four types of conduct most likely to be litigated. This suggests that in these areas the law and the way it applies to business conduct is most unclear or contentious and therefore the ACCC is least able to settle matters easily. For unconscionable conduct and misuse of market power, this hypothesis was also borne out by the interviews'*³¹.

However, later in the Report, there is a discussion (based on interviews with ACCC staff) about the greatest difficulties in enforcement. In relation to the enforcement of unconscionable conduct it is reported that:

*'This is a difficult area because the ACCC has been very keen to take cases but the law is unclear and the ACCC has not been very successful at winning cases. Staff commented that "the public believe everything is unconscionable conduct" (perhaps, partly as a result of the ACCC giving this area a high profile) and have high expectations that cannot be met. This may be particularly true of small businesses. Many of the cases that have been run have concerned small business against small business rather than small business against large business and this has also disappointed expectations about what the provisions would achieve. In answer to Question Five [about what staff see as the major strategic enforcement priorities of the ACCC impacting on the staff person's work and what are emerging issues] a further six staff saw unconscionable conduct as a major strategic priority for the Commission and commented on the difficulty in investigating such cases.'*³²

To MTAA's knowledge the ACCC has only successfully litigated one s51AC case; though there have been Court endorsed settlements of a number of other cases involving alleged breaches of s51AC. As mentioned in section 3.3 of this submission, the one successful s51AC action taken by the Commission was against Simply No Knead.

Given the considerable amount of evidence that was put before the Reid Inquiry into Fair Trading, sufficient to cause the multi-party Committee to produce a unanimous report recommending significant change to the Trade Practices Act it is difficult to accept that the law has only been capable of one definitive decision on a breach of s51AC. It could be argued,

³¹ Parker, Christine and Stepanenko, Natalie, *'Compliance and Enforcement Project: Preliminary Research Report'*, Centre for Competition and Consumer Policy, Australian National University, August 2003 pp 24-25

³² Parker, Christine and Stepanenko, Natalie, *'Compliance and Enforcement Project: Preliminary Research Report'*, Centre for Competition and Consumer Policy, Australian National University, August 2003 p 40

perhaps, that such a low number of cases means that there has been quite a behaviour change in commercial conduct since 1998; however not even opponents of a strengthening of s51AC put forward that argument. Most opponents of strengthening s51AC argue instead that it is still a relatively new piece of law and establishing case precedents takes time and there are cases under investigation or it is argued that in fact the law is working in that although there has only been one matter successfully litigated and a number of other matters have been settled before a full hearing has taken place and that is a good outcome.

MTAA believes that the reason that there has only been one successfully litigated matter, despite the ACCC's role in pursuing test cases, is because s51AC does not offer the prospect of redress for the issues which were put before the Reid Inquiry. That Inquiry recommended that the proscription be on 'unfair' conduct. MTAA believes that until such time as there is an amendment to section 51AC to proscribe unfair conduct, small businesses, particularly those who are vulnerable or who are economically captive will be unable to seek redress against the type of conduct which would be considered unacceptable in many other dealings in our society.

5.5 Recommendations for Amendment to s51AC

The Fair Trading Coalition has proposed that section 51AC be amended as follows:

'The Fair Trading Coalition believes and recommends that s51AC would provide greater support to businesses in their dealings with larger corporations if the section proscribed 'unfair', 'harsh' as well as 'unconscionable conduct' as at present. Sub-sections 51AC(1) and (2) would then read as follows:

- "(1) A corporation must not, in trade or commerce, in connection with:*
- (a) the supply or possible supply of goods or services to a person (other than a publicly listed company); or*
 - (b) the acquisition or possible acquisition of goods or services from a person (other than a listed public company);*
- engage in conduct that is, in all the circumstances, unfair, harsh or unconscionable.*
- (2) A corporation must not, in trade or commerce, in connection with:*
- (a) the supply or possible supply of goods or services to a corporation (other than a publicly listed company); or*
 - (b) the acquisition or possible acquisition of goods or services from a corporation (other than a listed public company);*
- engage in conduct that is, in all the circumstances, unfair, harsh or unconscionable."*

It is also recommended that s51AC be amended to proscribe the following conduct:

- * 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.’*

MTAA supports the FTC’s recommendation for changes to s51AC.

