

4 Misuse of market power

Abuse of power by customers, suppliers and competitors

4.1 The terms of reference for this inquiry made it quite clear the Committee was to look at business conduct issues of concern to small business generally, not just retail tenancy and franchising issues.

4.2 Difficulties small businesses had encountered in their dealings with 'big business' fell roughly into the following categories:

- lack of bargaining power able to be exercised by small trade and professional firms in their dealings with powerful corporate clients;¹
- lack of bargaining power of small businesses - especially rural producers - in their dealings with powerful buyers, especially in the context of the deregulation of previously regulated industries;²
- suppliers' discriminatory pricing and refusals to deal with small business; and
- the exercise of market power by large businesses in competition with small business.

4.3 This section of the report deals primarily with the last two points, in the context of an examination of whether section 46 of the Trade Practices Act (Misuse of Market Power) provides any protection for small business against unfair conduct by big business.

1 Royal Australian Institute of Architects, *Submission No. 46*; Australian Council of Building Design Professionals Ltd, *Submission No. 47* and Australian Institute of Valuers and Land Economists Inc., *Submission No. 142*.

2 The Committee took evidence from the Queensland Chicken Growers Association Inc on the proposed deregulation of that industry under the Competition Principles Agreement (*Submission No. 50* and *Transcript of evidence*, pp. 263-72). The growers were concerned at the lack of bargaining power they would have in their dealings with the major processors, including Inghams and Steggle. The ACCC informed the Committee that Inghams had lodged an application for authorisation of collective negotiations with South Australian chicken growers, and the ACCC had indicated its willingness to authorise such arrangements (*Submission No. 62.2*).

4.4 The Committee also received submissions about government regulation that inhibits the effective operation of small businesses,³ considered to be beyond the scope of the Fair Trading inquiry, and about unfair (subsidised) competition by government owned or funded enterprises.⁴

4.5 The overarching concern in the Fair Trading inquiry that small businesses could not afford to exercise their legal rights because of the prohibitive cost of legal action surfaced again in complaints about difficulties faced by small business in collecting outstanding debts.⁵

Price discrimination

4.6 The Committee received a series of complaints about suppliers discriminating against smaller retailers by not setting a common wholesale price.⁶ A number of submissions pointed out the major retailers could sell at retail prices lower than the wholesale prices paid by small businesses.⁷ For example, Mr Max Baldock, representing the Small Retailers Association of South Australia, pointed out the chains regularly sell slabs of Coca Cola for \$12 to \$13, whereas the wholesale price to small retailers is \$18 to \$21.⁸

4.7 Peter and Pam Person, proprietors of a Yamaha dealership in Atherton, Queensland, made a submission to the Committee on this issue on behalf of the Atherton Chamber of Commerce.⁹ The Committee received 419 letters from small businesses in Queensland supporting this submission.

3 For example, the Committee received submissions from the Chiropractors Association of Australia in relation to the containment of chiropractic in Australia (*Submission No. 24*), from the Pharmacy Guild of Australia in relation to the burden imposed on pharmacists by laws relating to out-of-date prescriptions (*Submission No. 115*), and from the NSW Bookmakers Co-operative Ltd in relation to the claimed excessive regulation of licensed bookmaking in that State (*Submission No. 36*).

4 Queensland Chamber of Commerce and Industry, *Submission No. 81*; Nursery Industry Association of Australia, *Submission No. 133* and the Australian Newsagents' Federation Ltd, *Submission No. 92*. The Committee notes that the 1995 Competition Principles Agreement and the Competition Code Agreement between the Commonwealth, State and Territory governments provides, in effect, that all government business enterprises are subject to the Trade Practices Act and are operated in accordance with the principle of competitive neutrality.

5 Rita Bently, *Submission No. 4* and Australian Canvas and Synthetic Product Association Inc, *Submission No. 84*.

6 Victorian Association of Bakers, *Submission No. 3*; H&F Educational Services, *Submission No. 6*. and K G Goodman, *Submission No. 7*.

