The Parliament of the Commonwealth of Australia

Senate Legal and Constitutional References Committee

Inquiry into s. 46 and s. 50 of the Trade Practices Act 1974

May 2002

ISBN 0 642 71171 2

This document was produced from camera-ready copy prepared by the Senate Legal and Constitutional Legislation Committee, and printed by the Senate Printing Unit, Department of the Senate, Parliament House, Canberra.

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CHAPTER 1

INTRODUCTION

Referral of the Inquiry

1.1 The Trade Practices Amendment Bill (No. 1) 2000 was introduced into the House of Representatives on 29 June 2000[1] and into the Senate on 29 November 2000.[2] Amendments to the Bill suggested by the Labor Party and the Australian Democrats were not accepted by the Government. During the Committee stage of debate on the Bill in the Senate, Senator Murray foreshadowed his intention to refer his amendments to a Senate committee for further consideration.[3] They were referred to the Senate Legal and Constitutional References Committee on 8 August 2001,[4] for report by the first sitting day in April 2002.

1.2 On 8 October 2001, the House of Representatives was dissolved for the federal election. On that date, business of the House, including the Bill, lapsed. However, business of the Senate continued, notwithstanding the dissolution of the House of Representatives. That is, all references to committees proceeded, subject to any other orders of the Senate in relation to specific items of business.

1.3 On 11 February 2002, the eve of the 40th Parliament, Committee business of the 39th Parliament ceased. Following the opening of the 40th Parliament on 12 February 2002, the Committee agreed to recommend to the Senate that its Inquiry into the Trade Practices Amendment Bill (No. 1) 2000 be re-referred to the Committee. On 11 March 2002[5] the Senate referred the Bill to the Committee, with a reporting date of 14 May 2002.

Background

Genesis of the Inquiry

1.4 This Inquiry follows directly from the findings of the Joint Select Committee on the Retailing Sector which, in 1999, inquired into the growth of large supermarket

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1 House of Representatives, *Official Hansard,* 29 June 2000, p. 18578 per the Minister for Financial Services and Regulation, the Honourable Joe Hockey, MP

2 Senate, *Official Hansard*, 29 November 2000, p. 20141

3 Senate, *Official Hansard*, 8 March 2001, p. 22792

4 Senate, *Official Hansard*, 8 August 2001, p. 25809

5 Journals of the Senate, *No. 4*, 11 March, 2002

chains and their impact on small and independent retailers. The Committee presented its findings in August 1999.[6]

1.5 Submissions to that inquiry from small and independent retailers and wholesalers, mainly but not exclusively grocery retailers and wholesalers, claimed that the growth of the major chains has resulted in a decline in profitability and market share among the small retailers. They proposed changes to the *Trade Practices Act 1974* which would provide them with some protection from the most damaging effects of unrestricted competition from dominant players in the market.

1.6 The Joint Committee made ten recommendations designed to alleviate some of the concerns of the small retailers. Many of these recommendations had implications beyond the retailing sector. Some were subsequently adopted by the Government, such as the establishment of an independent Retailing Industry Ombudsman and a Retail Code of Conduct. Others were incorporated into the Trade Practices Amendment Bill (No. 1) 2000.[7]

1.7 Some significant, more general, recommendations of the Joint Committee were not adopted. One of these, recommendation 10, forms the basis of the two amendments referred to the Senate Legal and Constitutional References Committee for its consideration. Similar recommendations (numbers 5 and 6) were also included in Senator Murray's Supplementary Remarks to the Joint Committee Report.

Conduct of the inquiry

1.8 Following referral of the amendments to the Committee on 8 August 2001 the Committee wrote to a range of interested individuals and organisations drawing their attention to the Committee's Inquiry and seeking submissions. It placed advertisements in the *Australian Financial Review* on 3 September 2001 and in the *Weekend Australian* on 1 September 2001.

1.9 The Committee has received 28 submissions. These are listed at Appendix 1.

1.10 The Committee held a public hearing in Melbourne on 17 April 2002. A list of witnesses is at Appendix 2.

1.11 The Committee is aware that a number of reviews are currently being undertaken into various aspects of the *Trade Practices Act 1974*. The findings of at least one of these[8] can be expected to impact on proposed s. 46(8) and proposed s.

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6 In the report entitled *Fair Market or Market Failure? A review of Australia's retailing sector.* Report by the Joint Select Committee on the Retailing Sector, Canberra, August 1999

7 For example, new s. 87(1A), which allows the Australian Competition and Consumer Commission to undertake representative actions and to seek damages on behalf of third parties for contraventions of Part IV of the Trade Practices Act.

8 Review of the Competition Provisions of the Trade Practices Act 1974, to be chaired by Sir Daryl Dawson, AC KBE CB and to report in November 2002.

50AA. An appeal to the High Court in *Boral's case*,[9] set for hearing on 21 May 2002, can also be expected to influence future interpretations of s. 46.

1.12 Details of the other reviews are set out in Appendix 3.

Notes on References

1.13 References to submissions in this Report are to individual submissions as received by the Committee, and not to a bound volume. References to the Hansard transcript are to the proof Hansard. Page numbers vary between the proof and the official Hansard transcript.

9 Boral Masonry Ltd is appealing to the High Court [M 27/2001] against a decision of the Full Bench of the Federal Court (001) FCA 30 which found it guilty of predatory pricing.

CHAPTER 2

THE BROADER CONTEXT

2.1 It is clear from evidence received by the Committee and from community debate on the *Trade Practices Act 1974* more generally that there is a wide divergence of views on the Act. Its underlying objectives and its effectiveness in achieving them are both disputed.

The competition objectives of the *Trade Practices Act 1974*

2.2 In part the disagreements stem from the inherent contradictions within the Act itself. Its objectives are twofold. Firstly, it is intended to foster competition and fair trading. It does this by prohibiting anti-competitive trading practices including anti-competitive mergers (s. 50 and s. 50A), misuse of market power (s. 46), anti-competitive agreements (s. 45), exclusive dealing (s. 47) and resale price maintenance (s. 96-100). The Act also prohibits unconscionable conduct by corporations or individuals (Part IVA) and sets out industry codes of conduct (Part IVB). The competition provisions of the Act are designed to protect the **process** rather than individual companies.

2.3 Part IV of the *Trade Practices Act 1974* sets out the anti-competitive conduct which attracts penalties under the Act. These penalties are set out in Part VI. Anti - competitive conduct may be permitted in cases in which the public benefit outweighs the anti-competitive effect of the conduct. In these circumstances corporations must apply to the Australian Competition and Consumer Commission (ACCC) for authorisation of their anti-competitive conduct. The authorisation process is set out in Part VII of the Act. No public interest test is available in cases of misuse of market power.

2.4 Evidence to the Committee and opinion in the wider community, while generally supportive of the need to promote competition, is divided about the limitations to be placed upon it. Some see enhanced competition as necessary to Australia's economic survival, especially in an increasingly globalised economy.[1] They would prefer to see existing restrictions on competitive behaviour removed, or at least reduced (for example by a weakening of the current merger test).[2]

2.5 The rationale behind Part IV is that competition is of itself desirable and should be fostered and promoted. Competition is said to encourage efficient and enterprising operators and to discourage inefficient ones, thus benefiting the economy

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1 See, for example, *Submission 25*, Australian Chamber of Commerce and Industry, pp. 5-6 and *Submission 13*, Woolworths Ltd, p. 2

2 See, for example, "Time to repeal merger rules," Ron Gilbert, *Canberra Times*, 20 January 2001

in general and consumers in particular through lower prices and greater responsiveness to consumer demands. Competition assists efficient companies to grow to a size which enables them to compete successfully in global markets. It is therefore essential to Australia's economic survival. The Part IV provisions of the Act make a significant contribution to this process.

2.6 This view was expressed by Merkel J. in a recent court case relating to s. 46.

> The objective of s 46(1) is the protection, advancement and promotion of a competitive environment and competitive conduct on the assumption that competition protects the interests of consumers and is in the public interest…[3]

2.7 Some proponents of this view point out however that, while the objective of competition law is to promote a competitive environment rather than to protect individual firms from failure, predatory pricing, which is central to the concerns addressed by the proposed amendment to s. 46, itself distorts the competitive environment.[4] For this reason it is prohibited under s. 46 of the Act.

2.8 Others believe that the claims made for the benefits of unrestricted competition have been greatly exaggerated and that no convincing case has been made for this position. While acknowledging the benefits for some, they point to the detrimental consequences for others.[5] People holding this view also disagree that there is any necessary link between dominance in the domestic market and export success. On the contrary, they consider that domestic rivalry is a more significant contributor to such success because of its role in encouraging efficiency and innovation.[6] In their view it would be better to err on the side of more rather than fewer restrictions on competitive behaviour.