The Association does not believe that proposals for change should be ignored or set to one side because change is proposed to cause uncertainty in business contracts. Small business has no certainty in its dealings with large businesses. Yet big business can determine certainty. This proposal simply redistributes certainty more equitably.

6. Codes of Conduct

6.1 Introduction

Following the Report of the House of Representatives Standing Committee on Industry, Science and Technology, *'Finding a Balance: towards fair trading in Australia'*, the Government as mentioned earlier in this submission, introduced the Trade Practices Amendment (Fair Trading) Bill 1997. The Bill, in part, inserted a new Part IVB in the Trade Practices Act which enabled a code of practice, to be underpinned legislatively as either a mandatory or voluntary code (after an impact assessment, consultation and approval process).

Part IVB of the Trade Practices Act provides that the Government can by Regulation declare an industry code to be mandated under the Act as either a mandatory code covering all participants in a given sector or a voluntary code, which is binding on those companies which agree to be bound by it.

Currently, there is only one code of practice declared to be mandatory (the Franchising Code of Conduct), though it was announced at the time the Bill was introduced that the Government initially considered that two codes would be mandated; a Franchising Code of Conduct and an OilCode.

The Franchising Code of Conduct came into effect on 1 October 1998 (though some provisions of the Code applied from 1 July 1998).

6.2 Retail Motor Trades and Codes of Conduct

Recent comments by the Chairman of the Australian Competition and Consumer Commission, Mr Graeme Samuel AO, about the possibility of the ACCC endorsing voluntary codes of conduct has sparked some debate about the value of voluntary codes of conduct.

MTAA has been a strong advocate for and supporter of mandatory codes of conduct and remains so. The Association has in the past experienced (with both the defunct voluntary Oil Industry Code of Practice and the defunct voluntary Franchising Code of Practice) quite a number of difficulties relating to enforcement/sanctions, coverage, ability of parties to discuss/propose amendments to the voluntary code and so on. MTAA understands that ACCC's experience in the past on endorsed codes has been difficult, with the public perception being that endorsement of a code means that it will be enforced, thus raising issues of resource allocation for the Commission and possibly creating a false sense of security for consumers.

MTAA notes that the Government remains committed to industry self regulation where possible and notes also the latest comments by the Chairman of the Commission supporting 'co-

regulation'. However, retail motor traders remain sceptical of the value of such voluntary arrangements for business to business dealings.

In fact MTAA has, for some time, on behalf of its body repair members been seeking to negotiate with insurance companies a business to business code of conduct for the smash repair sector. MTAA and VACC have been working on a code of conduct for at least three years. A draft code has been submitted to the Insurance Council of Australia (ICA) and to leading insurers. The draft code has been rejected by the ICA and unanimously all insurers, in its entirety, and the ICA and individual insurers have refused to provide comment on the code or to negotiate regarding any clauses it contains.

Difficulties in the relationships between repairers and insurance companies were identified and acknowledged by the then Industry Commission in its report on its Inquiry into Vehicle and Recreational Marine Craft Repair and Insurance Industries. The recommendation in that report was that:

*'The insurance and repair industries should jointly convene a forum to determine processes needed to establish a code of conduct covering matters which impinge on relationships between the two industries and a procedure for resolving disputes between insurers and repairers.'*³³

MTAA is disappointed that eight years after a recommendation from the Industry Commission that the parties establish a code of conduct, five years since the passage of the amendments to the Trade Practices Act providing for the mandating of codes of conduct and the more recent involvement of the ACCC in convening conferences on the issues between repairers, insurers and consumers absolutely no progress has been made on the introduction of a code of conduct.

MTAA believes that until there is a mandated code of conduct covering the sector, the conduct of insurers will continue to cause problems for repairers, particularly in relation to quotation disputes, 'take it or leave it' contracts, payment terms, lack of dispute resolution procedures, the increasing lack of choice offered to consumers as to where damaged vehicles are repaired and the like.