7 Peter and Pam Person, *Submission No. 15*. Len Rathmann, WA Council of Retail Associations, *Transcript of evidence*, p. 414.

8 Max Baldock, Small Retailers Association of South Australia Inc, *Transcript of evidence*, p. 484.

9 Peter and Pam Person, *Submission No. 15*.

4.8 Mr and Mrs Person observed that price discrimination had fostered the growth and development of the major chains at the expense of small businesses:

*... [the major chains] now basically control pretty well every facet of retailing in Australia. As a result of their ability to obtain extremely keen prices from their suppliers, they, in turn, increase the cost to their smaller competitors, simply because the same suppliers have to charge the smaller competitors a higher cost price, to compensate themselves for the poor margins they have received from their dealings with the majors. Put very simply - **what the suppliers lose on the swings they have to pick up on the roundabout.**¹⁰*

4.9 Mr and Mrs Person pointed out the major retailers also obtain favourable trading terms from suppliers. It was suggested to the Committee at a public hearing that the chains are earning so much from the suppliers in fees for store promotions, shelf space, gondola ends and so on that they do not have to sell products at all to make a profit.¹¹

4.10 The Australian Competition and Consumer Commission (ACCC), addressing these matters, submitted:

*Many price differences between commercial buyers reflect economies of scale and cost efficiencies large buyers are able to provide. ... complaints about price discrimination often are not about price discrimination but about price differences. In that sense they are procompetitive and are beneficial to consumers because in a competitive market discounted prices are passed on to consumers.*¹²

4.11 Mr and Mrs Person (and the letters in support of their submission) called for a strengthening of the Trade Practices Act and/or the setting up of a new regulatory authority to investigate and control the buying price differentials between small and large retailers.¹³

10 Peter and Pam Person, *Submission No. 15*.

11 Max Baldock, representing the Small Retailers Association of South Australia Inc, *Transcript of evidence*, pp. 484-85.

12 ACCC, *Submission No. 62.2*.

13 Peter and Pam Person, *Submission No. 15*.

4.12 Section 49 of the Trade Practices Act (Price Discrimination) was repealed in 1995, following the National Competition Policy Review chaired by Professor Fred Hilmer.¹⁴

4.13 Prior to the repeal of Section 49, it had been unlawful for a supplier to discriminate in the price charged to purchasers of goods of like grade and quality if the discrimination was of such magnitude, or of such a recurring character, that it was likely to have the effect of substantially lessening competition. There were certain statutory defences - for example, if the price discrimination was cost-justified, or if the supplier had acted in good faith to meet competition.

4.14 The Small Business Coalition had submitted to the Hilmer review that section 49 of the Trade Practices Act should be amended to prohibit price discrimination that disadvantaged individual businesses, without the requirement to show damage to competition in a market.¹⁵ However, the Hilmer Committee was not persuaded, concluding :

... price discrimination generally enhances economic efficiency, except in cases which may be dealt with by s.45 (anti-competitive agreements) or s.46 (misuse of market power). To the extent that s.49 has had any effect it seems to have been to diminish price competition. The Committee does not consider that competition policy should be distorted to provide special protection to any interest group, including small business, particularly where this is potentially to the detriment of the welfare of the community as a whole.¹⁶

4.15 The Trade Practices Commission (now the ACCC) said it would investigate instances of price discrimination as potential breaches of section 46 (Misuse of Market Power) where:

- powerful suppliers offer special financial rebates or discounts in return for securing all, or an increased proportion of customers' business; or
- powerful buyers induce price discrimination directed at damaging their competitors.¹⁷

14 National Competition Policy Review, *National Competition Policy: Report of the Independent Committee of Inquiry* (AGPS, August 1993), Recommendation 4.2. The removal of section 49 from the Act had earlier been recommended by the Swanson Committee (1976) and the Blunt Committee (1979); further, the then Trade Practices Commission had recommended to the House of Representatives Standing Committee on Legal and Constitutional Affairs (1989) that section 46 of the Act should be reworked to include price discrimination.

