

MTAA



SUBMISSION BY THE

*MOTOR TRADES ASSOCIATION
OF AUSTRALIA*

TO THE

*REVIEW OF THE TRADE PRACTICES
ACT*

30 July 2002

1. Introduction

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 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 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.

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
Auto Electricians
Automotive Accessory Retailers
Automotive Dismantlers
Automotive Engineers
Automotive Glass Fitters
Automotive Parts Cataloguers
Automotive Radio and Stereo Specialists
Automotive Service Managers
Automotive Trimmers
Automotive Upholsterers
Automotive Transmission Specialists
Battery Makers and Reconditioners
Body Builders
Brake Specialists
Car Alarm Fitters
Caravan Dealers
Car Dealers
Car Salesmen
Car Wash Operators
Chassis Builders and Repairers
Commercial Vehicle Body Fabricators
Detailers
Diesel Engineers
Diesel Injection Technicians*

*Dynamometer Operators
Engine Fitters
Engine Performance Specialists
Engine Reconditioners
Exhaust System Specialists
Farm Machinery Dealers
Fuel Injection Specialists
Gas Fitters
Hire and Rental Vehicle Operators
Marine Automotive Engineers
Motor Boat and Marine Dealers
Motor Cycle Dealers
Motor Cycle Mechanics
Motor Mechanics
Panel Beaters
Petrol Pump Attendants
Radiator Repairers
Spray Painters
Tow Bar and Trailer Fitters
Tow Truck Operators
Truck Builders and Operators
Tuning Specialists
Tyre Fitters
Tyre Retreaders
Wheel Alignment Specialists*

2. *Small Business Charter of Fairness*

One of the highest aims of MTAA since its inception has been to secure and maintain a fair trading environment for its members. The suppliers to the retail motor trades, particularly in the petroleum, new motor vehicle dealing, farm machinery dealing and body repair sectors, are large national and in fact mostly large multi-national companies. Retail motor traders are invariably price takers and the terms and conditions of their engagement with their suppliers are invariably set by the suppliers. There is little, if any, effective consultation by suppliers as to the terms of supply and/or franchise agreements.

The balance of power in those contractual relationships is vested almost solely with the supplier and in our view the use of that market power is largely unfettered. That is so despite provisions in the Trade Practices Act dealing with misuse of market power, unconscionable conduct and the mandatory Franchising Code of Conduct. However in saying that MTAA does acknowledge that there has been successful prosecutions by the Commission for breaches of s51AC and the Franchising Code of Conduct. However, in the main the successful cases have involved relatively small operators in other sectors and the case law that has developed has been of little assistance to retail motor traders.

As part of its efforts to secure and maintain that fair trading environment, MTAA prepared for the 2001 Federal Election campaign a Small Business Charter of Fairness. The aim of the Charter is to address the unfair and anti-competitive behaviour undertaken by big business in its relations with small business.

MTAA believes that a viable small business sector is essential if Australia is to sustain a competitive market at home and abroad and avoid becoming the plaything of huge corporate cartels. The Small Business Charter of Fairness aims to address unfair and anti-competitive behaviour undertaken by big business in its relations with small business.

For two decades governments have pursued policies aimed at 'opening up' the Australian economy. Tariffs have been reduced, financial markets have largely been deregulated, labour markets have been deregulated, shopping hours freed up and government businesses corporatised, privatised and forced to compete and national organisations that once provided competitive tension have been demutualised and become public listed companies. This has been done in the name of competition policy.

However, competition policy has increased the concentration of business in the hands of powerful corporations. It has had the effect of allowing large businesses to absorb some competitors or drive others out of business. In several sectors, large corporations which are often based or owned overseas have expanded inexorably at the expense of small businesses owned by Australian families or Australian proprietors and managers.

Of course at the time that the Association prepared and promoted its Charter, it was not aware that the Prime Minister would, during the course of that election campaign, announce this Review of the competition provisions of the Trade Practices Act.

The Association believes however that its ambitions in relation to the Charter and the various elements of the Charter are very relevant to the matters which must be considered during the course of this Review.