Similar problems were encountered with the new motor vehicle suppliers prior to the introduction of the mandatory Franchising Code of Conduct. Most suppliers refused to acknowledge that they were engaged in franchising and did not subscribe to the former voluntary code. Although franchised motor vehicle dealers support the introduction of a specific mandated code of conduct for their sector, the inclusion of new motor vehicle dealing under the mandatory code has resulted, to a limited extent, in them benefiting from the pre-contractual disclosure regime and the dispute resolution process. However that is not to imply that the Franchising Code of Conduct has addressed all of the concerns of franchised motor vehicle dealers. It has not. Substantial matters such as minimum tenure arrangements, rights to unilaterally vary contracts and the issue of termination at will (where there has been no breach of an agreement by the franchisee) remain outstanding and are matters which dealers would like to see addressed in a specific code.

³³ *'Vehicle and Recreational Marine Craft Repair and Insurance Industries'*, Industry Commission, Report No 43, 15 March 1995, recommendation 5

While there have been several attempts at negotiating a mandatory code of conduct for the oil industry, none have yet been successful because introduction of a mandatory code has been linked to repeal of two specific Acts covering the retail sector of the petroleum industry. MTAA's service station operators have been unable to agree to repeal of the two Acts because the various drafts of a code have all failed to address service station operators concerns about vertical (and more recently horizontal), transparent and fair pricing arrangements, tenure and dispute resolution.

6.3 Raising Standards of Business Conduct

With only one mandatory code of conduct, which has limited application, established under Part IVB of the Act it is difficult to propose that Part IVB has been generally successful in raising standards of business conduct in Australia.

However, MTAA believes that mandatory codes of conduct can be used to establish improved standards of business behaviour. However the Government appears unwilling to mandate additional codes. The Retail Grocery Industry Code of Conduct established following the Baird Inquiry into retailing³⁴ was not introduced as either a mandated mandatory code or a mandated voluntary code. There has been no indication from the Government that it intends to address concerns about standards of behaviour in the smash repair industry by mandating a code of conduct. The Franchising Policy Council, established to provide advice to the Government on the Franchising Code of Conduct has been disbanded.

MTAA believes that the Committee should recommend the Government take a more pro-active role in raising standards of business conduct through the introduction of mandatory codes of conduct in key sectors where there is continuing and widespread discontent between small and large business.

³⁴ *Fair Market or Market Failure?*, Joint Select Committee on the Retailing Sector, 30 August 1999

7. In Support of Small Business

Small businesses dominate the retail motor trades; from new vehicle dealer to dismantler. The majority of retail motor traders employ less than 10 people; some however employ hundreds of people. However even the larger operators are though small in comparison to their mostly multi-national suppliers. The larger operators, as are many of their smaller counterparts, are often 'captive' of their suppliers. This is particularly so for those in franchise relationships where the franchisee will have invested significant funds in entering into and maintaining a franchise agreement. The success of the business not only relies on the skills of the owner/operator/franchisee but on fair and equitable dealings between the retail motor trader and its supplier.

Changes to contractual arrangements, unresolved disputes, lack of consultation on new agreements and unfair terms in agreements all have an impact on the retail motor trade business. In some sectors of the retail motor trades, notably the retail petroleum market, suppliers may also be retail competitors.

In Melbourne the recent take-over of a significant number of Shell petrol stations by Coles Myer has caused difficulties for other operators in the market. On Wednesday, 3 September 2003, the Shell terminal gate price for unleaded petrol in Melbourne was **85.34** cents per litre (cpl) (for L15 (temperature corrected litres) and 85.03 cpl for bulk purchases. Coles Express was posting a retail price of **84.9** cpl, with the retail price reduced to **80.9** cpl on presentation of a discount docket from a Coles supermarket (or Bi-Lo supermarket or Liquorland outlet). It should not be forgotten that Shell, in addition to supplying fuel to Coles petrol outlets, also supplies fuel to a number of independent service station operators.

If major petroleum retailers, such as Coles, continue to post retail prices below the terminal gate price independent and other small operators will find it very difficult to remain in the market. Below cost selling is a significant issue for service station operators and one which the Trade Practices Act seems, at this time, unable to address. As the Coles/Shell arrangement is further 'rolled out' around the country and the recently announced Woolworths/Caltex joint venture arrangement is introduced smaller retailers are going to come under increasing pressure. As their fuel sales volumes drop, so will their shop and other ancillary sales fall (as fewer customers enter their sites) so the viability of their businesses will be jeopardised. MTAA believes that the entry of supermarkets to the retail petroleum market with their various 'offers' is much more about capturing increased supermarket sales and customer spending than any real desire on the part of the two retailers to be petrol retailers.