15 *National Competition Policy: Report of the Independent Committee of Inquiry*, p. 77.

16 *National Competition Policy: Report of the Independent Committee of Inquiry*, pp. 79-80.

17 Trade Practices Commission, *Section 46 of the Trade Practices Act 1974: Misuse of Market Power* (February 1990), pp. 47-48.

4.16 It appears unlikely that section 46 will provide a remedy for all the price discrimination problems faced by small businesses in Australia. In particular, it will not address the issue of the major retailing chains being able to obtain discounts and trading terms for which small businesses are not eligible.

4.17 The Committee considers the repeal of section 49 resulted in a marginal weakening of protection for small business against price discrimination. The onus is now on businesses facing price discrimination to prove that the conduct has an anticompetitive purpose, not just an anticompetitive effect. However, the Committee also notes section 49 is not considered to have proven a particularly effective protection against price discrimination anyhow.¹⁸

4.18 The Committee does not believe it would be appropriate to re-introduce the price discrimination provision. The Committee considers price discrimination against small business can best be dealt with under the ‘unfair conduct’ amendments to Part IVA of the Trade Practices Act proposed in chapter 6 of this report.

Predatory pricing

4.19 The Committee heard complaints of predatory pricing by Woolworths, Coles and Franklins against their small business competitors.¹⁹

4.20 Mr Bill Roberts, Vice-President of the Hunter Small Business Persons Association under the umbrella of the Council of Small Business Organisations of Australia (COSBOA), gave evidence that the major chains were increasing their trade by eliminating small businesses:

*Where can supermarkets increase their trade? Can more be eaten? No, they have to get any increase off small business - and they are going to get it off small business. The way they will do that is that they will stand outside of a small business, watch the product and then lower the price of that product until the retailer goes out of business. They do this all the time. This is their method. It is not: let's help each other; it is: that's tough.*²⁰

4.21 The Small Business Deregulation Taskforce also received complaints that there was inadequate protection for small business against predatory pricing and that the present provisions in the Trade Practices Act had facilitated the growth of the large retail chains.²¹

4.22 This issue is illustrated in the case study in Box 4.1.

18 *National Competition Policy: Report of the Independent Committee of Inquiry*, p. 80.

19 Port Stephens Sand Company, *Submission No. 66*, Australian Newsagents' Federation, *Submission No. 92* and Joseph Natoli, Queensland Fruit and Vegetable Traders' Association, *Transcript of evidence*, p. 278.

20 Bill Roberts, appearing with COSBOA, *Transcript of evidence*, p. 552.

21 Charlie Bell, Chairman, Small Business Deregulation Taskforce, *Submission No. 52*.

Box 4.1 Case study - fruit and vegetable distribution in Queensland

CASE STUDY - FRUIT AND VEGETABLE DISTRIBUTION

The following case study is summarised from evidence given by Mr Joseph Natoli, representing the Queensland Fruit and Vegetable Traders' Association, in Submission No. 65 and at the public hearing in Brisbane on 22 October 1996.

Mr Natoli's family has been in the fruit retailing industry for seventy-one years, most recently operating within shopping centres in Maroochydore and Sunshine Plaza.

The Maroochydore store traded strongly and supported four families in partnership and 30 employees. Then Franklins transformed its grocery store into a 'Big Fresh' store. In the first week of opening, Big Fresh sold extra-large eggs at 33 cents per dozen. Mr Natoli was left with 6 000 dozen eggs unsold, for which he had paid 80 cents per dozen. Big Fresh managers inspected Mr Natoli's store daily, returning to undercut his prices. Mr Natoli became involved in a price war with Big Fresh:

On one particular occasion, Big Fresh advertised sultana grapes at \$1.99 a kilo. By chance, we had advertised sultana grapes at \$1.79 a kilo. They dropped their price ... we dropped ours. Within two hours, Big Fresh dropped their price to 49 cents a kilo. We reduced our price to 99 cents a kilo, but raised it to \$1.29 per kilo, our cost price. They later raised their price to 69 cents and kept it there for two days. Their manager told us they kept the price low to punish us and teach us a lesson for taking them on.