2.9 These general views are reflected in evidence to the Committee on the proposed amendments. Those favouring unrestricted competition generally oppose the amendments, which they see as an additional brake on competitive conduct, while those concerned about the effects of unrestricted competition welcome them as an additional constraint to mitigate some of the adverse effects of competition. Many of the latter group however do not believe the amendments go far enough, [7]for reasons noted in the following Chapter.

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3 *Robert Hicks Pty Ltd* (t/a Auto Fashions Australia) v. *Melway Publishing Pty Ltd* (1999) 42.512

4 See, for example, *Transcript of evidence,* National Association of Retail Grocers of Australia, p. 29 and *Submission 12*, Motor Trades Association of Australia, p. 2 as well as "Restrictive Trade Practices," Stephen Corones, *Australian Business Law Review*, vol 28, p. 68

5 See, for example, *Submission 9*, Vegetable Council of the Tasmanian Farmers and Graziers Association, p. 1

6 See, for example, *Submission 19*, Australian Newsagents' Federation Ltd, p. 19

7 See, for example, *Submission 6,* Ausveg, p. 2 and *Submission 11*, Wimmera Region, Victorian Farmers Federation, p. 2

2.10 There is a wide divergence of opinion also on the circumstances in which a public interest test should apply. As noted in Chapter 3, these disagreements have also surfaced in respect of the proposed s. 50AA, which does not include a public interest test, unlike other provisions of s. 50.

The consumer protection objectives of the *Trade Practices Act 1974*

2.11 The second objective of the *Trade Practices Act 1974* is to protect consumers. It does this by setting out, in part V, the practices which it considers will harm consumers and which attract penalties under the Act. The Part V provisions are wide ranging, covering such practices as misleading or deceptive conduct, misrepresentation, harassment and coercion, product safety and information, and consumer warranties. The manufacture or import of defective goods is prohibited in Part VA. Remedies for offences against consumers are set out in Parts V and VA.

2.12 There is little disagreement on the need to protect consumers. Differences emerge at the point at which the need to promote competition is seen to conflict with the need to protect consumers.

2.13 Such conflicts were not considered a major issue at the time of the Act's implementation in 1974. It was thought then that competition and consumer issues were different sides of the same coin. True competition, it was thought, would give consumers choice. In turn, consumers would ensure that corporations acted within the constraints placed on them in the legislation.

2.14 Developments since 1974 have undermined this approach. On the one hand, the rapid expansion of the global economy has required companies to grow and brought them up against the s. 50 merger restrictions. At the same time, complex developments such as advances in telecommunications have made it virtually impossible for ordinary consumers to keep themselves fully informed and so their need for regulatory authority backing has increased rather than decreased over time.

2.15 One body of opinion argues that the nature of unrestricted competition is such that the less competitive organisations must always lose, with consequent detriments to them and to those associated with them, such as their employees and their suppliers. But the consumer will benefit when the most efficient organisation triumphs because its greater efficiency will flow through to consumers in the form of cheaper prices.[8] Therefore, there is ultimately no conflict between the promotion of competition and the protection of consumers and any apparent short term conflict should be resolved by strict application of the anti-competitive provisions of the Act.

2.16 Others disagree with this interpretation. They suggest that while unbridled competition may benefit consumers in the short term, while corporations are battling

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8 See, for example, "Misuse of Market Power, Mergers and Other Rules," Independent Committee of Inquiry into National Competition Policy (Hilmer) 1993, pp. 61-64

to gain market dominance through price cutting and increased product range and services etc, these benefits do not last. Once a company has established market domination, consumers and suppliers are at its mercy with respect to prices, choice, availability and service.[9] They may also be 'milked' to subsidise the company's international efforts. Therefore, in any conflict between the need to promote competitive behaviour and the need to protect consumers, one should be cognisant of the long term as well as the short term effects of unregulated competition upon consumers.

2.17 Both of these points of view are reflected in evidence to the Committee on the proposed amendments.

Does the *Trade Practices Act 1974* achieve its objectives?

2.18 Given the divergence of opinion on the relative importance of the two major objectives of the *Trade Practices Act 1974* it is hardly surprising that differences are also evident in assessments of the extent of the Act's success in advancing these objectives. These differences were evident in discussions on the two proposed amendments.

2.19 It is clear from evidence to the Committee as well as from broader academic and community comment that attempts to ascertain both the extent of anti-competitive conduct under the Act and the success of attempts to counter it are hampered by lack of consensus on the meaning of various key phrases. These include lack of agreement on what constitutes 'market power', which in turn depends on the definition of 'market share', what constitutes 'misuse of market power' and what constitutes 'a substantial lessening of competition'.

2.20 Further confusion arises from the difficulty in distinguishing between acts which are pro-competitive and those which are anti-competitive. Establishing the existence of predatory pricing is a case in point. Predatory pricing is a breach of s. 46 and a major cause of complaint by small business. True predatory pricing is undertaken to damage or to drive out existing competitors and to prevent the entry of new competitors into the market, usually with the expectation that losses can be recouped later when the offending company has increased its market dominance.

2.21 However, some conduct labelled predatory by small players may in fact be merely aggressive pricing made possible for large players through economies of scale unavailable to smaller players. If the conduct complained of is in fact aggressive pricing rather than predatory pricing based on the expectation of later recoupment then reforms to predatory pricing legislation in s. 46 will not address the underlying concerns of small business.

> To recapitulate, selling below costs plus recoupment by supra-competitive pricing equals predatory pricing. Absent the second element, or at least the

9 See, for example, *Transcript of evidence*, National Association of Retail Grocers of Australia, p. 29 and *Submission 7*, G&P Watts, Pty Ltd, p. 7

> hope or expectation of it, there is no more than ruthless competitive conduct, something which the Act does not forbid, but rather promotes.[10]

2.22 Attempts to mount prosecutions under the provisions of s. 46 require a litigant to first establish that the offending corporation enjoys a substantial degree of market power and then to establish that it has misused that power for a purpose prohibited under s. 46.

> Section 46 of the *Trade Practices Act* requires, not merely the coexistence of market power, conduct and the proscribed purpose, but a connection such that the firm whose conduct is in question can be said to be taking advantage of its power.[11]

2.23 Lack of agreement on what constitutes a substantial degree of market power and what constitutes misuse of that power are formidable barriers to prosecution in the view of some, before litigants can overcome the further barrier of proving purpose, acknowledged by many[12] as a significant obstacle despite the fact that the Act allows purpose to be ascertained by inference, from the conduct of the corporation.

2.24 Those who support greater restrictions on competition claim that the barriers described above are such as to limit the effectiveness of the courts in prosecuting breaches of s.46 and that the Act should be modified to assist such prosecutions. [13]In evidence to the Committee on the s. 46 amendment this group did not generally see the proposal before the Committee as being sufficient to overcome the barriers described above. This was particularly the case in view of the difficulty of proving that an offender had engaged in conduct for a prohibited purpose. For this group[14] the proposed amendment represented only a first step towards closer regulation of corporate behaviour.

2.25 Those who opposed greater restrictions on corporate behaviour suggested that recent case law has both clarified and broadened the definitions of market power and misuse of market power (as described in Chapter 3) rendering further clarification or limitations on s. 46 unnecessary.[15]

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10 "Case Notes - Melway Publishing Pty Ltd v Robert Hicks Pty Ltd (2001) 178 ALR 253." Christopher Hodgekiss, *Trade Practices Law Journal,* vol 9, September 2001, p. 190

11 "Case Notes – Melway Publishing Pty Ltd v Robert Hicks Pty Ltd (2001) 178 ALR 253." Christopher Hodgekiss, *Trade Practices Journal*, vol 9, September 2001, p. 183

12 See, for example, *Submission 21*, Australian Competition and Consumer Commission, p .5 and *Submission 22,* National Association of Retail Grocers of Australia, p. 6

13 See, for example, *Transcript of evidence,* Australian Competition and Consumer Commission, p. 3 and *Submission 24*, Mr Geoff Edwards, p. 4

14 See, for example, *Submission 6,* Ausveg, p. 2 and *Submission 11*, Wimmera Region, Victorian Farmers Federation, p. 2

15 See, for example, *Submission 23,* Law Council of Australia, pp. 4-5 and *Submission 15,* Business Council of Australia, pp. 5-6

2.26 Similar arguments apply to the term 'substantial lessening of competition' in s.50 (including the proposed new s. 50AA). Opponents of increased restrictions on corporate behaviour favour a return to the previous term used in the section, that is,– 'market dominance.'[16] This earlier test, if reintroduced, would narrow the circumstances in which mergers or acquisitions could be prohibited. Such mergers, it is suggested by this group, are essential to promoting the development of large Australian companies big enough to compete in overseas markets. Any restriction on mergers, including the ultimate sanction of divestiture, can therefore be expected to undermine Australia's international competitiveness.[17] Extension of the divestiture remedy beyond companies considering merger, as proposed in s. 50AA, is therefore anathema to this group.

