

## Motor Trades Association of Australia

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Inquiry into the Consumer Policy Framework  
Productivity Commission  
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Dear Commissioners

MTAA is the peak national representative organisation for the retail, service and repair sector of the Australian automotive industry. The Association represents the interests, at the national level, of over 100,000 retail motor trade businesses with a combined turnover of over \$120 billion which employ over 316,000 people. MTAA is therefore the largest 'stand-alone' small business association in Australia.

MTAA has a strong interest in consumer policy and welcomes the opportunity to make a submission to the Inquiry into Australia's Consumer Policy Framework. The Association's interest in consumer policy is in relation to the impact of regulation compliance upon small business, and the need to provide rights and redress to the small business consumer during the undertaking of commercial transactions.

MTAA believes that the current arrangements for consumers under the Framework are generally sufficient and supports a continuation of the Federal, state and territory arrangements which are based upon the Trade Practices Act 1974 at the Federal level and the various state and territory regulatory arrangements which address more specific matters. However, there are a number of matters which MTAA believes need to be addressed, and these are set out in the Association's attached submission.

I trust that these comments are of assistance in your consideration of this matter and I would be happy to discuss these matters further with you at your convenience.

Yours faithfully

**MICHAEL DELANEY**  
**Executive Director**

11 May 2007

**MOTOR TRADES ASSOCIATION OF AUSTRALIA**



**SUBMISSION TO THE  
PRODUCTIVITY COMMISSION INQUIRY INTO  
AUSTRALIA'S CONSUMER POLICY FRAMEWORK**

**MAY 2007**

# Table of Contents

<b>Executive Summary</b> .....	<b>i</b>
<b>1. Introduction</b> .....	<b>1</b>
1.1 Overview of the Motor Trades Association of Australia .....	1
1.2 MTAA’s Interest in this Inquiry .....	3
<b>2. The Consumer Policy Framework</b> .....	<b>4</b>
2.1 The Rationale for Consumer Policy .....	4
2.2 Overall Framework and Approach.....	5
2.3 The Regulation Construct.....	6
2.4 The Role of Small Business.....	7
2.5 Disadvantaged and Vulnerable Consumers .....	7
<b>3. Small Business Consumers</b> .....	<b>9</b>
3.1 Strengthening the Trade Practices Act 1974 .....	9
3.1.1 <i>Section 46</i> .....	9
3.1.2 <i>Section 51AC</i> .....	10
3.2 Market Concentration.....	11
3.3. Franchising Code of Conduct .....	11
3.4. Creation of A “Small Business as Consumers” Division.....	12
<b>4. Small Business: Representation and Regulation</b> .....	<b>13</b>
4.1 Small Business Representation .....	13
4.2 Reducing the Regulatory Burden on Small Business .....	13
4.3 The Use of Standard Form Contracts within the Retail Motor Trades ....	14
<b>5. Gaps and Imbalances within the Existing Framework</b> .....	<b>15</b>
5.1 Motorcycle Theft.....	15
5.2 Unlicensed Traders.....	15
5.3 Sales of Non-ADR Compliant Motorcycles .....	16
<b>6. Dispute Resolution, Enforcement and Redress</b> .....	<b>18</b>
6.1 Enforcement.....	18
6.2 Redress and Penalty Provisions .....	18
6.3 Access to Dispute Resolution and Arbitration.....	19
6.3.1 <i>Consideration of Technical Evidence</i> .....	19
6.3.2 <i>Transparency and Objectivity of Mediation Proceedings</i> .....	19
6.3.3 <i>A Dispute Resolution Protocol</i> .....	19
<b>7. Conclusion and Recommendations</b> .....	<b>20</b>
<b>Bibliography</b> .....	<b>22</b>

## **Executive Summary**

The Motor Trades Association of Australia (MTAA) is the peak national representative organisation for businesses in the retail, service and repair sector. The Association's interest in consumer policy is two-fold, namely; the impact of regulation compliance upon small business, and the need to provide rights and redress to the small business consumer during the undertaking of commercial transactions. MTAA therefore has a strong interest in consumer policy and welcomes the opportunity to make a submission to the Inquiry into Australia's Consumer Policy Framework (the Framework).

MTAA believes that the current arrangements for consumers under the Framework are generally sufficient and supports a continuation of the Federal, state and territory arrangements which are based upon the Trade Practices Act 1974 at the Federal level and the various state and territory regulatory arrangements which address more specific matters. Notwithstanding that general comment, there are a number of specific matters which MTAA believes need to be addressed and these are set out in this submission.

MTAA believes that the Framework must regulate against inappropriate market behaviour. It is crucial that governments recognise the significant role which small business plays in providing competition and every effort must be extended to protect and promote competition and the benefits it extends to consumers. MTAA has long argued that there is an urgent need to strengthen sections 46 and 51AC of the *Trades Practices Act 1974 (TPA)* in order to create an equitable trading environment which fosters market competition. Similarly, MTAA is concerned that the Framework does not adequately address the issue of market concentration, which significantly impacts consumers through a lessening of competition and choice.

Regulatory burden remains of serious concern to small business and many small business owners believe that the policy decisions of regulators, agencies and departments at a Federal, state and territory level are made with little regard to the impact that they will have on their businesses. It is MTAA's belief that the statutory appointment of an independent Small Business Advocate, whose Office would be able to communicate the needs of small business to Government and comment on Government policy without being constrained, would address small business concerns.

MTAA in this submission also addresses a range of other issues including the Franchising Code of Conduct, unlicensed retail motor trade operators, the use of standard form contracts and dispute and redress mechanisms.

The Association makes a number of recommendations for changes to the current Framework which the Association believes will assist both consumers and small business and which will also assist in ensuring that Australia has strong and competitive markets.