In addition to the influence that suppliers have over the livelihoods of retail motor traders, national and international mergers and take-overs have resulted in fewer often multi-national corporations having greater control over the Australian market. This has an impact on retail motor traders in Australia. For example the relatively recent take-over of Daewoo by General Motors had a major impact on Daewoo dealers in Australia. MTAA understands that not all of the then existing Daewoo dealers were offered new agreements by the new parent company. The then existing dealers had done nothing wrong; it was just that the 'upstream' arrangements had changed; but dealers paid the price of those changes.

Because of the influence and impact that actions of suppliers (who may also be competitors) have on the businesses operated by retail motor traders MTAA believes that the Trade Practices Act must be amended to:

- strengthen s51AC to proscribe unfair, harsh as well as unconscionable conduct and to specifically prohibit certain forms of unilateral conduct as described earlier in this submission;
- amend s46 to ensure that there is an effective provision in the Act dealing with the misuse of market power; and
- to provide for a notification process under the Act which will allow small businesses to collective bargain with their larger suppliers/acquirers.

7.1 Collective Negotiation

The Government, in its response to the Dawson Review of the Trade Practices Act announced that it supported the introduction of a notification process under the Act which would allow small businesses to collectively negotiate. The Fair Trading Coalition has proposed that such a process should include the following elements:

- the process should be modelled on the third line forcing provisions in the Act as there the prohibited conduct is a per se offence - as will be most collective bargaining;
- hence it is important that the third line forcing test apply; that is, that immunity cannot be revoked unless the ACCC finds that the public benefit from the conduct does not outweigh the public detriment from the conduct;
- as is the case under the existing notification process the onus should rest with the ACCC to satisfy itself that the notified collective bargaining arrangements will be against the public interest. In addressing that matter, the legislation should specifically state that the Commission must consider the interests of small business and the relative bargaining strengths of the parties involved;
- the Trade Practices Act will need to be amended to specifically state that there is a public benefit in collective negotiation;
- unless the ACCC determines that the collective arrangement is not in the public interest, the notification and immunity from prosecution under the Act will come into effect 14 days after lodgement. While there is no formal appeal process if the Commission does not issue a notice denying notification, parties can ask the Commission to review the notification at any time;
- collective boycotts must be able to be the subject of notification. In addition, the Commission should not be able to deny a notification (on the grounds that such conduct is not in the public interest) simply because the conduct notified includes a right of boycott;
- provision for a third party, such as a trade or industry association, to have the right to act as a bargaining agent for a group of small businesses;
- the collective bargaining arrangements should be able to cover all relevant dealings between the parties and not only price; for example negotiations on contract terms and conditions. It would not cover dealings with those not the subject of the notification;

- if notifications are to apply for a limited period, that should be no less than five years; and
- if the ACCC denies a notification on the grounds that it is not in the public interest a clear process must be established to allow the notifying party to have that decision reviewed, as currently exists for notifications.

The Government also proposed that a threshold be introduced for small business access to that notification process. The Government has mentioned a threshold of \$3 million. MTAA believes that the threshold should be the same as that in s51AC (which is up to \$3 million per transaction).

Most individual retail motor traders have no market power relative to their supplier/acquirer. The Trade Practices Act prohibits any collective action by businesses, thus retail motor traders and many other small business operators are unable to exert any influence over their larger business counterparts. MTAA views collective bargaining as an opportunity for retail motor traders to exercise some countervailing power in their dealings with their suppliers/acquirers. It is not suggested that this will result in an equality of power between the parties, nor is it suggested that it should. In some relationships notably franchising it is appropriate that the franchisor has rights to protect its intellectual and other property rights. However, MTAA does believe that a collective negotiation right will provide a counter to some of the unilateral behaviour engaged in by many large corporations.

7.2 Creeping Acquisitions

The current merger law does not generally cover what is known as ‘creeping acquisitions’. Any one small acquisition, in isolation and by itself, is unlikely to substantially lessen competition in a market. The concern is that major firms can acquire small players without breaching the law and yet over time substantially diminish competition. MTAA believes that acquisitions which have that effect require careful consideration.