Eight months after the opening of Big Fresh, the Natolis fell behind in their rent and were locked out of the store.

Along with other fruit and vegetable retailers in Queensland and northern New South Wales, Mr Natoli obtains his supplies from the markets in Rocklea, Brisbane. The markets have traditionally operated on the basis of sale to the highest bidders. However, over the last decade, wholesale agents - with the agreement of growers - have negotiated 'program specials' with the major supermarket chains, whereby supply at an agreed price is set weeks or months in advance. In times of short supply, other buyers are caught up in a bidding frenzy to secure any product not committed to the major chains.

Mr Natoli recounted one incident where he had entered a section of the market to obtain a price on beans.

The salesman was on the phone, and I saw the price sheet for [a major supermarket chain] ... 700 cases of beans for \$1.20 per kilo with the sale price in the stores to be \$1.49. Other small buyers and I were forced to pay \$2.00 per kilo ... The next day the price [rose] to \$2.50 per kilo.

Even without 'program specials', the major chains have preferential access to the markets. The Brisbane Market Authority restricts entry to weekday mornings, from 6 am on Mondays and 7 am on other days. However, according to Mr Natoli, trucks carrying produce for the supermarket chains exit during the early hours of the morning before small buyers are able to enter, and Sunday is one of the busiest days at the markets because agents are servicing the chain stores.

4.23 The Queensland Fruit and Vegetable Traders' Association and the Micro Business Consultative Group recommended there should be specific legislative protection against predatory pricing, as in France, where it is illegal to sell below cost price.²²

4.24 Alternatively, it was suggested the chains should be required to sell at the same price in all supermarkets in a particular region (reflecting economies of scale in purchasing and distribution) rather than charging higher prices in catchment areas where they have no competition to subsidise heavily discounted prices in shopping centres where they face vigorous competition from independent retailers.²³

4.25 Predatory pricing is encompassed by section 46 of the Trade Practices Act, to the extent it is engaged in for the purpose of eliminating competitors or deterring potential entrants to a market.

4.26 The ACCC has indicated it will examine complaints alleging price predation for any infringement of section 46 even when pricing is not below some measure of cost - bypassing the economic debate on whether prices should be set to cover average total costs or just variable costs.²⁴

4.27 The factors that would be pertinent in establishing if a powerful company is engaging in predatory pricing in breach of section 46 include the following:

- whether or not the powerful company is cross-subsidising discounting in one market with profits from another area of activities;
- whether or not price cuts are selective in the sense that some buyers obtain lower prices than others;
- whether or not the powerful company will be able to recoup profits lost in discounting once competitors have been eliminated or damaged; and
- whether or not there are rational economic reasons for the price cutting (such as seasonal pricing, pricing aimed at increasing utilisation of plant capacity, promotions or disposal of superseded stock).

4.28 The Committee does not consider there is any need for further legislative protection against predatory pricing.

4.29 The Committee considers below possible amendments to the Trade Practices Act to give the ACCC the power to take representative actions in section 46 cases.

22 *Exhibit No. 34.* Attached to the submission of Joseph Natoli, Queensland Fruit and Vegetable Traders' Association, *Submission No. 65.* Soula George, Micro Business Consultative Group, *Transcript of evidence*, p. 307

23 Joseph Natoli, Queensland Fruit and Vegetable Traders' Association, *Submission No. 65.*

24 Trade Practices Commission, *Section 46 of the Trade Practices Act 1974: Misuse of Market Power* (February 1990), pp. 43-44.