2.27 Supporters of the existing term claim that there is no need to strengthen the provisions since even under the existing term only a small number of mergers are prevented. They are generally not opposed by the ACCC where local companies face significant import competition or where there are no major barriers to new entrants to the market. Where these conditions do not exist, or where the proposed merger might not meet the public interest test, the ACCC has in the past been more likely to allow mergers to proceed with conditions attached rather than to oppose them outright. Figures provided by the ACCC would seem to support this view.[18]

2.28 Recent case law has been of little assistance in clarifying what constitutes a substantial lessening of competition but media reports[19] suggest that the relative merits of a substantial lessening of competition and market domination will be hotly debated in the review of the competition provisions of the *Trade Practices Act 1974*.

2.29 Concerns have also been expressed about the way in which the Act is administered by the ACCC. Those favouring greater deregulation of competitive behaviour complain that the ACCC is too powerful, too antagonistic to business and too publicity conscious. They consider the proposed amendments will add to its power and reduce its accountability.[20] Those opposing greater deregulation consider it is too cautious in mounting prosecutions, even in cases of blatant anti-competitive conduct.[21]

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16 This was replaced in 1993 by the current term 'a substantial lessening of competition'.

17 See, for example, *Transcript of evidence*, Australian Competition and Consumer Commission, p. 47 and *Submission 13*, Woolworths Ltd, pp. 2-3

18 In 1997-98 the ACCC reviewed 176 proposed mergers and opposed five. In 1998-99 it reviewed 185 and opposed seven. In 1999-2000 it reviewed 208 and opposed four. From "How the ACCC is changing the shape of Competition in Australia." Address to Scipaust 2001 conference by Ross Jones, May 2001

19 For example, "ACCC will seek enhanced powers in proposed review", Stephen Bartholomeusz, *The Ag*e, 14 November 2001 and "Replenishing the armoury", Elizabeth Knight, *Sydney Morning Herald,* 15 November, 2001

20 See, for example, *Transcript of evidence, 17 April 2002*, Australian Chamber of Commerce and Industry, pp. 49-50

21 See, for example, *Submission 7*, G&P Watts, Pty Ltd, p. 5

2.30 In part these criticisms reflect the conflicting nature of the ACCC's role, that is, to promote competition and to protect consumers, which in turn reflects the conflicts inherent in the legislation. It is difficult to keep the roles separate, especially when the ACCC is placed in the position of weighing conflicting public benefits. This may happen, for example, when it is called upon to sanction a merger necessary for the long term survival of a company but without immediate benefits to the consumer. Some commentators have called for the two roles to be performed by two separate bodies in an effort to overcome these difficulties.

Concluding remarks

2.31 The Committee notes that the differing views expressed in evidence to its Inquiry are reflective of those in the wider community. They are described in detail in Chapter 3.

CHAPTER 3

THE AMENDMENTS

3.1 Two amendments were referred to the Committee, as follows:

S. 46(8) - Misuse of market power

3.2 The amendment proposes an additional ss. to s. 46. This reads:

> (8) In an action brought against a corporation by the ACCC under subsection (1), if the ACCC can show that the corporation:
>
> (a) has a substantial degree of market power; and
>
> (b) has taken advantage of that power;
>
> the onus rests with the corporation to show that the corporation has not taken advantage of its power for a purpose referred to in subsection (1).

S. 50AA - Action where ownership situation has effect of substantially lessening competition

3.3 The amendment proposes a new s. 50AA. This reads:

> (1) If a corporation:
>
> (a) owns shares in the capital of a body corporate; or
>
> (b) owns assets of a person;
>
> and the ownership has the effect of substantially lessening competition in a market, the ACCC may apply to the Court for an order that the corporation divest itself of the shares or assets
>
> (2) If a person:
>
> (a) owns shares in the capital of a corporation; or
>
> (b) owns assets of a corporation;
>
> and the ownership has the effect of substantially lessening competition in a market, the ACCC may apply to the Court for an order that the person divest himself or herself of the shares or assets.
>
> (3) Without limiting the matters that may be taken into account for the purposes of subsections (1) and (2) in determining whether the ownership has substantially lessened competition in a market, the matters mentioned in subsection 50(3) may be taken into account.

3.4 Proposed s. 50AA has been slightly modified since it was introduced by Senator Murray. Originally it gave the ACCC power to order divestiture. It now permits the ACCC 'to apply to the Court for a divestiture order'. This modification is required to conform to the doctrine of the separation of powers. The ACCC is not a judicial body and so cannot make judicial orders. The intent of the new section is unchanged.

3.5 Each amendment is separately considered below.

The amendment to s. 46

3.6 The intention of this amendment is to increase the likelihood of the ACCC succeeding in actions against corporations with a substantial degree of market power in circumstances in which they are alleged to have misused that power for a purpose prohibited under s. 46. The prohibited purposes, enumerated in ss. 46(1) of the Act are:

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

3.7 At present the onus rests with the ACCC or other complainant to prove that the corporation against which an action has been brought has misused its market power for a proscribed purpose. Such a claim is difficult to substantiate because of the problem of obtaining adequate evidence of the company's purpose and of establishing that a company acted for an improper purpose, that is, that it engaged in anti - competitive conduct. The purpose test is the principal means of distinguishing between competitive and anti-competitive conduct. Given that there is often a very fine line between the two, the purpose test is sometimes considered inadequate to the task.

3.8 If the amendment is accepted, the onus will rest with the corporation to prove that its conduct did not represent a misuse of market power for a proscribed purpose. In these circumstances it is suggested that the ACCC is likely to be more successful than it has been to date in mounting prosecutions under s. 46. (Reversal of the onus of proof is to be limited to actions brought by the ACCC). Passage of the amendment may also encourage more cases to be brought against offending corporations.

3.9 It is intended that the amendment will deter anti-competitive conduct on the part of companies with market power. However, even those individuals and organisations which supported the proposed amendment in evidence to the Committee

recognised that it was likely to achieve only limited benefits.[1] The majority of them therefore advocated a change to the purpose test, either in addition to or in place of the amendment to reverse the onus of proof.

The case for the amendment to s. 46

3.10 A number of submissions to the Inquiry, and witnesses at the public hearing, supported the proposed amendment to s. 46 because of its alleged potential to assist small businesses claiming misuse of market power on the part of dominant competitors.[2] If this amendment were enacted the company[3] concerned would have to demonstrate that it had a legitimate purpose in undertaking the conduct in dispute. That is, the corporation rather than the ACCC would be required to establish purpose.

3.11 The ACCC stated that in its view, the introduction of this amendment would benefit not only the individual company suffering damage at the hands of a dominant competitor but the economy more generally, through promotion of greater competition.

> There is often a fallacy in reasoning when people focus on the effect of the law on one player rather than on the whole economy, because typically section 46 cases are about, if you like, a conflict between businesses. The typical complaint is from a person whose opportunities for participating in business are being damaged by anticompetitive behaviour by someone else. In other words, their investment – upstream or downstream investment or investment by competitors – may be affected. I believe that a stronger section 46 and the effects of that on investment have to be looked at generally rather than just in relation to the behaviour of a monopolist.
>
> …If we get a more competitive behaviour by monopolies, with lower prices, there will be greater demand and greater investment. So I do not regard 46 as being intrinsically damaging: I think it has promoting effects on competition.[4]

3.12 The Australian Newsagents' Federation described the problems faced by individual newsagents seeking redress against dominant companies under the existing legislation. These concern their difficulty in providing proof of the alleged misconduct:

> In circumstances where an individual newsagent attempted to claim the misuse of market power in their dealings with dominant

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1 See, for example, *Transcript of evidence,* Australian Competition and Consumer Commission, p.9 and *Submission 12*, Motor Trades Association of Australia, p.2

2 See, for example, *Submission 17*, Victorian Farmers Federation Egg Producers Group, p. 2 and *Submission 20*, Queensland Fruit and Vegetable Growers Ltd, p. 2

3 If it is decided to reverse the onus of proof in relation to s. 46 then the Schedule to the Act would also change. This would extend the provisions to persons and unincorporated entities.