The benefit of being able to deal with creeping acquisitions is well demonstrated in the recent dismantling of Franklins, which enabled restoration of market share of the independents from 17 per cent to 25 per cent. Market share of the majors was a prime consideration in that, but such opportunities for ‘reassignment’ on account of creeping acquisitions rarely arise.

It is proposed that the merger provisions of the Trade Practices Act be amended to allow the ACCC to take into consideration previous mergers and acquisitions by an acquirer and to aggregate the effect of previous mergers and assess the resultant state of competition in any relevant market.

Such a power should ensure that new players could freely enter a market. While this is acknowledged as being a key issue for the supermarket sector, the impact of such a change would not be confined to that sector.

It would address not only the large and increasing market share of the majors in grocery retailing but also that occurring in liquor retailing, hardware and any other retailing sector with a growing domination by a relatively small number of large corporations. In the past creeping acquisitions

has been a issue in sectors such as glass merchants, paper merchants, ready mixed concrete and small newspapers.

The Trade Practices Act should also be amended to provide that where a company reaches a certain market share, for example the CR4 test currently used by the ACCC in assessing mergers,³⁵ any further acquisition must be notified to the ACCC.

Alternatively, the Government could 'declare' certain highly concentrated industries and where declared any acquisitions would need to be notified to the ACCC and assessed by the ACCC on public benefit criteria.

7.3 Other Measures

The following measures have been proposed to this Inquiry by the Fair Trading Coalition and are supported by MTAA.

7.3.1 Appointment of a Second Small Business Commissioner at the ACCC

The appointment, following the fair trading reforms, of a Small Business Commissioner to the Australian Competition and Consumer Commission was most welcome. Since that appointment, the Commission has increased its focus on small business issues; albeit perhaps not quite to the extent small business would like. However, it often seems that there is a conflict within the Commission in respect of its pursuit of small business issues.

Often it seems that in the drive to present the lowest price to consumers, big business seeks to cut its costs and that nearly always impacts on small businesses; who either purchase from or supply to big business. While the impact of this behaviour by big business can substantially affect the viability of the small business, representatives of small business inevitably find that there is a view within the Commission that little can be done because the result for consumers is lower prices and/or greater competition and the like and that that is the only issue or imperative under the Act.

It seems that within the Commission the consumer viewpoint dominates and small business concerns remain unresolved if there are perceived or alleged to be 'benefits' for consumers. Small business believes that a more balanced approach should be adopted by the Commission in dealing with these matters. The appointment of a second, specialist, small business Commissioner would assist in achieving that balance. It is recommended that the Government consult with the small business community on future appointments of small business commissioners.

³⁵ The Commission's merger guidelines refer to a market concentration threshold of the combined market share of the four (or fewer) largest firms (CR4) being 75 per cent or more and the merged firm supplying at least 15 per cent of the relevant market.

7.3.2 A Small Business as Consumers Division of the ACCC

This division should focus small business activities within the ACCC, take small business representative actions and generally act as a small business advocate within the ACCC, within the ambit of an amended Trade Practices Act.

This could include acting as an advocate for small business interests in relation to trade practices matters.

The division should comprise the two Small Business Commissioners and the Chairman to vote on small business issues. The division should be supported by an appropriate structure and resources within the Commission.

7.3.3 A Complaints Investigation Role for the ACCC

Small business is a consumer and yet the culture of the ACCC does not see it as that.

The Trade Practices Act does not specifically give the ACCC a role to handle complaints, be they consumer or business complaints. This works against a complaint handling culture and moves resources away from handling individual complaints.

The Act should be amended to specifically provide that the ACCC address and deal with complaints. The ACCC should be required to monitor that effort and to take action on systemic issues. The Commission should be required to establish and maintain a public register of complaint trends.

7.3.4 A Small Business Ombudsman

The FTC recommended to the Dawson Review that the Government should appoint an adequately resourced Small Business Ombudsman. The role of the Small Business Ombudsman would be to investigate complaints by small business against the actions of, or treatment by, Government and its agencies (ACCC, ATO, DITR, DEWR and others) and would perhaps act more like an agency of review.