The MTAA Small Business Charter of Fairness is as follows:

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.

3. *MTAA Recommendations*

MTAA recommends that the amendments to the Trade Practices Act proposed in the Charter and the administrative changes which are also included in the Charter be supported by the Review. In particular, MTAA recommends that:

- *section 46 of the Trade Practices Act be amended to include an effects test and to allow an authorisation process under s46;*
- *the ACCC be given the powers to issue 'cease and desist' orders;*
- *the ACCC be given the power to more closely monitor and deal with creeping acquisitions;*
- *criminal sanctions apply to individuals who engage in price fixing activity;*
- *s51AC be strengthened to proscribe the offering of 'take it or leave it' contracts, unilateral variation of franchise or tenancy agreements and the termination of contracts at will without just cause;*
- *there be a prohibition on selling at unreasonably low prices; and*
- *small business have the right to collectively negotiate with its suppliers and franchisors.*

4. *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 to the Review by the Fair Trading Coalition (FTC). The FTC submission provides a more detailed consideration of the matters included in the Small Business Charter of Fairness and on the recommendations listed above. MTAA is a founding member of that Coalition and fully supports the submission made by the FTC. MTAA strongly believes that the matters canvassed therein should be given close and careful consideration by the Review.

5. *Recent Developments in Relation to s46*

In its submission to the Review, the Fair Trading Coalition noted that, in reference to the Boral case which is currently before the High Court, the Court can only interpret the law in its current form. The Coalition also said that it did not believe that the current law relating to misuse of market power was sufficiently strong and further stated that it believed the provision required amending. One of the recommendations proposed by the Coalition to strengthen s46 was that an effects test be added to the purpose test in s46(1). That recommendation is of course strongly supported by MTAA.

However MTAA is concerned, based on decisions in both the High Court and the Federal Court in the past 12 months or so, that the law as currently written, is becoming increasingly difficult, if not impossible, to enforce.

The ACCC, an experienced and well resourced litigator, which essentially pursues only the most worthy of cases, has not been successful in seeking to establish misuse of market power. Major cases have been lost (namely. Safeway and Rural Press. Boral and Universal Music

are both on appeal. 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 players 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 Queensland Wire case will have effectively been overturned.

The greater concern to MTAA is that the Commission itself may withdraw from enforcing s46 and that thus there would be no public protection against misuse of market power. 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, we also believe 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 not proposing that there be any significant change to the concepts underlying s46.

In addition to the recommendations listed above MTAA also recommends that s46 be expanded to include a list of conduct which should be proscribed by that provision. Specifically MTAA recommends that the following new sub-section be included in s46 as follows:

'For the purpose of sub-section (1) a corporation will be deemed to have taken advantage of its market power in a market or any other market for a proscribed purpose if it:

- (a) prevents access by competitors to scarce facilities or resources;*
- (b) purchases goods to prevent the reduction of existing prices;*
- (c) adopts product specifications incompatible with products produced by any other person in order to prevent entry into or reduce competition in a market;*
- (d) impedes, or prevents entry into or expansion in a market by:
 - (i) squeezing, by a vertically integrated supplier, of the margin available to unintegrated competitors; or*
 - (ii) acquisition by a supplier of customers who would otherwise be competitors of a supplier;**
- (e) selectively introduces fighting brands:*

- (f) *raises the cost levels of competitors;*
- (g) *creates barriers to market entry; or*
- (h) *discriminates in prices as between like businesses.'*

MTAA believes that the inclusion of this proposed new sub-section, together with the other amendments proposed in this submission, would provide small business with the protections which Parliament intended but which are presently ineffective against unacceptable market behaviour by large businesses which abuse their market power.

6. *Conclusion*

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. The object of the Act is to 'enhance the welfare of Australians through the promotion of competition and fair trading and provision of consumer protection'. There is, we would submit, a strong social objective in the Act 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.

That, MTAA believes, is what the Trade Practices Act and its enforcement agency, the ACCC, should be seeking to ensure. 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.

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Canberra*

30 July 2002

Attachment 1

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