4 *Transcript of evidence,* Australian Competition and Consumer Commission, p. 7

> publisher/distributors, the capacity for the newsagent to bring such an action and to be able to show there was misuse of market power and moreover to show that there was intent, requires a level of evidence and access to corporation detail that is unlikely to be able to [be] sourced.[5]

3.13 This view was shared by the ACCC:

> The ACCC's experience has been that in the absence of "smoking gun" documents, proving a relevant purpose under section 46 to the satisfaction of a Court is an onerous forensic process.[6]

3.14 A submission from Mr Weeliem Seah suggested that a limited reversal of the onus of proof might be considered. In this situation the ACCC or a complainant would need to show all the elements of an offence under s. 46 except purpose. The company would then have to demonstrate that its purpose was not contrary to ss. 46(1). Such an approach, where the defendant would be deemed to have breached ss. 46(1) unless able to prove otherwise, would more fairly distribute the cost and effort involved in litigation between plaintiff and defendant.

> A deeming provision would assist in facilitating proof of purpose without changing the nature of the prohibition. It is submitted that one which operates in the manner suggested strikes a reasonable balance between the interest in the section catching the conduct that it is designed to catch, and the interest in avoiding the imposition of a restrictive or undermining influence over the conduct that the section is designed to promote.[7]

3.15 Another submission, from Ausveg, while supporting the proposal to reverse the onus of proof, suggested means by which the proposed amendment might be improved:

> Reversing the onus of proof under section 46 of the Trade Practices Act (1974) effectively means that the ACCC would need to establish whether or not the organization has a substantial degree of market power and whether that organization was abusing its market power. The ACCC would then consider the evidence provided by the corporation.
>
> While this is an improvement on the current system, it means that the ACCC is effectively both the judge and the jury. In order to maximise the benefit of the proposed change, it is suggested that an independent arbitrator should be responsible for deciding if the corporation has a substantial degree of market power and has taken advantage of that power, before the ACCC investigates the corporation's evidence.[8]

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5 *Submission 19*, Australian Newsagents' Federation Limited, p. 12

6 *Transcript of evidence, ,* Australian Competition and Consumer Commission, p. 2

7 *Submission 14*, Mr Weeliem Seah, p. 267 of attachment

8 *Submission 6*, Ausveg, pp. 2-3

3.16 Many of those supporting the proposed amendment to s. 46 considered that, while helpful, it did not go far enough.[9] In their view a major obstacle to successful prosecution under s. 46 was, as noted above, the need to show that a company misusing its market power did so for one of the purposes proscribed in that section. They argued that large companies have multiple purposes and, can usually point to a purpose that is not prohibited under the Act, with documentation to support their claim.

3.17 Evidence by the ACCC suggested that companies under scrutiny went so far as to destroy evidence of conduct having a proscribed purpose under s. 46, making it virtually impossible for complainants to mount successful prosecutions.

> Further, firms with substantial market power appear to be very much aware of the consequences of "smoking gun" documents being found in their internal records such as those relied upon in the QWI, Boral and Rural Press proceedings. Such firms appear to be taking great care to avoid potentially incriminating documents being created or stored. For example, the ACCC is aware from experience of instances where corporations have issued specific instructions in relation to the creation or destruction of internal documents, that display a disregard for compliance with the TPA. Consequently, the forensic task for the ACCC in proving section 46 breaches is getting more difficult.[10]

3.18 However, prosecution is made easier by the fact that it is necessary to establish only that a prohibited purpose 'is ascertainable by inference from the conduct of the corporation'.[11] This is discussed in greater detail later in this Chapter.

The case for an 'effects' test

3.19 Because of the perceived limitations expressed by some witnesses of the reversal of the onus of proof in bringing successful prosecutions under s. 46, some evidence focussed instead on the introduction of an 'effects' test to replace the existing 'purpose' test.[12]

3.20 In some cases a corporation's conduct might not have the **purpose** of damaging competition, although that is its **effect**.

> …Purpose is hard to prove, even though it can be inferred through surrounding conduct, and in any case does not attack situations where there

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9 See, for example, *Submission 11*, Wimmera Region Victoria Farmers Federation, p. 2 and *Submission 12*, Motor Trades Association of Australia, p. 2

10 *Submission 21*, Australian Competition and Consumer Commission, p. 7

11 Ss. 46(7) of the *Trade Practices Act 1974*

12 See, for example, *Submission 12,* Motor Trades Association of Australia, p. 2 and *Submission 13*, Victorian Farmers Federation Egg Producers Group, p. 3

> is not a 'purpose' to damage competitors as required by the current law, yet the effect is the same.[13]

3.21 Those favouring this view have suggested incorporating an 'effects' test into s. 46 in addition to (or in a few cases in place of) the existing 'purpose' test.

> Section 46 of the Trade Practices Act is aimed at prohibiting the misuse of market power. It must be made easier to take action against the misuse of market power, as the balance is currently skewed in favour of those alleged to be misusing their market power. The current airlines debacle and the likely future shape of that industry make it all the more urgent that something be done.
>
> It is thus proposed that the Trade Practices Act be amended so as to provide that where the corporation has 'the purpose or effect'; in engaging in the conduct proscribed in Section 46 (1)(a) to (c) that that be unlawful. Currently the law solely proscribes a 'purpose.'[14]

3.22 This approach is preferred by the ACCC to a reversal of the onus of proof:

> We prefer some form of effects test in section 46. We would regard reversal of onus as an improvement on the status quo.
>
> …We would be suggesting that effect be added, not that purpose be subtracted from the law. We believe that would be an appropriate test…. it is still extremely difficult to win cases using an effects test. Section 46 is not easy under any circumstances,[15]

3.23 The ACCC explained that such an approach would bring the s. 46 provisions in to line with other provisions of the Act which include an 'effect' or 'likely effect' test, such as s. 45, s. 47 and s. 50 as well as s. 151AJ, relating to the telecommunications industry.

3.24 The National Association of Retail Grocers of Australia (NARGA) said that it would also remove some of the subjectivity involved in ascertaining purpose and focus attention on the economic effect of certain conduct, rather than its perceived morality.

> At the moment, with question of purpose, the judge has to sit there and perhaps second-guess how a competitive player would behave in a particular context. The judge has to determine where the limits of that vigorous competition are and where conduct starts transgressing that notion of vigorous competition and becomes something much more sinister – namely, anticompetitive conduct.

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13 *Submission 10*, Mr Hank Spier, p. 8

14 *Submission 12*, Motor Trades Association of Australia, p. 8 of attachment

15 *Transcript of evidence,* , Australian Competition and Consumer Commission, p. 9 & p. 10

> …so it comes down not only to being able to find proof but to a judgement as to that proof. Resolving what the evidence suggests the purpose was is not an easy issue…[16]

3.25 NARGA also suggested that, if the purpose test remained, guidelines should be developed to assist companies in reaching decisions about anti-competitive purposes, thus reducing the level of subjectivity involved[17]

3.26 NARGA further suggested[18] that, to allay concerns about the introduction of an 'effects' test its use could be limited to actions taken by the ACCC, in the same way as the proposed amendment to reverse the onus of proof is limited to actions taken by the ACCC.

The case against an 'effects' test

3.27 An effects test is not universally supported, even among those who recognise the limitations of the current 'purpose' test. In this view, incorporating an 'effects' test into s. 46, or replacing the 'purpose' test with an 'effects' test could have the unintended consequence of catching conduct undertaken for legitimate or competitive purposes which has the effect of, for example, driving competitors from the market or preventing the entry of new players. Such an approach could prevent legitimate business activities, contrary to the overall purpose of s. 46, which is to promote competition. The dilemma reflects the difficulties inherent in distinguishing between desirable and undesirable competitive conduct in s. 46, and indeed in many sections of the *Trade Practices Act 1974*.

> …whilst the object of s 46 is to protect the competitive process, it is targeted at improper business practices, rather than conduct that is merely exclusionary or injurious of it. Although the conduct having the effect of exclusion or of lessening competition otherwise than by competition has a detrimental effect on the competitive process, to extend the section to prohibit legitimate business activity via an effects test would take it beyond the restrictive trading practices it was designed to prohibit.[19]

3.28 Mr Seah went on to argue that an 'effects' test would be no easier to apply than the current 'purpose' test:

> It is to be seriously queried whether an effects test would make it any easier to separate predatory from legitimate competitive behaviour, or contribute to the achievement of the section's object any better than the present purpose-based test.[20].