## 1. Introduction

The Motor Trades Association of Australia (MTAA) welcomes this opportunity to participate in this inquiry into Australia's Consumer Policy Framework.

### 1.1 Overview of the Motor Trades Association of Australia

MTAA is the peak national representative organisation for the retail, service and repair sector of the Australian automotive industry. The Association represents the interests, at the national level, of over 100,000 retail motor trade businesses with a combined turnover of over \$120 billion which employ over 316,000 people. MTAA is therefore the largest 'stand-alone' small business association in Australia. The Association is a federation of the various state and territory motor trades associations and automobile chambers of commerce, as well as the New South Wales based Service Station Association Ltd (SSA) and the Australian Automobile Dealers Association (AADA). MTAA also has a number of Affiliated Trade Associations (ATAs), which represent particular sub-sectors of the retail motor trades, ranging from motor vehicle body repair to automotive parts recycling. Those 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)*  
*Auto Parts Recyclers Association of Australia (APRAA)*  
*Automotive Repairers Association of Australia (ARAA)*  
*Automotive Transmission Association of Australia (ATAA)*  
*Engine Reconditioners Association of Australia (ERA of A)*  
*Farm and Industrial Machinery Dealers Association of Australia (FIMDAA)*  
*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 ATA's listed above are composed of the relevant sections of each of the MTAA Member bodies and are represented, at a national level, by MTAA.

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

- raise awareness in the community of the retail motor trades' significant contribution to the Australian economy (the trades have a turnover of over \$120 billion and employ over 316,000 people);

- convey and promote to governments the interests of the retail motor trades;
- promote improved working relationships and practices with the motor trades' unions;
- on behalf of the Members of the Association, provide information about the trades to governments, the public and the trades' employees;
- work with governments to plan 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 its customers and the general public.

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 the retail, service and repair sector of the automotive industry:

Air-conditioning Technicians	Dynamometer Operators
Auto Electricians	Engine Fitters
Automotive Accessory Retailers	Engine Performance Specialists
Automotive Dismantlers/Parts Recyclers	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	Motorcycle Dealers
Battery Makers and Reconditioners	Motorcycle Mechanics
Body Builders	Motor Mechanics
Brake Specialists	Panel Beaters
Car Alarm Fitters	Petrol Pump Attendants
Caravan Dealers	Radiator Repairers

Car Dealers	Spray Painters
Car Salespeople	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 MTAA's Interest in this Inquiry

MTAA, as the peak national representative organisation for businesses in the retail motor trades, has a strong interest in consumer protection. The Association's interest is two-fold, namely; the impact of regulation compliance upon small business, and the need to provide rights and redress to the small business consumer during the undertaking of commercial transactions.

MTAA acknowledges the difficulties facing governments in balancing the needs of small business with consumer protection. However, MTAA believes that it is important that governments acknowledge the complexity of the issues affecting the "Framework", and that many of the issues raised within MTAA's submission require a degree of cooperation between governments and trade, industry and other groups in order to achieve fair and equitable policy arrangements.

Many of the Association's member businesses are consumers themselves, often operating as franchisees, and thus require recognition similar to that afforded to the individual consumer. MTAA has long argued that there is an urgent need to strengthen sections 46 and 51AC of the *Trades Practices Act 1974 (TPA)* in order to create an equitable trading environment which fosters market competition.

MTAA's submission will address as comprehensively as possible the issues raised by the Productivity Commission in its Issues Paper. In preparing this submission MTAA has sought the views of all of its Member bodies. Rather than separately addressing each of the questions posed in the Commission's Issues Paper, the Association's submission is structured around the broad headings contained in the Issues Paper.

Should the Commission require clarification or further information on any of the issues raised within this submission, the Association would be pleased to assist.

## **2. The Consumer Policy Framework**

MTAA believes that the current arrangements for consumers under Australia's Consumer Policy Framework (the Framework) are generally sufficient and supports a continuation of the Federal, state and territory arrangements which are based upon the Trade Practices Act 1974 and require the states and territories to regulate specific practices.

However, any consideration of the Framework grapples with the issue of balancing consumer and business interests. Therefore, it is important that policy-makers carefully consider and balance the need to assist consumers to navigate the marketplace with creating an equitable and effective regulatory regime which enables business to operate without unnecessary burden and within a fair trading environment.

MTAA recognises that the complexity of small business operations can make it difficult for policy-makers to identify and adequately address issues affecting small business and proposes that it is important that policy is applied across jurisdictions in a consistent and targeted manner. In order to achieve appropriate policy outcomes, policy-makers should recognise that the relationship between competition and consumer policy is one of deep connection. Furthermore, it is crucial that policy-makers consider the dual nature of small business; that it is a consumer in its own right, as well as being a supplier of goods and services to customers.

### **2.1 The Rationale for Consumer Policy**

Consumers should, as a rule, be protected from exploitation which encompasses fraudulent practices, exploitative market operations and unsafe products.<sup>1</sup> MTAA is firmly of the opinion that governments, when formulating consumer policy, should consider the interests, rights and safety of the consumer.

It is the Association's belief that protection, in the form of legislation, regulation, mutual cooperation and education simultaneously protects and empowers consumers. In order to ensure that these outcomes are met, the rationale for consumer policy must encompass fair competition and trading, manufacturing and design standards for products, the ability for policy to reflect consumer concerns, as in the case of increasing environmental awareness as well as changes to traditional operating environments, as exemplified by the use of e-commerce.

It is important however, that consumer protection be balanced against the compliance costs for business, particularly small businesses, and that they also provide a net benefit to society; that is that the benefits of government regulation/intervention in the market outweigh the costs for business of that regulation/intervention.