8. Are Overseas Laws Relevant to Australia?

In a recently published article Dr Ian McEwin³⁶ referred to Australia as being a 'small and open economy', an SOE. Dr McEwin stated that:

'Australia, like New Zealand and Singapore, is an SOE. This raises the question of whether the competition law of an SOE should differ from that of larger countries like the US or those in Europe. Economic structures inevitably differ between small and large economies; hence, size may be important to the way competition law is drawn up and administered. Small countries have limited numbers of disputes and limited resources by comparison. Therefore, to what extent should small economies copy legislation and case law from larger countries, as Australia did in 1974? Further, should small economies adopt a stricter rules-based approach with lower administrative costs, or should they be more flexible, given the particular circumstances in small economies where markets are more concentrated? ...'

The comments were made in the context of a critique of the Dawson Review and the extent to which it addressed the terms of reference for its inquiry. Nevertheless Dr McEwin's comments highlight an important issue for Australia.

Australia is an isolated country with a relatively small population spread over a very large geographic area; with often large distances between major urban centres. Markets in Australia have become increasingly concentrated over the last 10 years; with some sectors dominated by as few as two to four large corporations. By contrast markets in the US and Europe are much less concentrated, populations are much larger and generally less dispersed.

In competition law terms, particularly the regulation of the misuse of market power, should Australia be guided by developments and laws in other countries? Or should it be accepted that the structure of the Australia economy is different in so many ways and that therefore our response to market power needs to reflect that difference as well as that society has long term goals which do not necessarily reflect the short-term view that big is good and will always result in lower prices for consumers.

Many sectors of the retail market and in some cases, the wholesale and distribution market, are struggling with the aggressive strategic arrangements being pursued by the two dominant retailers in Australia. Sectors affected by the aggressive expansion of both Woolworths and Coles Myer include groceries, bakeries, butchers, fruit and vegetable retailing, convenience store wholesalers, liquor, petrol, newsagents and most likely pharmacies.

The aggressive nature of the race by Woolworths and Coles for the consumer dollar has prompted many calls from affected parties for specific laws against predatory pricing, below cost selling, creeping acquisitions and the like.

³⁶ McEwin Ian, 'Competition Law in a Small Open Economy', University of New South Wales Law Journal, August 2003, p 15

From a small business perspective calls for specific legislation to address that sort of anti-competitive behaviour are quite legitimate as in many cases the behaviour is threatening the livelihood of businesses, who must make profits from their own outlet and do not have the capacity to cross subsidise between, say, liquor or petrol and groceries.

MTAA sees the concerns about predatory pricing and below cost selling as reflecting also a concern about the direction in which our economy is heading. At present and unless some action is taken to prevent it, it would seem that our retail sector in particular is to be dominated by a duopoly. MTAA believes that such an outcome will not be good for its members or indeed for consumers.

Thus MTAA suggests that Australia should be cautious about adopting overseas provisions dealing with market power because the structure of Australia's economy differs from many overseas jurisdictions. There is a need for an effective provision against misuse of market power in Australia, but that needs to be addressed in the context of a highly concentrated economy with a relatively small, but dispersed population.

9. Conclusion

MTAA believes quite strongly that there have been benefits for Australia from the introduction of National Competition Policy. However, the Association believes as well that not all the benefits have been shared equally. MTAA is concerned also that in the last decade or so there has been quite a structural shift in our economy. Many markets have become more concentrated.

The two largest retailers have expanded their operations quite significantly in the past few years into what might be described as traditionally small business activities and one, in particular, has signalled its intention to further expand its retail base.

Lower prices are of course good for consumers; it is difficult to argue they are not. The issue is though whether low prices are sustainable in the long term and whether society wishes to pay the cost ; namely, greater market concentration and a loss of a substantial number of small businesses and the benefits they provide to their communities and their customers.

MTAA believes that Australia is at a cross-roads. Do we allow big business to simply get bigger through its acquisitions of smaller competitors, its unfair treatment of smaller businesses and its aggressive entry into markets outside its traditional areas? Or do we recognise that small businesses from pharmacies to liquor stores to newsagents and retail motor traders can operate efficiently in the market, can offer price and service competition and many other benefits to our society. If the latter is thought to be the case and that is certainly the view of MTAA and its retail motor trader members, then Australian needs competition law which reflects that view.