Exercise of market power

4.30 The Committee also heard complaints of refusals to deal.²⁵ Problems obtaining supply were experienced by small independent distributors in their dealings with vertically integrated big businesses. Examples of this problem were given by independent cinemas and independent rooftile distributors.

Film distribution

4.31 The Committee took evidence on the public record and in confidence on alleged unfair conduct in the distribution of 'blockbuster' films for exhibition in cinemas.²⁶

4.32 The cinema industry is highly vertically integrated: for example, Roadshow Film Distributors (reported to have had a 55% share of the first release film market in 1995) and Birch, Carroll & Coyne (the largest cinema chain in Australia) are both part of the Greater Union group of companies.²⁷ It is claimed that the integrated companies afford preferential supply to their own cinemas, with the result that independent cinemas cannot obtain 'blockbuster' or first release films until the integrated cinemas have all but exhausted the potential audience. Clearly, this conduct threatens the viability of independent cinemas.

4.33 Independent cinemas around Australia sought to address the problem through the Entertainment Industry Employers Association (EIEA). The EIEA drafted a proposed Memorandum of Understanding, that would - if agreed - have committed distributors and independent exhibitors to a dispute resolution mechanism. The EIEA also proposed that an industry code of conduct be developed to improve working relations between film distributors and exhibitors. However, these initiatives were not favourably received by the distributors.²⁸

4.34 The EIEA drew the Committee's attention to a recent report by the Mergers and Monopolies Commission (UK) on film distribution in the United Kingdom. The Commission had recommended, amongst other things:

- that the Office of Fair Trading monitor the conduct of vertically integrated distributors/exhibitors;²⁹ and
- that an independent arbitration panel be established to consider exhibitors' complaints about refusals by distributors to supply films.³⁰

25 The Horological Guild of Australasia noted that many watch manufacturers had restricted supply of parts to their brand agents or importers, *Submission No. 27*.

26 J W Madge, *Submission No. 64* and Mt Vic Flicks, *Submission No. 129*.

27 J W Madge, *Submission No. 64*.

28 EIEA, *Submission No. 149*.

29 In Australia, the ACCC is responsible for the types of functions performed by the Office of Fair Trading in the United Kingdom.

30 *Exhibit No. 138*.

4.35 Independent exhibitors in Australia have taken their complaints to the ACCC, alleging contraventions of section 46. The ACCC advised the Committee :

In past investigations the Commission has been unable to obtain sufficient evidence to establish that the purpose in the major film distributors supply of films to independent cinemas on less favourable terms was to prevent or deter them from competing with the integrated cinemas. Unless evidence becomes available of such a purpose the Commission will find it difficult to establish a breach of section 46.³¹

4.36 During the inquiry, the ACCC employed an industry consultant to examine and report on competition issues in film distribution in Australia. The ACCC expected to receive the report in May 1997.³² At the time of writing, the report had not been released publicly nor had the ACCC decided what action, if any, it would take in the cinema industry. However, the ACCC considered there could be merit in adopting a similar approach to that recommended by the UK Mergers and Monopolies Commission for an independent arbitration panel to address problems of access to supply.³³

Rooftiling industry

4.37 The Committee took evidence on the public record and in confidence on alleged unfair conduct in the rooftiling industry.

4.38 As in the case of film distribution, the underlying problem is the vertical integration of the major suppliers of rooftiles, who also operate their own distribution networks. The Committee was told Monier, Boral and Nubrik had wound back dealings with the independent distributors and moved to direct distribution. Until 1992, the manufacturers had only held national accounts or large volume accounts, such as the account for Jennings, leaving smaller builders to the independent distributors.