It is also essential that the issue of enforcement is considered in the application of consumer policy, as the lack or uneven application of enforcement creates a marketplace in which operators can trade outside of legislation and regulation with

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<sup>1</sup> Centre for Popular Education, University of Technology, Sydney (December, 2001). *What is effective consumer education? A literature review*. Australian Securities and Investment Commission. pp 3.



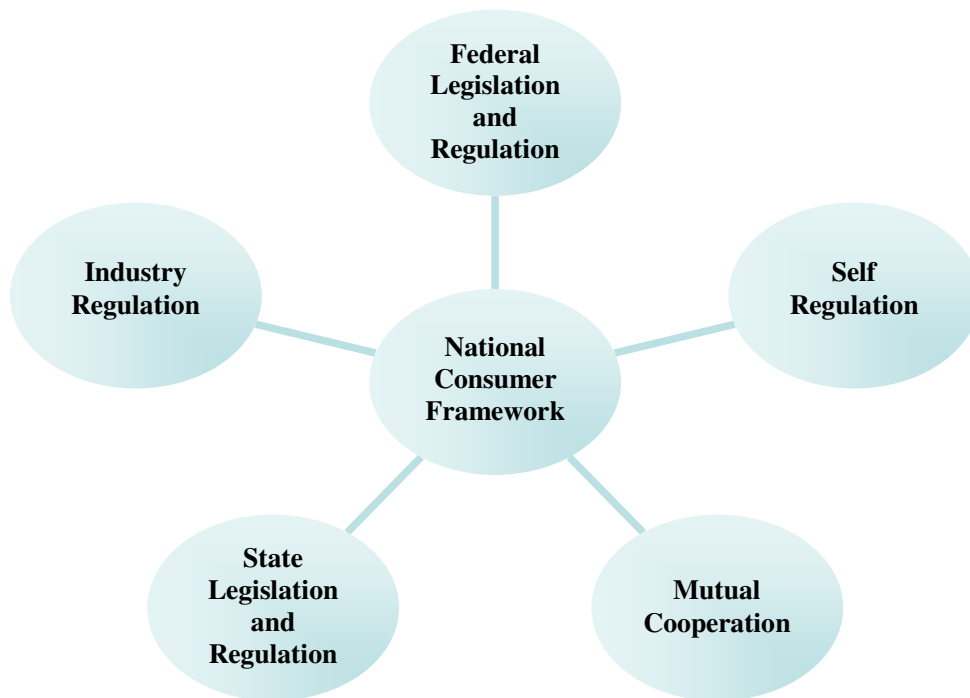
little fear of redress, to the detriment of consumers who are not protected during transactions having such a character.

Furthermore, it is MTAA's opinion that it is the role of governments to ensure that there are in place policies which are balanced and considered and which provide for a fair trading environment for small business so as to ensure that the concentration of markets, which inhibit competition and comparison of product, and ultimately restrict consumer choice, cannot occur.

In order to achieve a strong and sustainable Framework, it is crucial that governments consider: the harmonisation of legislation and regulation, the cost of regulation upon business, the small business as consumer, the need for strong and competitive markets, consumer protection and enforcement. Consumer theory, whilst informative, should not be the sole driver of the formulation of consumer policy.

## 2.2 Overall Framework and Approach

During an address to the National Consumer Congress in March 2007, the Chairman of the Australian Competition and Consumer Commission (ACCC), Mr Graeme Samuel stated that *"Our system of consumer protection is built on that 3 pronged approach...of strong law, vigorous enforcement and educated consumers"*. However, it is MTAA's belief that the consumer Framework requires the following multi-faceted approach:



MTAA believes that the Trade Practices Act is the essential element which underpins the Framework. MTAA has long advocated for significant reform of the TPA with a view to securing a regulatory Framework which promotes a fair trading environment for all businesses. As previously discussed, a strong and competitive market is an essential element to consumer policy, as competition provides consumers with the choice to select

products and services. The removal or lessening of competition through market concentration and predatory behaviour can significantly restrict consumer choice and can lead to inefficient outcomes for consumers. MTAA acknowledges that the Government has recently been consulting with small business in relation to proposed amendments to the TPA; and in particular amendments to sections 46 (misuse of market power) and 51AC (unconscionable conduct). However, MTAA believes that further amendments to sections 46 and 51AC, than those thus far proposed, are likely to be necessary; including the strengthening of the unconscionable conduct provision to include in the list of factors which can be taken into consideration, the use of ‘take it or leave it’ contracts.

MTAA has previously argued that more fundamental strengthening of section 51AC is required in that the provision should be expanded to also address ‘harsh and unfair’ conduct. Appropriate arrangements are required to ensure that suppliers or acquirers with substantial market power do not in their dealings disadvantage or unfairly treat small business as such behaviour ultimately leads to the demise of small business and the restriction of consumer choice. MTAA, through the Fair Trading Coalition<sup>2</sup>, continues to discuss with Government the need for a stronger TPA.

In relation to the wider Framework, there is in MTAA’s view a significant need for harmonisation and uniformity of relevant legislation across jurisdictions. While the relevant competition and consumer protection provisions of the TPA are mirrored in the respective jurisdiction fair trading laws, in other areas of consumer policy there are differences between the states and territories in the regulatory arrangements which apply and MTAA believes that the Productivity Commission should recommend to the Government that it work with state and territory governments to achieve uniformity of consumer protection arrangements across jurisdictions. For example, in relation to the sale of motor vehicles, different arrangements apply across the country in relation to “cooling-off periods”, unlicensed traders and motor vehicle encumbrance registers (which latter, MTAA notes is being examined as part of the Personal Property Security review and a proposed outcome from that review is a national register).