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16 *Transcript of evidence,* , National Association of Retail Grocers of Australia, p. 39

17 In *Transcript of evidence,* National Association of Retail Grocers of Australia, p. 30

18 *Transcript of evidence,* National Association of Retail Grocers of Australia, p. 42

19 *Submission 14*, Mr Weeliem Seah, pp. 263-264 of attachment

20 *Submission 14*, Mr Weeliem Seah, pp.264-265 of attachment

3.29 The Australian Chamber of Commerce and Industry (ACCI) agreed with this statement. In its submission, the ACCI noted that an effects test had been proposed on many occasions and rejected, precisely because it would not be able to distinguish between normal competitive behaviour and anti-competitive conduct contrary to the provisions of the *Trade Practices Act 1974*.[21] The ACCI concluded:

> The effects test would have a chilling effect on market competition since a business would have no means to assess in advance how the ACCC would perceive its actions.[22]

3.30 A number of other submissions[23] also referred to the large number of recent inquiries which had decided against changes to s. 46 and, more particularly, to the introduction of an effects test. For example, Telstra Corporation Ltd noted that:

> It has been shown that there has been, and continues to be, a formidable array of opinion against the introduction of an effects test in section 46. Without exception, in each of the six occasions since 1979 in which the introduction of an effects test was put to a committee reviewing the operation of section 46 of the Act, it was rejected.
>
> …Telstra is not suggesting that the mere number and unanimity of the rejection of an effects-based test by the above review committees should be solely persuasive against the introduction of such a test. Telstra notes, however, that the history of calls for the introduction of an effects test is overwhelmingly consistent: the effects test does not distinguish between anti-competitive conduct and pro-competitive conduct, so that welfare-enhancing conduct might be deterred were such a test to be introduced.[24]

3.31 Submissions from a number of small growers and suppliers to large retail chains and their representatives, while supportive of the amendment and of proposals to incorporate an 'effects' test, argue that these changes will not be sufficient to prevent proscribed conduct under s. 46. They consider their interests would be better protected through changes to the collective bargaining provisions of the *Trade Practices Act 1974*. At present collective bargaining is prohibited under s. 45 of the Act. Since the collective bargaining provisions of the *Trade Practices Act 1974* fall beyond the scope of this Inquiry they are not considered in this Report. However, the Committee notes the level of concern on this issue among growers providing evidence to the Inquiry.

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21 *Submission 24*, Australian Chamber of Commerce and Industry, p. 3

22 *Submission 25*, Australian Chamber of Commerce and Industry, p. 4

23 See, for example, *Submission 10,* Spier Consulting, *Submission 27*, Professor Warren Pengilley, and *Submission 28,* Telstra Corporation Ltd

24 *Submission 28*, Telstra Corporation Ltd, p. 1 and p. 9. This submission describes (in pp 5-8) some of the committee reviews which have considered and rejected the introduction of an effects test in section 46. They include the Griffiths, Cooney, Hilmer, Reid and Baird committees

The case against the amendment to s. 46

3.32 A number of submissions and witnesses at the public hearing[25] made the point that the proposed amendment, by removing the presumption of innocence, was contrary to fundamental principles of law.

> Reversing the onus of proof actually means removing the presumption of innocence which is a fundamental tenet of Australia's legal system and most liberal democracies. The presumption of innocence means that a person is deemed innocent until the State can prove their guilt before an independent court of law. Reversing the onus of proof means that a person is deemed guilty unless he or she can prove they are innocent. Such radical departures from basic human rights are normally only taken during times of national emergencies such as in times of war or persistent terrorism.[26]

> Defendants should not be placed in a position where they are required to disprove an assumption of guilt. Such a situation is contrary to fundamental principles of Australian law.[27]

3.33 Some other provisions of the *Trade Practices Act 1974* also provide for reversal of the onus of proof. In Part VB, for example, which deals with price exploitation in relation to a New Tax System, the Commission may issue a notice to a corporation if it considers it has contravened certain subsections of the Act. The notice is *prima facie* evidence of guilt. A corporation in receipt of such a notice must demonstrate that it did not breach the relevant subsections. Similar provisions apply in Part X1B in relation to alleged anti-competitive conduct in the telecommunications industry.

3.34 None of the submissions discussing the reversal of the onus of proof, neither those supporting it or those opposing it,-differentiated between the legal and evidential burden of proof. However the ACCC clarified in evidence[28]that it was referring to the legal burden of proof. The distinction is important. If the legal burden were reversed, defendants would have to establish, on the balance of probabilities, that they did not use their market power for an improper purpose. If the evidential burden were reversed this would merely require defendants to introduce evidence showing that their purpose was not improper. In this latter case the burden of proving improper purpose on the balance of probabilities would remain with the ACCC.

3.35 Some critics of the amendment [29]point out that, if passed, it will introduce a further anomaly into the *Trade Practices Act 1974* since it will allow the ACCC to

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25 See, for example, *Transcript of evidence*, Business Council of Australia, p. 15 and Submission 25, *Australian Chamber of Commerce and Industry*, p. 3

26 *Submission 16*, Australian Institute of Petroleum, p. 2

27 *Submission 4*, Shell Company of Australia Limited, p. 1

28 *Transcript of evidence,* Australiana Competition and Consumer Commission, p. 11

29 See, for example, *Submission 23,* Law Council of Australia, p. 6

operate according to a reverse onus of proof but will offer no such advantage to private individuals or companies bringing action under the amendment.

> The proposal now under consideration is limited to s46 actions brought by the ACCC. It will give the ACCC an "anti-competitive" forensic advantage in such actions, which will not be available to other potential applicants.[30]

3.36 The Business Council of Australia highlighted the difficulty which companies would face in proving that **all** of their purposes, and not just their principal purpose, were within the provisions of the Act, given that, as discussed, large companies normally have a variety of purposes.

> I make the point that merely proving that you had a viable commercial purpose is not sufficient to prove that you did not also have an illicit misuse of market power purpose. It is an incredibly onerous shift onto corporations which could be triggered at any time where a corporation is considered to have a substantial market power and to have taken advantage of that.[31]

3.37 Some submissions considered that the ACCC already possesses sufficient power to enable it to mount successful prosecutions under s. 46.[32] They point to four factors which enhance the power of the ACCC in undertaking prosecutions under s. 46.

3.38 The first is that the ACCC, when mounting actions for an alleged contravention of s. 46, takes civil rather than criminal action. The rules of civil prosecution apply. These require a lower standard of proof than criminal prosecutions and give the ACCC significant powers to obtain evidence.

> The ACCC is currently required to prove guilt on "the balance of probabilities" to find a breach of section 46. This is a lower standard of proof than applies to criminal offences (including offences under Part V) where proof is required "beyond reasonable doubt." Given there are substantial penalties for breach of section 46 (fines of up to $10M for each act) it is arguable the standard of proof should be raised to the criminal standard not lowered further.[33]

> …when the ACCC takes action alleging a contravention of s46, the action is not a criminal prosecution. It takes the form of a civil action. The rules of civil procedure apply. Proof is on the lower standard of the "balance of probabilities" (ie "more likely than not to have occurred"). The ACCC may take advantage of all the procedures available in civil litigation when attempting to prove a contravention of s46. These include access to all the

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30 *Submission 13*, Woolworths Limited, p.7

31 *Transcript of evidence,* Business Council of Australia, p. 19

32 See, for example, *Submission 15*, Business Council of Australia, pp. 4-6 and *Submission 25,* Australian Chamber of Commerce and Industry, p. 2

33 *Submission 16*, Australian Institute of Petroleum, p. 2

> defendant's relevant internal files and workings, and the elimination of any right to silence. The defendant is compelled by the intrinsic rules of a civil trial to give evidence and to be cross examined about the purposes of the conduct. In addition, it has unique powers to obtain information, documents and evidence before trial conferred by s155 of the Trade Practices Act.
>
> The result is that, when the ACCC prosecutes an alleged contravention of s46, it has available to it a raft of powers and forensic advantages which are not available to other litigants or to other prosecutors…[34]

3.39 The second factor is that recent amendments to the *Trade Practices Act 1974* enhance the power of the ACCC in dealing with cases of alleged misuse of market power.

> Following the recommendations of the Joint Select Committee on the Retailing Sector, and responding to earlier recommendations of the Australian Law Reform Commission, Parliament has passed the *Trade Practices Amendment Act (No. 1) 2001*. The consequent amendments to the Trade Practices Act have significantly strengthened the powers of the Act to deal with allegations of misuse of market power or other concerns with the relationship between businesses…
>
> These amendments expand considerably the options and protection available to small business and consumers under the Act.[35]

3.40 The third factor strengthening the ACCC's powers in mounting prosecutions under s. 46 is related to recent court cases decided in the ACCC's favour.

> …three major court cases have been decided in relation to s46 since the Joint Select Committee on the Retailing Sector inquiry. These decisions, according to the ACCC, "*have considerably broadened the application of the section."* The cases are the 'Boral', 'Rural Press' and 'Melway' cases.
>
> The ACCC has argued that decisions in these cases *"have strengthened the impact of those areas of the Trade Practices Act outlawing such actions as predatory pricing, price fixing and other restrictive practices"*.[36]

3.41 The decision of the Full Bench of the Federal Court in *Boral's case*[37] in particular is said to have lowered the barriers to successful prosecution under s. 46.