The Trade Practices Act has no capacity to anticipate the future. The ACCC cannot of course know the future, but society probably requires some 'future proofing'. One fundamental example of why such 'future proofing' is needed, particularly in relation to creeping acquisitions, is the change occurring in the petroleum industry. The petroleum industry now comprises eight refineries, four refiner/marketer companies and 8,000 service stations, across a range of ownership and operation. There has been, particularly since the 2001 Federal election, a very active public policy effort to produce an industry reform package.

The merger of Ampol and Caltex in 1995 resulted in the merged entity being the subject of a number of regulatory undertakings, which expired at the end of the 1990s. Within three years of the expiry of the undertakings there are now real concerns about the future of the retail petroleum market. In that time a key independent retailer, Liberty, has exited the market (though it remains as a wholesaler) and more recently there has been an accelerated pace of self-interested change, which has no public interest element. MTAA believes that within six months we could see:

- duopolistic retailers poised to secure 60 to 70 per cent of the retail petroleum market;
- the demise and bankruptcy of many independent operators;
- a loss of franchisees; and
- the likely withdrawal of one, or possibly two, refiners.

Thus self-interested rationalisation of the refining sector will have occurred without reference to the public interest. Retail outlets will have been closed without addressing environmental concerns, extra costs imposed on consumers through travel or loss of infrastructure.

This will have occurred as well in spite of the Trade Practices Act, without reference to either Executive Government or the Parliament and without consultation with consumers. The ACCC will have been a bystander, lacking the capacity to deal with this future or to stop it. If ever there would seem to be a case for reform of the Trade Practices Act this would seem to be it.

Thus MTAA believes that the Trade Practices Act needs to be amended to ensure that small business is not subject to anti-competitive and unfair business as proposed in this submission.

MTAA supports, in particular:

- amendment of s46 to provide an effective provision dealing with the misuse of market power by larger corporations;
- a strengthening of s51AC to proscribe unfair conduct in business transactions;
- a greater use of mandatory codes to raise standards of business conduct;
- the introduction of a collective negotiation notification process under the Trade Practices Act for small business and
- amendment of the Act to deal with concerns about creeping acquisitions.

MTAA sees those proposals not as 'either or' options but as a suite of measures to encourage the further growth of small business in Australia.

MTAA
National Secretariat
Canberra

5 September 2003

Attachment 1

SIZE OF THE RETAIL MOTOR TRADES 1998-99 - BY INDUSTRY						
ANZIC Code	Description	Retail Sales \$m	W/sale sales \$m	Total Income* \$m	No Mgmt Units#	Employment
5245	Marine equipment retailing	656.3	1.1	696.6	424	2,632
5311	Car retailing	14,059.50	5,071.70	21,127.60	2,698	34,054
5312	Motor cycle dealing	1,758.10	6.00	1,853.10	686	5,224
5313	Trailer & caravan dealing	343.40	19.50	377.50	211	1,105
5321	Automotive fuel retailing	13,562.80	219.20	14,816.80	4,257	45,396
5322	Automotive electrical services	21.30	15.40	480.80	1,609	6,125
5323	Smash repairing	31.60	13.40	3,040.40	5,594	32,659
5324	Tyre retailing	1,843.10	321.60	2,364.60	1,345	11,490
5329	Automotive r&s nec	238.20	112.70	4,513.30	11,455	48,093
	Sub totals			49,270.70	28,279	186,778
4521	Petroleum product wholesaling	2,099.50		2,511.50	465	9,197
4621	Car wholesaling	2,133.50	13,966.40	16,527.90	538	10,493
4622	Commercial vehicle wholesaling	1,322.00	9,084.10	10,870.90	430	9,210
4623	MV new part dealing	188.00	7,880.80	8,412.90	2,436	32,889
4624	MV dismantling & used parts	12.40	428.90	460.00	853	4,496
	Sub totals			38,783.20	4,722	66,285
	TOTAL			88,053.90	33,001	253,063

Source: ABS Catalogues 8638.0, 8622.0, 8624.0

* Includes wholesale sales, retail sales and commission, rental, service income and other income not separately itemised here.

Survey based on management units on ABS Business Register. Does not include sole operators.