31 ACCC, *Submission No. 62.2.*

32 ACCC, *Submission No. 62.2.*

33 ACCC, *Submission No. 62.2.*

4.39 The business conduct issues raised with the Fair Trading inquiry concerned the tactics by which the manufacturers had achieved the restructuring of the industry. It was alleged the manufacturers had given verbal assurances of continued supply of rooftiles that were never honoured,³⁴ and distributors were lured into exclusive supply arrangements with particular manufacturers, only to be refused supply at the manufacturer's discretion.³⁵ The Committee was disturbed to hear it had not been customary in the rooftiling industry to negotiate written distribution contracts, making distributors vulnerable to manufacturers' restructuring plans.³⁶

4.40 The Committee sought the advice of the ACCC on the issues raised. The ACCC advised that its Melbourne office had investigated the complaints raised in evidence to the Fair Trading inquiry and had concluded there was insufficient evidence of a breach of the Trade Practices Act. However, the ACCC pointed out it had previously taken successful action against the manufacturers for a price fixing arrangement and boycott in South Australia.³⁷

Retailing

4.41 The Committee also took evidence that the major retailing chains negotiate with shopping centre managers to require that direct competitors be excluded from shopping centres. For example:

- Mr David Roskell, a merchant from the Hunter region of NSW, submitted that major supermarkets are demanding that developers exclude independent butchers, delicatessens and fruit and vegetable retailers from new centres, citing Glendale in Lake Macquarie as an example;³⁸ and
- Ms Linda Hewitt, a former toy store proprietor, gave evidence that she was kicked out of Macarthur Square, Campbelltown NSW, following an agreement between Lend Lease and Coles Myer that World 4 Kids would face no direct competitor on entry to that centre.³⁹

4.42 The Committee considers the ACCC should investigate any claims of exclusionary conduct by the major retail chains in Australia in view of the high level of concentration in this sector.

34 Brian Crews, *Transcript of evidence*, p. 170.

35 Neal Slattery, *Transcript of evidence*, pp. 173-74.

36 Brian Crews, *Transcript of evidence*, p. 172.

37 ACCC, *Submission No. 62.2*.

38 David Roskell, *Submission No. 141.1*.

39 Linda Hewitt, *Submission No. 114*.

Legislative protection against the misuse of market power

Section 46 of the Trade Practices Act

4.43 Section 46 of the Trade Practices Act (Misuse of Market Power) provides that a corporation which has a substantial degree of power in a market should not take advantage of that power for the purpose of:

- eliminating a competitor (in the market in which it is powerful or any other market);
- preventing entry to any market; or
- deterring or preventing competitive conduct in any market.

4.44 The types of conduct that might be covered by section 46 include:

- predatory pricing (whereby a powerful firm - with 'deep pockets' engages in discounting with the intention of damaging a competitor's viability and thus driving that competitor out of the market);
- price discrimination;
- refusals to deal because of selective distribution arrangements;
- withdrawal of supply to distributors that stock competing brands;
- refusal to supply or allow reasonable access to spare parts; and
- price or supply 'squeezes' by vertically integrated firms, whereby products are withheld from independent distributors or else supplied at a cost that does not permit the independent distributors to be competitive in the market.⁴⁰

4.45 The Committee heard complaints about all the above forms of conduct during the Fair Trading inquiry.

4.46 Section 46 of the Trade Practices Act does not apply to vigorously competitive conduct by powerful corporations that may, in the normal course of business, damage other less powerful firms. The types of conduct listed above will only be in breach of the Act:

- if the conduct is engaged in by a corporation with a sufficient degree of market power;
- if the corporation is taking advantage of its market power and could not engage in the same form of conduct in the absence of market power; and
- if the conduct has an unlawful purpose, that is eliminating a competitor or potential competitor and/or deterring competitive conduct.⁴¹

40 Trade Practices Commission, *Section 46 of the Trade Practices Act 1974: Misuse of Market Power* (February 1990), pp. 33-50.

41 Trade Practices Commission, *Section 46 of the Trade Practices Act 1974: Misuse of Market Power* (February 1990), pp. 43-44.