### **2.3 The Regulation Construct**

Industry regulation, which can be mandatory or self-regulatory, is principally designed to govern the relationship, rights and responsibilities of the supplier, or acquirer, and the consumer. MTAA believes that regulation is essential, in principle and practice, provided that the formulation of such regulation is considered and it addresses the concerns of small business, including the prohibition of anti-competitive behaviour and which in a balanced manner, promotes and protects the rights of the consumer. It is important that generic legislation such as the TPA or the fair trading laws offer these protections and that the appropriate authorities are proleptic in the enforcement of these provisions. In some circumstances industry specific legislation may also be appropriate such as that relating to the sale of motor vehicles.

In general, MTAA is of the opinion that voluntary codes are ineffective and offer little protection to either consumers or small business. MTAA notes that its members are subject to two mandatory regulatory codes: the Oilcode and the Franchising Code of

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<sup>2</sup> MTAA convenes and chairs the Fair Trading Coalition. The Fair Trading Coalition is an informal grouping of 31 small business organisations committed to a strengthening of the Trade Practices Act.

Conduct, as well as the industry regulated Motor Vehicle Insurance and Repair Industry Code of Conduct, which is mandatory in New South Wales.

MTAA also advocates a regulatory construct which includes; mandatory industry codes, a strengthened TPA which empowers the ACCC to adequately address current weaknesses in the Act and access for business and consumers to the civil courts.

## **2.4 The Role of Small Business**

Small business plays a valuable role within the market place by fostering competition which provides consumers with lower prices and greater choice of product and retailer. Essentially, small business involvement in the market place provides consumers with the maximum amount of choice and access to services.

Small business also plays an important community function by promoting diversity through specialised products and services and provides entrepreneurial and employment opportunities for communities and individuals and is often heavily involved in community activities. Local small businesses often play an important part within many local economies by purchasing from local suppliers, employing local staff and spending profits in the area.<sup>3</sup> Given the economic and social benefits of small business involvement with the marketplace, the Framework should enable business to not only compete, but to thrive and grow.

It is MTAA's view that it is in the nature of many of the companies which hold substantial market power and who benefit from market concentration to maximise shareholder returns, but that this can, in some instances be detrimental to their small business suppliers and potentially negatively impact upon consumers.

“Government and its regulatory authorities must ensure that there is a place in our society for small business, for the entrepreneurs who operate those businesses, for the employment opportunities they provide and for the diversity and service that big business is unable or unwilling to provide.”<sup>4</sup>

MTAA believes that there is an urgent need for governments to acknowledge the significant rise in market power and concentration of big business within many sectors of the economy. MTAA firmly believes that this rise threatens not only the livelihoods of innumerable small business operators, but is of serious detriment to competition and consumers.

## **2.5 Disadvantaged and Vulnerable Consumers**

MTAA recognises that there will be some consumers in the market who will be less able to protect their own interests than others: however, the extent to which that applies will be determined to a large extent by the circumstances of the individual and also by the complexity of the transaction. As noted in the Issues Paper, even well-informed consumers can be vulnerable in certain circumstances. However there are already a

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<sup>3</sup> House of Commons All Parliamentary Small Shops Group (2006). *High Street Britain: 2015*. pp 13.

<sup>4</sup> Fair Trading Coalition (July 2002). *Submission by the Fair Trading Coalition (A Coalition of Small Business for Trade Practice Act Reform) to the Review of the Trades Practices Act*. pp ii

number of policies in place which are intended to offer protections to consumers and they include the misleading and deceptive conduct provision of the TPA, (and the various pieces of state and territory fair trading legislation), specific policy instruments like the Uniform Consumer Credit Code, anti-discrimination legislation, the unconscionable conduct (in consumer transactions) provisions of the TPA (section 51AB) and in some jurisdictions, unfair contracts legislation.<sup>5</sup>

MTAA does not condone and cannot support any business which takes advantage of disadvantaged and vulnerable consumers. However, MTAA is aware that the potential cost of complying with policy and regulation designed specifically to protect the rights of disadvantaged and vulnerable consumers can potentially place significant burdens upon small businesses

In order to minimise this burden, MTAA advocates the involvement of trade and industry groups in issues affecting vulnerable and disadvantaged consumers. MTAA has in the past been involved with other industry stakeholders in seeking to address the circumstances of particular groups of consumers; specifically the development of the 'Access to Service Stations for People with Disabilities' guidelines.<sup>6</sup>

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<sup>5</sup> *Trade Practices Act 1974*. Part V, Section 52.

<sup>6</sup> Australian Institute of Petroleum (2004). *Access to Service Stations for People with Disabilities*.

### **3. Small Business Consumers**

Small business plays a significant role in providing competition; however both small business and the competition it encourages can be vulnerable to inappropriate market behaviour where there is not effective legislation which ensures that competition remains strong. In many ways, small business through its dealings with larger suppliers or acquirers acts as a consumer.

As previously mentioned, MTAA believes that competition in a market is best secured through there being a large number of competitors and a diversity of business ownership and operation.

The current regulatory arrangements and provisions within the Framework, which provide some rights and redress to small business in its dealings with large corporations, are discussed below. MTAA has some concerns that these arrangements require strengthening to ensure Australian marketplaces are competitive and provide good outcomes to consumers.

#### **3.1 Strengthening the Trade Practices Act 1974**

MTAA has long advocated a strengthened TPA. While it has done so in the interests of its retail motor trade members, it has also done so in the interests of securing a fair and competitive trading environment for all traders and ultimately for the benefit of consumers.