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34 *Submission 13*, Woolworths Limited, p. 8

35 *Submission 15*, Business Council of Australia, p. 4. The submission lists amendments introduced through the Trade Practices Amendment Act (No. 1) 2001.

36 *Submission 15,* Business Council of Australia, p.5, quoting from ACCC Media Release, *Increased ACCC Support for Regions*, 12 July 2001. The cases referred to are *Australian Competition and Consumer Commission* v. *Boral Ltd* (2001) FCA 30, an appeal on which is pending in the High Court; *Australian Competition and Consumer Commission* v. *Rural Press Limited* (001) FCA 116; and *Melway Publishing Pty Ltd* v. *Robert Hicks Pty Ltd* (2001) HCA 13 respectively

> That decision lowers the threshold of section 46 actions very, very considerably. Put shortly, after the Full Federal Court's decision last week in ACCC v Boral, the hurdles that a litigant or the regulator must surmount in order to prove conduct in contravention of section 46 – in that case, predatory pricing – have been lowered very considerably so that section 46 actions may now be brought much more readily than was previously understood to be the case.[38]

3.42 Lastly, the wording of s. 46 also assists complainants because a conviction can be recorded even in cases in which evidence of a prohibited purpose 'is ascertainable only by inference from the conduct of the corporation or of any other person or from other relevant considerations'.[39]

> The existing subsection 46(7) is a more useful tool than a formal reversal of the onus of proof, because it allows the court to infer a prohibited purpose from the conduct of the corporation or the surrounding circumstances. This provision can also operate as a de facto reversal of the onus of proof because, as the High court has indicated, the court may draw inferences as of a prohibited purpose if the corporation does not offer a "legitimate reason" as to why it engaged in the conduct complained of. For example, in the Queensland Wire case, the fact that BHP could not give a valid business reason for refusing to supply the product to Queensland Wire was a major factor in the court's finding that BHP did have a prohibited purpose.[40]

3.43 Professor Norman suggested that the ACCC's view that few successful cases have been brought under s. 46 because of companies' success in destroying incriminating evidence can be equally well explained by the fact that most companies are **complying** with s. 46 provisions and are therefore not subject to legal action.

> The ACCC has put to this Inquiry that, in its opinion, the dearth on active matters under s. 46 is due substantially to the actions of potential offender companies in ensuring that documents that might implicate them are not generated or not made obtainable by litigants.
>
> …the counter explanation to a factual state of a "dearth of evidence" is that s. 46 really IS working and has forced desirable compliance.[41]

3.44 Some submissions opposed the amendment to s. 46 because of what they claimed was its potentially damaging effect on business confidence, competitive

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37 Boral is appealing to the High Court against the decision of the Full Bench of the Federal Court. The hearing has been set for 21 May 2002.

38 Senate, *Official Hansard*, 7 March 2001, p. 22665, Senator Brandis

39 From *Trade Practices Act 1974*, ss. 46(7)

40 *Submission 8,* Chartered Secretaries Australia, p.2. The case referred to is *Queensland Wire Industries* v. *BHP Co. Ltd*. and *Ano*r (1989) 167 CLR 177

41 *Submission 26*, Professor Neville Norman, p. 1

behaviour and research and development, to the ultimate detriment of consumers.[42] In their view the amendment would have the perverse effect of deterring competition rather than promoting it, which is the objective of s. 46 and indeed of the entire *Trade Practices Act 1974*.

> If there is a general softening of competition as more efficient competitors moderate their competitive conduct to accommodate a stronger s46, this will be to the detriment of all consumers, including the consumers in rural and regional Australia whom the proposal is intended to benefit.[43]
>
> Where new products and concepts are being developed, a company having market power should be able to utilise that market power, within reasonable limits, to commercialise the product of its research and development. A reversal of the onus of proof in the "purpose" element of section 46 could have a damaging effect on R and D and discourage companies from exploiting technological advances.[44]

3.45 A submission from Mr Geoff Edwards considered that, while the amendment would assist in prosecutions for predatory pricing under s. 46, which are difficult under the existing legislation, it would extend to all allegations of misconduct under s. 46, where existing legislation is adequate and further regulation unnecessary:

> The desire to amend section 46 to reverse the onus of proof of the purpose element stems, I sense, from particular difficulties involved with proving the very *exceptional* claim of predatory pricing. I am concerned that in trying o deal with the predatory pricing problem, the proper assessment of more run of–the mill section 46 claims, such as those involving vertical arrangements, will be compromised.[45]

3.46 This submission suggested that predatory pricing should be treated as a separate offence under s.46 and, in this case alone, should be subject to an effects test.

3.47 The Australian Institute of Petroleum suggested that public benefit to consumers should be considered by the courts as a mitigating factor in prosecutions for proscribed conduct under s. 46:

> Another issue to consider is whether the public benefit to the consumer should be a factor the courts take into account when evaluating whether a breach of section 46 has occurred. At present the ACCC has no power to authorise conduct in breach of section 46 even if there are net benefits to the public (through lower prices and the like) of such conduct.[46]

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42 See, for example, *Submission 16*, Australian Institute of Petroleum, p. 2

43 *Submission 13,* Woolworths Limited, p.10

44 *Submission 8*, Chartered Secretaries Australia, p. 2

45 *Submission 24,* Mr Geoff Edwards, p. 1

46 *Submission 16*, Australian Institute of Petroleum, p. 3

3.48 Others [47]suggested that it will place an unfair burden upon defendants, even in cases in which they are found to have acted within the law.

> The Business Council is also concerned that the meaning of the proposed amendment will not be well understood by the general public. As a result, even where companies are able to prove that they have not acted with the purpose of damaging a competitor, and have therefore not breached the Act, they will already have been penalised through adverse media coverage of the regulatory action taken against them.[48]

3.49 In the view of some witnesses,[49] the major problem with s. 46 is uncertainty as to its meaning and interpretation. The proposed amendments will add to this uncertainty rather than resolving it.

> … if we are looking for what we need in trade practices legislation, which is more clarity and certainty about what is acceptable and what is not, this [proposed legislation] goes in entirely the wrong direction and gives you an enormously vague outcome rather than a positive and helpful outcome.[50]

> …I firmly believe that the major problem of s.46 is not whether or not it needs to be "beefed up" but the complete uncertainty of what the law means. This uncertainty is not fair to business decision-makers and leads to considerable inefficiencies. It is not fair to small business or consumers either because unpredictability of result can involve unreal or non-achievable expectations and the futile expenditure of significant resources.[51]

The amendment to s. 50

3.50 Divestiture is used to ensure that, where markets are highly concentrated (regardless of the way in which such concentration was achieved) no public detriment results. Where such detriment can be demonstrated divestiture may be an appropriate and lawful remedy, even for legally acquired assets. This remains the case despite concerns from opponents of the amendment about possible constitutional difficulties (which are referred to later in the Chapter.) Divestiture in these circumstances has been employed against utility industries in Australia and against some companies in the United States operating in highly concentrated markets. The Committee shares the view expressed in all the evidence pointing to the seriousness of the divestiture remedy and the need to restrict its use to the courts.

3.51 The purpose of the existing s. 50 is to prohibit acquisitions that would result in 'a substantial lessening of competition'. The section was changed in 1993 from a less onerous provision which prohibited acquisitions that would result in 'market

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47 See, for example, *Submission 28*, Telstra Corporation Ltd, p. 2

48 *Submission 15,* Business Council of Australia, p. 6

49 See, for example, *Submission 28*, Telstra Corporation Ltd, p. 2

50 *Transcript of evidence,* Australian Chamber of Commerce and Industry, p. 50

51 *Submission 27,* Professor Warren Pengilley, p. 2

dominance'. The section is intended to block mergers or takeovers that would have this effect.

3.52 It has been suggested by some[52] that s. 50 as it stands has not achieved its purpose. In the period June 1997 – June 2000, for example, the ACCC examined more than 500 merger proposals and opposed only 25.[53] Corporations are said to have circumvented its requirements, either by showing that a proposed merger was in the public interest (in which case the ACCC may grant an authorisation) or by acquiring a dominant market position through creeping acquisitions rather than through a single act of takeover, so that the provisions of the *Trade Practices Act 1974* could not easily be invoked (although some would argue that the provisions of the Act are in fact broad enough to cover creeping acquisitions.)

3.53 If this amendment is agreed to then the courts, on application by the ACCC, will be able to order offending companies to divest themselves of those assets, the acquisition of which has had the effect of substantially lessening competition, regardless of the way in which they were acquired. It could conceivably extend the s.50 provisions to companies already in a dominant market position as well as those which might enjoy this position after proposed mergers or takeovers, but this is unlikely since the amendment as drafted does not apply retrospectively. In effect, the divestiture remedy would be available to the ACCC (through the courts) where assets substantially lessen competition in a market even where the acquisition of the assets was not itself a breach of the Act.