4.47 Many alleged breaches of section 46 fail for want of evidence that the powerful company has engaged in seemingly unfair conduct with the unlawful purpose of eliminating competitors or damaging competition.

4.48 The Deputy Chairman of the ACCC, Mr Allan Asher, advised the Committee that the standard of evidence required by the Courts to prove unlawful purpose is high.⁴²

Options for strengthening section 46

4.49 The Committee noted there have been remarkably few successful section 46 cases heard in the Courts since 1986 - when the threshold was lowered to apply to powerful corporations and not just those 'controlling' a market.

4.50 Two options were suggested for giving section 46 'more bite' - one proposal involves strengthening the law itself and the other proposal would enhance enforcement of the section. Each option is discussed below.

'Effect' test vs the 'purpose' test

4.51 It was suggested to the Fair Trading inquiry that section 46 should be amended to remove the requirement to prove unlawful purpose, so that conduct by a powerful corporation would be unlawful if it had the effect of eliminating competitors or deterring competitive conduct.⁴³

4.52 The Hilmer inquiry reported that a number of parties (including the Trade Practices Commission, its immediately former Chairman and an eminent trade practices counsel) had proposed the extension of the prohibition to conduct with adverse effects on competition. This had been opposed by others - including the Industry Commission and the Treasury. Other proposed enhancements to section 46 included a rebuttable presumption of intent in certain circumstances.⁴⁴

4.53 The Hilmer inquiry concluded that section 46, as it stood then and still stands, struck a fair balance between misuse of market power and aggressive competitive behaviour.⁴⁵

Representative actions

4.54 The ACCC submitted to the Committee that it should have the power to take representative actions for breaches of the restrictive trade practices provisions of the Trade Practices Act, including section 46, notwithstanding there is already provision for seven or more businesses to take 'group proceedings' in the Federal Court.

42 Allan Asher, ACCC, *Transcript of evidence*, p. 638.

43 Parlco Pty Ltd, *Submission No. 152.1*

44 *National Competition Policy: Report of the Independent Committee of Inquiry*, p. 68.

45 *National Competition Policy: Report of the Independent Committee of Inquiry*, pp. 70-71.

4.55 This proposal would not change the law on restrictive trade practices but, rather, would marginally enhance enforcement of the law.

4.56 For example, if the ACCC's proposal were to be adopted, the ACCC would be empowered to take action on behalf of a number of small businesses hurt by a corporation's misuse of market power.

4.57 Mr Allan Asher, Deputy Chairman of the ACCC, explained to the Committee:

The commission under section 46 is not entitled to seek damages for small business. We are, under the unconscionable conduct provisions, but ... those are far narrower even than section 46. So the commission could be far more helpful to small business if the law was changed to provide that we could take representative actions to recover damages for business complainants other than under unconscionable conduct.

Just consider this, even if small businesses were to give us evidence that showed a clear breach of section 46 or any other provision of Part IV, all we could do is take an enforcement action in the court and possibly get penalties or up to \$10 million per offence. But that money does not and cannot go to the complainant. It goes to the Commonwealth and that small business person would then have to take their own action to gain damages. Under the statute we really are not in a position to help as much as many people assume we are.⁴⁶

4.58 The Committee supports the ACCC's proposal as one that will marginally improve small business access to justice.

4.59 Recommendation 4.1

The Committee recommends that the *Trade Practices Act 1974* be amended to give the Australian Competition and Consumer Commission the power to take representative actions under Part IV of the Trade Practices Act which deals with various forms of restrictive trade practices, including the misuse of market power.

46 Allan Asher, ACCC, *Transcript of evidence*, p. 636.

ACCC's litigation profile

4.60 The ACCC cautioned that, given the resources involved in investigating and litigating breaches of the restrictive trade practices provisions of the Act, it would be unrealistic for small businesses to expect a dramatic increase in the number of cases taken to Court, even in light of the above recommendation on representative actions.