In recent months the Government has indicated that it intends to amend, in particular, sections 46 and 51AC of the TPA and indeed it has been consulting with stakeholders including MTAA, about those proposed changes. While, at the time of preparing this submission, the Government has not made any formal announcement about the detail of its proposed amendments, the Association welcomes any move to clarify the operation of section 46 and to strengthen the competition provisions of the Act

MTAA believes that the legislative Framework should provide small business with certain rights and redress against unacceptable behaviour such as:

- ‘misuse of market power’;
- ‘take it or leave it’ contracts;
- ‘predatory pricing’; and
- ‘unconscionable conduct’.

While the current regulatory Framework goes some way to providing that, much more is required.

##### **3.1.1 Section 46**

During the Dawson inquiry into the TPA, there were suggestions that the High Court would clarify the operation of section 46 by defining the boundaries of the section. In 1998, the ACCC instituted proceedings against Boral Masonry Ltd (Boral) claiming that Boral had misused its market power by engaging in ‘predatory pricing’ with the intent of driving competitors out of its market. Following a series of court cases in which the Federal Court ruled that Boral had not misused its market power and the ACCC

successfully appealed to the Full Court of the Federal Court which unanimously upheld the appeal and overturned the earlier decision, Boral successfully sought leave to appeal to the High Court. The High Court, upheld Boral's appeal, with a majority of six to one (with Justice Michael Kirby dissenting), on the basis that the provisions relating to the misuse of market power within section 46 of the TPA had not been breached:

“Section 46 is not breached unless a firm has a substantial degree of market power and takes advantage of that power. As I have indicated a firm that cannot recoup its losses by supra-competitive pricing simply does not have market power and cannot take advantage of that power.”<sup>7</sup>

As a result of the decision, Justice Kirby noted that the ruling “frustrates the proper operation of the section and the achievement of the purposes for which it was enacted by the Parliament”.<sup>8</sup>

Given the Boral decision, and similar uncertainty created by decisions in cases brought by the ACCC against Woolworths-Safeway and Rural Press, MTAA believes that in order to address this imbalance it is of the utmost importance that reforms to section 46 must clarify its scope and application and strengthen its provisions.

Of all the competition provisions of the Trade Practices Act, only section 46 makes mentions of ‘competitors’. In the Association’s view, it is important that section 46 be strengthened to ensure that ‘competitors’ are not subject to inappropriate market behaviour.

### **3.1.2 Section 51AC**

With the introduction in 1998 of section 51AC, the then Minister for Workplace Relations and Small Business declared that the section would:

"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."<sup>9</sup>

Unfortunately, section 51AC has all but been stymied as an effective avenue of redress as the ‘unconscionable conduct’ test does not consider unfair or harsh behaviour as ‘unconscionable’.

MTAA believes that section 51AC (1) and (2) should be amended to include a prohibition of behaviour that is unfair and or harsh as well as unconscionable. The Association would support an amendment to the section 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*

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<sup>7</sup> McHugh, Justice Michael (7 February 2003) *Boral Besser Masonry Limited (now Boral Masonry Ltd) v Australian Competition and Cons [2003] HCA 5 (7 February 2003) Ruling*. Part 290.

<sup>8</sup> Kirby, Justice Michael (7 February 2003). *Boral Besser Masonry Limited (now Boral Masonry Ltd) v Australian Competition and Cons [2003] HCA 5 (7 February 2003) Ruling*. Part 323.

<sup>9</sup> Minister for Workplace Relations and Small Business, the Hon. Peter Reith MP (30 September 1997). *Trade Practices Amendment (Fair Trading) Bill 1997, Second Reading Speech, House of Representatives*.

(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.

### **3.2 Market Concentration**

One of the major areas of concern to MTAA is market concentration. To the extent that Australia's regulatory framework addresses the issue of market concentration it does so through the provisions of section 50 of the TPA dealing with mergers. The significant weakness of section 50 is that it fails to address 'creeping acquisitions' which are of course a pathway to greater market concentration. The issue of 'creeping acquisitions' has been a matter which has been considered and debated at length in other inquiries, but which in MTAA's view remains unresolved.

The danger for consumers of highly concentrated markets, which are a feature already of some sectors of the Australian economy (for example, groceries, insurance and fuel retailing) is a loss of diversity in the market (which can often mean a loss of choice for consumers) and inevitably a loss of competition in the market. Where there are fewer competitors in a market there is likely to be less price competition and a resulting diminution of consumer benefit.

The need to ensure competitive and fair markets therefore plays an intrinsic role in the formulation and operation of consumer policy. Government intervention in consumer policy should take into account the words of the former Chairman of the ACCC, Professor Allan Fels that: "*competition energises, to the benefit of consumers, companies already operating in the marketplace*".<sup>10</sup>

MTAA believes that the current policy framework does not pay sufficient regard to the issue of market concentration within Australian markets. A diversity of outlets and operators is imperative to maintaining the high performance of Australia's economy and the flow-on benefits of competitive choice and product value to consumers.

### **3.3. Franchising Code of Conduct**

The Franchising Code of Conduct was introduced as a mandated code in 1998 to address inappropriate behaviour by some franchisors and also address an information asymmetry whereby franchisees did not necessarily have access to important and material information about the franchise system and the terms of the agreement relating to that system.

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<sup>10</sup> Fels, Professor Allan (11 November 2002). *Speech to the Monash University Governance Forum*.

With over 61,500 franchisees<sup>11</sup> in Australia, MTAA considers that the Franchising Code of Conduct (the Code) is an important policy instrument for franchisees which has resulted in an improvement in the level of information available to them and has seen also the removal from the sector of a number of franchisors whose behaviour was inconsistent with the Code.

