



Motor Trades Association of Australia

Mr John Hawkins
Committee Secretary
Senate Standing Committee on Economics
PO Box 6100
Parliament House
CANBERRA ACT 2600

Dear Mr Hawkins

Thank you for the opportunity to provide a submission to the Senate Economics Committee's inquiry into the Competition and Consumer Legislation Amendment Bill 2010. I apologise for the lateness of this submission.

The Motor Trades Association of Australia (MTAA) has always maintained a strong interest in matters relating to competition law. Large numbers of retail motor traders operate under franchise agreements or other contractual arrangements and thus they have an interest in the provisions in the Trade Practices Act (soon to be the Competition and Consumer Act) concerned with unconscionable conduct. The Association also responded to the two discussion papers released by the Government in 2008 and 2009 on creeping acquisitions.

Unfortunately the time available for the preparation of submissions on this Bill has been limited and this submission does not address in detail all aspects of the Bill, but provides some broad comments on the measures contained in the Bill.

In general terms MTAA does not oppose the Bill and believes that passage of the Bill should be supported.

However the Association also believes that the measures outlined in the Bill are unlikely to have a significant effect on behaviour in the market.

As is noted in the Explanatory Memorandum some of the amendments to the merger provisions are matters that are currently included in the ACCC's Merger Guidelines and are thus matters which are already considered by the Commission in its enforcement of the Trade Practices Act. It is acknowledged though that the Guidelines do not have the force of law. While the removal of the word 'substantial' from section 50(6) may clarify the operation of section 50 following the decision in *Australian Gas Light Company v Australian Competition and Consumer Commission*, it is not clear that it will substantially address MTAA's concerns about creeping acquisitions.

MTAA, through the Fair Trading Coalition, in response to the 2008 Government discussion paper on creeping acquisitions supported a more significant change to the Act to address concerns about

increasing market concentration. The Association supported the introduction of a new section to the Act which would state that a corporation would be prohibited from making an acquisition if it already had a substantial degree of power in a market, and the acquisition would result in any lessening (as opposed to a substantial lessening) of competition in that market.

The proposed amendment to section 50 to remove reference to 'a market' and replace it with 'any market' is welcomed by the Association and it believes that that should allow the Commission to consider all markets in which the acquirer is active in relation to any merger matter.

In relation to the amendments proposed in respect of the unconscionable conduct provisions, again the Association has no objection to them, but does not believe that they will address many of its concerns about the operation of the unconscionable conduct provisions. For small business operators one of the major difficulties is that 'unconscionable' conduct is a difficult concept to prove. The factors to be listed in the new section 22 of the Competition and Consumer Act are not of themselves determinative of a breach of the unconscionable conduct provision and the courts have found that there must be something more than 'hard bargaining' on the part of the stronger party to sustain a case of unconscionable conduct. Many businesses that operate under contractual arrangements (such as franchise agreements) are in a 'captive' situation and MTAA does not believe that the current law deals effectively with inappropriate behaviour by larger business in such circumstances.

MTAA believes, as it has previously proposed to the Committee, that business-to-business contracts should in fact be covered by unfair contracts legislation.

The Association acknowledges that the amendments are proposed to expressly clarify that the unconscionable conduct provisions apply not only to conduct during the negotiation of an agreement but also to conduct during the course of the agreement. While this is a welcome amendment to the Act, the comments above in relation to the hurdle of proving 'unconscionability' remain, in the Association's view, relevant.

I trust that these comments are of assistance to the Committee in its consideration of the Bill.

Yours sincerely

A handwritten signature in blue ink, appearing to read "Sue Scanlan".

SUE SCANLAN
Acting Executive Director

8 June 2010