3.54 The amendment is a further attempt to prevent misuse of market power for anti-competitive purposes. Like the proposed amendment to s. 46 it raises difficult questions about the inherent contradictions in the *Trade Practices Act 1974*, which is designed both to promote competition in the interests of consumers and to limit competition where this is shown or perceived to harm their interests. One commentator has suggested that: "Section 50 is a classic case of competition law itself restricting competition".[54]

The case for the amendment to s. 50

3.55 Some evidence to the Committee suggested that the amendment to s. 50 was a necessary measure to deal with corporations which bypassed existing s. 50 provisions.[55] One submission referred to the oil industry as one in which the amendment might justifiably be used.

> The Petroleum Marketing Sites Act has been by-passed by multi-site franchises, and has evidently not been monitored by the Federal

52 See, for example, *Submission 22*, National Association of Retail Grocers of Australia, p. 13

53 "Merger policy 'not a necessary evil,'"Ben Ready (quoting ACCC Commissioner, Ross Jones), *Canberra Times*, 28 July 2000

54 "Time to repeal merger laws," Ron Gilbert, *The Canberra Times*, 20 January 2001

55 See, for example, *Submission 19*, Australian Newsagents' Federation Ltd, pp. 18-19

> Government for several years. It is supposed to limit the number of sites the oil companies can actually operate themselves (not the number they can own which is often stated). However, the companies (logically) retained the best sites for their own operation so that the proportion of sales made through their own operated sites is far higher than the proportion of site numbers they operate.
>
> …To overcome and remove the problem is, in principle, quite simple, but in practice will require some radical changes both of attitude and structure, and if this cannot be voluntarily achieved, the amendment to the Act to provide for the divestiture power is essential.[56]

3.56 The National Association of Retail Grocers of Australia explained that at present the divestiture power of the ACCC is limited to a consideration of the extent of market concentration and its impact on competition and consumers at the point at which a merger is contemplated. This was the case with the recent proposed takeover of Franklins by Woolworths, for example. Thereafter it has no power to order divestiture.

> Thus, at present the only real opportunity for considering the level of market concentration arises where a merger that has the potential to substantially lessen competition is proposed. It is at that point that the ACCC can take a broader look at market concentration and decide whether or not to oppose the merger. In doing so, the ACCC is presented with an opportunity to prevent further market concentration by disallowing the merger, or allowing it as part of a s 87B undertaking that requires divestiture of assets the ACCC considers would remove the merger's potential lessening of competition.
>
> Apart from these merger opportunities, there are few other opportunities for dealing with market concentration issues.[57]

3.57 The Australian Newsagents' Federation rejected the view that many mergers were justified because of the improved efficiency which resulted from them and because they created companies of sufficient size to compete in international markets, rendering these divestiture provisions unnecessary. (This view is discussed later in this Chapter). They argued that the public interest should be considered when mergers were contemplated, as well as the commercial implications. Although supporting the amendment therefore, they did so with reservations.

> Concerns have been expressed before about the development of an Australian economy that ends up with fewer firms competing at a national level, resulting from efficiencies gained by mergers, acquisitions and the elimination of smaller firms. Such an outcome does not automatically translate to consumer benefit and the broader public interest.[58]

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56 *Submission 7*, G & P Watts Pty Ltd. p.4

57 *Submission 22,* National Association of Retail Grocers of Australia, p. 13

58 *Submission 19,* Australian Newsagents' Federation Limited, p.19

> If TPA legislation is to change, by the adoption of part (b) of this Inquiry, one of the concerns of the ANF [Australian Newsagents' Federation] remains the current focus on commercial measures of the lessening of competition, without addressing the broader community interests of the impact of less competition in a market.[59]

3.58 The ACCC favours a more limited divestiture power than that envisaged in the s. 50 amendment. The Commission suggested that existing divestiture provisions under s. 81 of the *Trade Practices Act 1974* were probably a sufficient remedy in most circumstances but that the s. 50 amendment could prove a useful additional remedy in a limited number of cases of 'flagrant or repeated anti competitive conduct in contexts beyond the merger context'.[60]

3.59 The ACCC suggested other circumstances in which recourse to an amended s. 50 might be appropriate:

> A remedy of divestiture may also provide a more effective deterrent by discouraging a corporation from engaging in a cost-benefit analysis of anti-competitive conduct. For example, the present level of civil penalties even when coupled with adverse publicity may not alone outweigh the value to a corporation of its anti-competitive conduct. The threat of divestiture would significantly reduce any incentive to engage in such conduct.
>
> The ACCC further notes that divestiture would provide an appropriate structural remedy to overcome anti-competitive structural issues in the economy…The remedy of divestiture has the added advantage that it can reduce the need for ongoing regulation of a particular industry stemming from structural issues that result in anti-competitive behaviour.[61]

3.60 The Commission considered that the significant practical constraints on the use of divestiture, as well as the preference of the courts to use pecuniary penalties, would restrict the use of the divestiture remedy, as incorporated in the proposed amendment to s. 50.[62]

3.61 Others who favoured this amendment also saw it as a 'reserve power' rather than a major remedy for redressing ownership situations which had the effect or purpose of substantially lessening competition:

> To give the ACCC power at large to order divestiture absent of any breach of the specific prohibitions in the TPA on the grounds that the industry structure is anti competitive is unusual and I might suggest arguably not one for [an] agency such as the ACCC but more for the Parliament.

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59 *Submission 19*, Australian Newsagents' Federation Limited, p.21

60 *Submission 21*, Australian Competition and Consumer Commission, p. 13

61 *Submission 21*, Australian Competition & Consumer Commission, p. 13

62 *Submission 21*, Australian Competition and Consumer Commission, p. 13

> However it is appropriate for the Court, on the application of the ACCC, to have the power to order divestiture in relation to all contraventions of the anti competitive conduct provisions of the TPA. I would expect that the power would be seldom utilized but is there if needed.[63]

The case against the amendment to s. 50

3.62 One of the major issues for those with concerns about the s. 50 amendment was the adverse effect which they claimed it was likely to have on certainty, on business confidence, on foreign investment and on the ability of Australian companies to compete globally.

> It is the view of the Business Council that a general divestiture power, however carefully crafted, would create considerable uncertainty for business and would open the door to a significant increase in regulatory intervention in the market place.[64]

> The proposed section 50AA would represent a significant obstacle in the way of foreign investment, and domestic company growth and expansion to achieve international standards of efficiency and competitiveness.

> …The proposed section 50AA would create enormous uncertainty and potentially prohibit corporations from increasing their market shares by product innovation, price competition or improved customer service. Instead of rewarding such pro-competitive behaviour, the new section 50AA would seek to deprive corporations of the increased market share resulting from their competitive and innovative conduct.[65]

3.63 Another concern[66] was the wide ranging effects of the amendment, which would not be restricted to companies in a monopoly position.

> The proposed section 50AA requires no monopoly power before a divestiture order may be sought. It is conceivable that the second or third biggest firms in a market, not in possession of monopoly power, could also be the subject of a divestiture application under proposed section 50AA if their position in the market *substantially lessens competition*. This is a far lower threshold than the possession of monopoly power.[67]

3.64 Some critics have claimed that the **existing** provisions of s. 50 have a detrimental effect on business[68] and that these provisions should therefore be limited

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63 *Submission 10*, Mr Hank Spier, p. 11

64 *Submission 15*, Business Council of Australia, p. 2

65 *Submission 13*, Woolworths Limited, p. 20

66 Raised, for example in *Transcript of evidence*, Australian Competition and Consumer Commission, p. 46

67 *Submission 23,* Law Council of Australia, p. 15

68 See, for example, *Submission 1*, Mr Reg T Fisk, p. 2

rather than enhanced. They claim that the existing provisions reduce the pressure on boards and management to become more efficient and that the incentive to perform is lessened if companies know that they are shielded from takeover by s. 50. They further claim that some companies facing an unwelcome takeover have even tried to invoke s. 50 against the bidder:

> There is an incentive for boards and management to become more efficient, and reduce costs and prices, if they know there is someone else "waiting in the wings" to take them over if they do not perform. The incentive to perform is less if they know they are shielded from a takeover by section 50 of the Trade Practices Act. Indeed, it is not unknown for management of a company that is the target of an unwelcome takeover bid to try to get the commission to invoke section 50 against the bidder.[69]

3.65 A further concern raised in submissions to the Inquiry, was the possibility that companies could face divestiture proceedings under the new s. 50AA even in cases in which no misconduct and no breach of the *Trade Practices Act 1974* had taken place:

> Shell's primary concern is that the proposed ACCC power could be utilised in circumstances where an organisation, through no direct action of its own, finds itself in a situation where its ownership of shares/assets has the effect of substantially lessening competition. An example of such a situation would be the recent events in the airline industry. With the demise of Ansett, Qantas is in a position of market dominance and competition has been significantly affected. Under the proposed amendment, the ACCC would have the power to divide the assets of Qantas – an act that would unfairly penalise Qantas shareholders.[70]

> This [proposed subsection 50AA] could have startling consequences – for the first time anywhere in the world, a company which has a monopoly could be broken up, irrespective of whether it acted illegally or engaged in any "good" conduct or bad.[71]

3.66 This situation is particularly problematic given that there are no public benefit exemptions in s. 50AA, such as apply to other divestiture provisions of the *Trade Practices Act 1974*. At present, for example, s. 88 of the *Trade Practices Act 1974*, which deals with authorisations by the ACCC, includes s. 50 in the list of sections with a public interest test. If the proposed s.50AA becomes law then a consequential amendment to s. 88 to include s. 50AA in the list of sections to which the public benefit test may apply would overcome this aspect of the problem.