4.61 The Committee was concerned at statements by the ACCC and the Treasury that the ACCC was not a legal aid institution for small businesses.⁴⁷ The Committee considers the ACCC should be far more helpful to small businesses by taking a more aggressive approach to investigating and litigating small business complaints, such as those outlined earlier in this chapter, especially in relation to the retail sector.

4.62 The Committee does not consider it acceptable to use small businesses as cannon fodder in the marketplace - providing rounds of competition to the major retailers before being eliminated to make way for new victims.

4.63 Yet this is what appears to be happening. As one witness put it:

*I believe it is only through a lack of understanding that people outside our industry are in support of deregulation and free competition. Deregulation does not improve competition. In the long term, it actually reduces it by allowing big companies to use their power games, through market dominance, to take small business' market share. It is all about transferring market share from the small operator to the big chain stores. **Small business is not afraid of fair competition.** ... We must all be aware by now that **small business does not have the resources to withstand an onslaught of predatory practices or commercial thuggery, nor access to legal counsel.**⁴⁸ [emphasis added]*

4.64 The Committee notes that Australia has one of the most highly concentrated retail sectors in the world, with the three major grocery retailers accounting for roughly three-quarters of sales. By comparison, the Committee noted advice that:

- United States antitrust laws limit the market shares of the three largest food retailers to 17% of the market;⁴⁹
- the top ten retailers in the United States have some 12.1% of the retail market;⁵⁰ and
- the 'Big Three' food retailers in the United Kingdom (Sainsbury, Tesco and Safeway) share 28% of the market.⁵¹

47 ACCC, *Submission No. 62* and the Treasury *Submission No. 168*.

48 Soula George, Micro Business Consultative Group, *Transcript of evidence*, pp. 300-01.

49 David Roskell, *Submission No. 141.1*. Bill Roberts, COSBOA, *Transcript of evidence*, p. 552.

50 COSBOA, *Submission No. 105*.

4.65 The major retailers in Australia wield market power to the detriment of small retailers. This is evident from the stories appearing earlier in this chapter. Section 46 of the Trade Practices Act (Misuse of Market Power) already gives the ACCC the power to take action against unlawful use of market power. The Committee urges the ACCC to exercise this power.

4.66 Recommendation 4.2

The Committee recommends that the Australian Competition and Consumer Commission make investigation of complaints, and enforcement of the law, in relation to the misuse of market power in the retail sector a top priority in light of the high degree of concentration in that sector and the disturbing evidence submitted to the Fair Trading inquiry.

Harsh or unconscionable conduct

4.67 The Committee considers section 46 of the Trade Practices Act does not address many of the problems small businesses encounter in dealing with powerful suppliers and competitors. The Committee accepts it is not appropriate to attempt to protect small businesses through the competition provisions of the Trade Practices Act - which are designed to engender strong competition.

4.68 Nonetheless, there needs to be a recognition the Australian commercial environment is no longer conducive to fair competition because of high levels of concentration in many industries - including retailing. It is naive to expect small businesses to survive unrestrained 'competition' without some form of protection from the worst excesses of the exercise of economic power. This is not a reflection on small business acumen but rather a recognition of the implications of the highly concentrated ownership of 'big business' in Australia.

4.69 The ACCC has argued that section 46 was not designed to control harsh, inequitable or unconscionable business behaviour, and that - if this is the intention of the legislature - such behaviour could be controlled under the unconscionability provisions in Part IVA of the Trade Practices Act.⁵²

4.70 The Committee agrees with this approach and deals with the issue of strengthening the unconscionable conduct provisions of the Trade Practices Act in Chapter 6 of this report.

51 COSBOA, *Submission No. 105*.

52 Trade Practices Commission, *Section 46 of the Trade Practices Act 1974: Misuse of Market Power* (February 1990), pp. 6-7.