The Association participated in the recent Government review of the Code and is aware that the Government is considering a number of amendments to the Code including in relation to pre-contractual and on-going disclosure requirements. While the exact detail of the proposed amendments has not yet been released, the general direction of those proposed amendments, as outlined in the Government's response to the Review, is supported by MTAA.

Notwithstanding its support for the proposed changes to the Code and its view that the existence of the Code has raised standards within the sector, MTAA believes that the Code requires further strengthening. For example, the Code does not provide for any mandated tenure and the disclosure regime focuses on 'after the event' disclosure; rather than a continuous disclosure regime, such as is required under Australian Stock Exchange (ASX) rules.

Currently, there is no formal mechanism in place for audit and/or review of franchise agreements or their associated disclosure statements. MTAA considers that if such a regime were in place, it would provide a significant incentive for franchisors to ensure that the information in their disclosure documents is up to date and accurate and that the documents complied with the requirements of the Code.

### **3.4. Creation of A "Small Business as Consumers" Division**

In MTAA's view, governments, having acknowledged the small business consumer, should further strengthen the Framework by creating a "Small Business as Consumers" Division within the ACCC. The role of that division would be taking small business representative actions and to act generally, within the ACCC, as an advocate for small business and small business-related matters.

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<sup>11</sup> Service Industry Research Centre, Griffith University (2006). *Franchising Australia 2006 Survey*. Franchise Council of Australia. pp 9



## **4. Small Business: Representation and Regulation**

As discussed earlier, regulation can have a significant impact upon small business. Well considered and targeted policy can assist small business undertake compliance requirements with minimal and positive impact. However, ill conceived policy can cause a significant burden to small business through increased operating costs and reduced productivity.

In order to minimise regulatory burden, it is crucial that small business is involved in policy creation. MTAA acknowledges the efforts of the Government to address the needs of small business by creating and funding the Office of Small Business.

### **4.1 Small Business Representation**

Small business owners in Australia often feel alienated from their governments, with many believing that the policy decisions of regulators, agencies and departments at a Federal, state and territory level are made with little regard to the impact that they will have on their businesses.

While Australia currently has an Office of Small Business (the Office) to provide advice and assistance programs and also the ACCC to regulate competition, neither have been able to act as agents of fairness for small business as consumers.

In MTAA's view, the inadequacies of the TPA limit the ability of the ACCC to deal effectively with small business issues. Furthermore, the Office is often unable to provide an independent approach to some small business concerns as there are policy constraints that require it to work within the scope of Government policy settings, sometimes regardless of the consequences of that for small business. MTAA therefore believes that there is a pressing need for an independent agency to act as a point of contact for small business and to address issues for the relevant decision makers.

MTAA considers that the appointment of a Small Business Advocate would address that need. As an independent statutorily appointed officer, the Advocate would be able to communicate the needs of small business to Government and comment on Government policy without being constrained. MTAA notes however, that the Advocate would need to be adequately resourced to fulfill those roles.

MTAA also believes that Government agencies dealing with consumer and competition issues should employ persons with a range of different backgrounds, including policy and industry experience. Such diversity would assist in the creation of policy that is intuitive and representative of the needs of small business, consumers and government.

### **4.2 Reducing the Regulatory Burden on Small Business**

Small businesses are subject to a range of Federal, state, territory and local government regulation and that regulation can create a significant compliance burden for those businesses. This regulatory burden diverts small business operators' attention from the important task of running their businesses and also results in increased administrative and compliance costs for small business. MTAA believes that governments should attempt to minimise the impact that their regulation has on

business and should ensure that any regulatory response is commensurate with the issue or matter that is being regulated.

### **4.3 The Use of Standard Form Contracts within the Retail Motor Trades**

MTAA is of the view that standard term contracts, appropriately drafted, assist small business in its dealings with consumers. MTAA also strongly believes that standard form contracts must not be harsh or unfair and believes that such contracts should be developed in consultation with trade and industry associations and where appropriate, government agencies. In MTAA's experience, contracts which are prepared or influenced by trade and industry associations, seek to ensure small business adheres to legislative and regulatory requirements in a uniform manner, thus ensuring greater compliance with a regulatory regime than might otherwise be achieved.

Given regulatory complexity, the use of standard form contracts can assist small business in substantially reducing its transaction costs and can also assist them with regulatory compliance. For example, consumers purchasing a motor vehicle from a licensed automotive dealer are usually provided with a standard contract of sale; albeit that that contract differs in length and form across jurisdictions. This contract, which includes information relating to warranty and "cooling-off" periods, ensures that consumers' rights are protected and ensures that the dealer is compliant with relevant regulatory requirements relating to the transaction (such as certain matters relating to the transaction which must be disclosed).

In the case of motor vehicle sales, the use of a standard form contract also assists consumers as the average consumer has little or no ability to assess the true complexity of the product or the ability to secure their safe title of the vehicle in question. Given that a motor vehicle is generally the second biggest purchase a consumer will make, it is critical that consumers are provided with the relevant and necessary information about the transaction that they are entering into in which standard form contracts assist in the provision of that information.

Given the complexity and extent of regulatory requirements, MTAA believes that, as automotive dealers may operate in several jurisdictions, that there is a need for harmonisation of the regulations relating to the sale of motor vehicles.

## **5. Gaps and Imbalances within the Existing Framework**

While MTAA believes that in general terms, the current Framework in place is of benefit to consumers, there are some areas where the Association considers that more could be done by governments to address some gaps within that Framework. The Association has a particular interest in the matters listed in sections 5.1 through to 5.3.

### **5.1 Motorcycle Theft**

One matter which impacts adversely on consumers is motorcycle theft. Motorcycles continue to be overrepresented in statistics relating to motor vehicle theft. This is particularly the case in regards to off-road motorcycles. According to the Australian Institute of Criminology, 80 per cent of stolen motor vehicles were recovered in 2004 – 05, while only 28 per cent of stolen motorcycles were recovered in the same period. MTAA suggests the low recovery rate for stolen motorcycles is related to the knowledge, within sections of the community, that no records are maintained by governments of vehicle identification numbers (VINs) for many off-road and possibly non-ADR compliant motorcycles.

MTAA also considers that the lack of recorded identification mechanisms for motorcycles is also problematic for motorcycle dealers, as they are unable to ensure they are not dealing in stolen or ‘re-birthed’ motorcycles. Under existing circumstances, a motorcycle dealer may not be able to guarantee clear title of a motorcycle to a purchasing consumer.

MTAA argues, then, that maintaining a record of all motorcycle’s VINs would contribute significantly to a reduction in motorcycle theft in the first instance, and assist its motorcycle dealer members in complying with their legal requirements to guarantee title for consumers. To that end, MTAA recommends the various Australian governments extend the scope of the National Exchange of Vehicle and Driver Information System (NEVDIS) to include all motorcycles. To date, the Association’s efforts to secure that outcome have not been successful.

It should be noted that MTAA is also pursuing this issue through the current negotiations in relation to the review by the Attorney General’s Department of the Personal Property Security regime. It is however not clear to the Association whether the proposed new regime will in fact address MTAA’s concerns about the lack of a national register of motorcycle identifiers. The Association believes that the Review should recommend to the Government that the register of motorcycle identifiers be included in the NEVDIS arrangements.

### **5.2 Unlicensed Traders**

Many aspects of retail motor traders commercial activities are regulated both by the Federal and respective state and territory governments. Much of that regulation is in place to provide consumers with certain rights and protections and, where appropriate, redress for breaches by traders of those regulations.

While compliance with regulations imposes costs on businesses, MTAA and its Member Associations acknowledge that there are strong consumer safety and protection arguments

for maintaining a level of regulation covering the sale, service and repair of motor vehicles. For example, the need to provide appropriate after sales service and warranty arrangements, the need for parts to be 'fit for purpose', the requirements for 'cooling-off' periods in relation to motor vehicle purchases, the need to provide consumers with clear title to vehicles, disclosure of information about vehicle mileage and age and so on. In some jurisdictions the level of regulation extends to licensing of businesses and/or technicians.

Retail motor traders also accept that with any regulatory regime, governments and their agencies will seek to enforce those arrangements; to do otherwise would neglect their responsibilities to consumers.

However, within the retail motor trade, there are significant and glaring examples of unlicensed backyard operators who are not subject to industry specific regulation due to the inability of authorities to identify such operators, thus leaving consumers vulnerable to unregulated trading. Consumers who purchase vehicles from these unregulated operators are, in reality, not protected by fair trading or warranty legislation. As these operators are often unlicensed, it is difficult for authorities to seek redress on behalf of consumers whose vehicles are faulty or have been subject to disreputable practices such as odometer fraud or vehicle 'rebuilt' or where title to a vehicle is subsequently proved at time of purchase by the unsuspecting consumer to have not been 'clear'.

MTAA believes that the lack of government enforcement in relation to backyard traders is quite unsatisfactory as the existence of unlicensed or backyard traders both discriminates against those retailers who comply (to their cost – both in terms of capital investment in their business and in ongoing operating costs) with the regulatory requirements and leaves consumers, notwithstanding *caveat emptor*, quite unprotected.

In MTAA's view there is a need for regulatory agencies to actively pursue, and where appropriate prosecute, the unlicensed sellers of motor vehicles. In relation to this area of consumer policy, enforcement activities should be focused as much, if not more so, on the activities of those retailers who operate outside the system as on those licensed and legitimate businesses who operate, in the main in a successful and compliant manner, within the system.

### **5.3 Sales of Non-ADR Compliant Motorcycles**

The practice of selling non-ADR (Australian Design Rules) compliant motorcycles by unlicensed operators is of serious concern to MTAA; again because of consumer safety and regulatory compliance issues. While this issue is not a new one for the Association, increased 'activity' in this area in recent months has been brought to our attention by Member bodies. One particular concern for the Association is the lack of specialist product safety knowledge of the vendors and the potential difficulties consumers may face in sourcing parts and warranty work.

MTAA encourages and supports safe and responsible motorcycling. However, it is MTAA's observation that motorcycle selling activity of this type is not always accompanied at the point of sale by any appropriate safety apparel such as approved helmets, boots or other protective clothing. Nor is there usually any recommendation made by sales staff as to the need for appropriate protective clothing to be worn by

anyone operating these motorbikes. Virtually all licensed motorcycle dealers will provide supplementary safety advice and support such as this as a matter of course.

Also of concern is the situation regarding servicing and ongoing spare-parts support for these motorcycles. Generally these vehicles are not supplied by a recognised brand manufacturer and it is reasonable to suggest that parts availability is likely to be somewhat limited in these circumstances. This potentially leaves purchasers of these bikes considerably exposed in the event of them needing to have any problems rectified. This situation is concerning if the apparent lack of after-sales support for these vehicles bring into question the retailer's ability to meet its warranty obligations, particularly if any problems arising also happen to be safety related.

Currently, Victoria has banned and Western Australia has highly regulated such sales within their jurisdictions. In order to extend protection to consumers in this area, MTAA recommends that the remaining states and territories address this inconsistency through similar legislation.

## **6. Dispute Resolution, Enforcement and Redress**

Dispute resolution, enforcement and redress are, and should always remain, an intrinsic and valuable part of the Framework. However, MTAA and its Member Associations believe that there are series of significant issues that should be addressed as part of the Review.

### **6.1 Enforcement**

“It’s critically important for the consumer policy framework that enforcement of the Act is efficient and effective.”<sup>12</sup>

MTAA believes that there are a series of enforcement gaps affecting the current Framework, including most noticeably, the failure of the Courts to punish breaches of the TPA. In order to address these gaps, MTAA believes that the ACCC must be adequately resourced and empowered to enable the Commission to enforce compliance

Similarly, government resources for the enforcement of legislation have diminished at the jurisdiction level to the extent that the focus is almost entirely on persons operating lawfully. MTAA believes that state and territory fair trading agencies resources are heavily weighted towards the provision of dispute resolution services, to the detriment of enforcement.

### **6.2 Redress and Penalty Provisions**

As part of a further empowered ACCC, MTAA advocates the introduction of cease and desist orders and divestiture penalties for misuse of market power to assist with the enforcement breaches of the TPA.

MTAA is also concerned that in relation to parts of the TPA (e.g. section 51AC), that no pecuniary penalties apply. The prospect of pecuniary penalties often acts as a disincentive for businesses to engage in unacceptable behaviour. This is contrasted with many of the ‘consumer’ sections of the TPA where pecuniary provisions do apply.

In relation to redress via civil litigation, the Association believes that there are two fundamental issues affecting small businesses and consumers;

- the disparity of minor claim limits (for example \$6,000 in South Australia and \$10,000 in Victoria); and
- the prohibitive cost of seeking redress for small claims for sums over this amount.

Currently, many claims involving consumers or small parties seeking redress for amounts above the existing thresholds are subject to threats, coercion and market leverage by the financially stronger party, which is able to fund extensive legal action. Additionally, the cost of seeking redress is often greater than the sum involved due to legal costs, and MTAA believes that affected parties may choose not to seek redress due to costs. MTAA is of the opinion that there is an urgent need to introduce a uniform threshold of \$20,000

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<sup>12</sup> Samuel, Graeme (15 March 2007). Address to the National Consumer Congress.

within the state and territory Small/Minor Claims Courts and Tribunals. By increasing the threshold, affected consumers will have greater opportunity to seek redress.

### **6.3 Access to Dispute Resolution and Arbitration**

While MTAA accepts the use of dispute resolution within the current Framework, it notes that participation in dispute resolution can often be burdensome upon business. MTAA Member Associations, who provide assistance to their Members, believe that there are a number of issues relating to dispute resolution which need to be addressed including: the conduct and limitations of mediators and the creation of a dispute resolution protocol.

#### ***6.3.1 Consideration of Technical Evidence***

It is the experience of MTAA Member Associations that dispute mediators generally fail to understand or give adequate consideration to technical evidence in matters relating to the retail motor trades. MTAA Member Associations advocate the mandatory use of assessors in disputes which centre upon claims of technical workmanship.

#### ***6.3.2 Transparency and Objectivity of Mediation Proceedings***

MTAA Member Associations believe that there is an urgent need for a mechanism to ensure transparency and objectivity in mediation and arbitration proceedings. MTAA Member Associations ask that governments consider instituting a mechanism which includes a review process, accountability and increased supervision of mediators by a higher authority and asks that governments develop an 'order of proceeding' for each of the dispute mediation authorities.

#### ***6.3.3 A Dispute Resolution Protocol***

MTAA Member Associations advocate the creation of a dispute resolution protocol which requires disputing parties to draft, with the assistance of the intervening authority, a written statement of their position and then to enter a formal or informal process of mediation that aims to narrow the dispute. Should this process fail independent and unprejudiced assessment of the case should be undertaken by the authority or independent mediator to assess the dispute and list considered recommendations. If this independent mediation is deemed unsatisfactory by either party then redress should be available through the civil courts.

## **7. Conclusion and Recommendations**

As an industry association which represents small business and small business as consumers, MTAA welcomes the Inquiry into Australia's Consumer Policy Framework, and reiterates that it believes that a fair and equitable marketplace has considerable benefits to consumers and small business.

MTAA believes that the following recommendations will address what the Association believes are significant gaps and imbalances within the Framework.

MTAA and its Members Associations advocate the following adjustments to the general Framework:

1. the prevention of further market concentration;
2. the acknowledgment of and minimisation of the impact of regulation on small business;
3. greater diversity of skills and backgrounds of staff engaged by consumer policy agencies;
4. empowering regulatory authorities to undertake enforcement activities;
5. regulation of dispute mediation to ensure:
  - greater consideration of technical evidence;
  - greater transparency of dispute proceedings
  - ethical, objective and transparent conduct by mediators;
  - the creation of 'order of proceedings' and 'dispute resolution process' protocols for all dispute proceedings; and

MTAA and its Member Associations call on the Government to:

6. further strengthen sections 46 and 51AC of the Trade Practices Act;
7. mandate a continuous disclosure regime as part of the Franchising Code of Conduct;
8. create a Small Business Consumer Division within the ACCC;
9. fund the position of a Small Business Advocate to act on behalf of small business at the policy and enforcement level;
10. extend the National Exchange of Vehicle and Driver Information System to include all motorcycles;

MTAA and its Member Associations call on state and territory governments to:

11. harmonise regulation relating to the sale of motor vehicles;
12. regulate non-ADR compliant motorcycle sales;
13. actively pursue unlicensed and unregistered individuals and businesses, especially with regards to 'backyard traders'; and
14. an increase in the limits of all small claims courts and tribunals to \$20,000.



MTAA's trusts that this submission will assist the Inquiry and Government to understand the nature of small business and result in the development of a strong and balanced Framework.

**MTAA  
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