3.67 But in the view of some, [72]the existing public benefit test has been of very limited value in preventing mergers, so it might be expected that it would do little to

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69 "Time to repeal merger rules", Ron Gilbert, *Canberra Times,* 20 January 2001

70 *Submission 4,* The Shell Company of Australia Limited, p.1

71 *Submission 13*, Woolworths Limited, p. 12

72 See, for example, *Submission 22*, National Association of Retail Grocers of Australia, p. 13

prevent divestiture orders under proposed s. 50AA, even were consequential amendments made to s. 88 as discussed above. In this view many mergers do not take place, even when the public interest test might reasonably be invoked, because companies are not prepared to undergo the rigours of the authorisation process.

> The authorisation process is flawed. It takes too long. The appeal mechanism is open to any interested party, which can in effect achieve economic blackmail. While the ACCC says that it rejects very few mergers, in fact, many mergers do not go to the ACCC because of concerns that parties have about the length of time it will take to deal with the mergers, and the fear that the ACCC will push certain mergers down the authorisation route.[73]

3.68 There may be constitutional difficulties if s. 50AA is introduced because it could allow confiscation of property where no offence has been committed. This in turn may require the Commonwealth to provide compensation 'on just terms' to affected individuals or organisations, in accordance with s. 51(xxxi) of the Constitution.

3.69 The ACCC also raised possible constitutional problems with proposed s. 50AA and suggested that, because divestiture under the proposed s. 50AA creates a new remedy in cases in which the ownership of shares or assets is not of itself a breach of the Act, then prosecutions under this section may be subject to constitutional challenge.

> There are constitutional issues concerning any divestiture model that inherently limit the scope of its possible application. The ACCC notes that the Court has an explicit divestiture power under section 81 of the Trade Practices Act in relation to mergers and there is case law suggesting that this particular divestiture model is less likely to attract constitutional difficulties.[74]

3.70 Other concerns raised[75] with respect to the s.50 amendment included the fact that divestiture orders can apply regardless of how long a company has owned the assets which have resulted in a substantial lessening of competition, rather than at the time at which a merger is contemplated. This makes it much more difficult to organise and enforce.

3.71 S. 50AA restricts divestiture to ownership of shares and assets. It is silent on the issue of control. It is conceivable therefore that a corporation could use this provision to bypass the intent of the amendment by divesting itself of the requisite assets but organising its operations to ensure that it maintained the necessary control.

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73 "Chance to update the TPA," Bob Baxt, *Financial Review*, 18 October 2001

74 *Submission 21*, Australian Competition & Consumer Commission, p. 2

75 For example in *Submission 13*, Woolworths Ltd, p. 12

> It may also be noted that section 50AA does not address itself to "control" of assets or shares but rather "ownership". This has a number of consequences – arrangements regarding "control" would lie outside section 50AA. The Court would be faced with an inquiry as to whether the mere fact of "ownership" of assets or shares, of itself, has the "lessening effect" on competition in a market. It would be more natural to expect that it is the method of control and management of assets and shares that is likely to lead to the effects on competition and a market, not the fact of ownership. As such in its present form, the section is unlikely to achieve the (radical) means advocated for by its proponents.[76]

3.72 Some submissions[77] suggested that sufficient remedies were already available to the ACCC in cases in which the ownership of assets by a corporation had the effect of substantially lessening competition. In particular they considered that existing s.81, which deals with divestiture for contraventions of s. 50, provides adequate power to the courts to order divestiture. They argued that the proposed amendment was therefore unnecessary:

> There are already effective measures in Part 1V of the Trade Practices Act to prevent a firm misusing market power that may flow from ownership of valuable assets to prevent two or more firms arriving at any competitive agreements and to prevent any acquisitions. There is no need to expand these safeguards further.[78]

> The Business Council also questions whether such a power [of divestiture] is needed when the powers over misuse of market power have been considera [bly] enhanced…The significant increase in the controls over market behaviour have reduced need for additional controls over market structure.[79]

3.73 Some witnesses [80]believed the amendment would result in an unjustifiable and damaging increase in the power of the ACCC.

> Such a measure would give the ACCC and the Courts too much discretion in determining how a firm acquires and uses its assets, and would cause uncertainty and discourage firms from acquiring assets or developing their facilities.[81]

> Instead of increasing the ACCC's powers the Parliament should greatly reduce them and the ACCC should be required to demonstrate a clear case

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76 *Submission 13,* Woolworths Limited, p.12

77 See, for example, *Submission 23*, Law Council of Australia, p. 10

78 *Submission 8,* Chartered Secretaries Australia, p.3

79 *Submission 15,* Business Council of Australia, p. 7

80 See, for example, *Transcript of evidence*, Business Council of Australia, p. 23 and *Transcript of evidence,* Australian Chamber of Commerce and Industry, p. 45

81 *Submission 8*, Chartered Secretaries Australia, p. 3

> that international competition cannot provide the competition in the Australian market in any case where it proposes to take action against any Australian company for anti-competitive action or market dominance. The doctrinal stance that the ACCC has taken is destroying business, wealth, and jobs in Australia to the benefit of foreign nationals and domiciled corporations.[82]

3.74 A number of witnesses[83] drew attention to the practical difficulties involved in divestiture, such as the problems inherent in finding suitable buyers for divested properties.

> The great difficulty with divestiture orders (and why they have been so rarely sought by the ACCC) is that there are rarely buyers willing to purchase divested assets and it is also difficult to actually isolate that component of the business to be divested from the remainder of the business.[84]A divestiture power also raises a number of questions concerning the implications of its use. For example, difficulties can arise if a suitable purchaser is not available for divested assets. The lack of a competitive market for such assets could have unforeseen and undesirable consequences, such as the loss of services to rural or regional communities.[85]

3.75 The problems are most acute in the case of unitary companies where it is difficult to separate the various components of a company and where divestiture may result in the collapse of the organisation, with adverse flow on consequences to employees and suppliers.

> There are numerous other difficulties in splitting up a unitary company.
>
> For example, a divestiture order may have adverse effects on third parties, such as creditors, minority shareholders and employees, if a corporation is required to divest itself of significant assets.
>
> Further, divestiture may require the court to supervise the long term effects of the order.[86]
>
> Even in companies with discrete components the divestiture remedy is slow, costly, and difficult to enforce:The actual process that would be involved to bring about a divestiture would take much court time, ongoing monitoring, enforcement, administration and cost.[87]

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82 *Submission 1*, Mr Reg T Fisk, p. 2

83 See, for example, *Submission 13*, Law Council of Australia, p. 16

84 *Submission 16*, Australian Institute of Petroleum, p. 3

85 *Submission 15*, Business Council of Australia, p.7

86 *Submission 13*, Woolworths Limited, p. 16

87 *Submission 25*, Australian Chamber of Commerce and Industry, p. 7

Conclusion

3.76 Evidence to the Committee in this Inquiry has naturally focussed on the content of the specific amendments under review, and on the implications of their adoption. But of course, the amendments do not stand alone. They are inextricably linked to other parts of the *Trade Practices Act 1974*. The Committee considers therefore that it may be premature to make recommendations on these amendments while other reviews of the *Trade Practices Act 1974* are proceeding, most notably the review of the competition provisions of the Act announced by the Prime Minister in October 2001, details of which were first made public on 9 May 2002.

3.77 The Committee notes that Sir Daryl Dawson, AC KBE CB, is chairing the committee that is conducting that review of the competition provisions of the *Trade Practices Act 1974* and the Committee awaits that report and any recommendations of that inquiry. The Committee proposes to refer the public submissions, the transcript of the public hearing and this report to the review committee.

Senator Jim McKiernan
Chair

ADDITIONAL COMMENTS BY SENATOR MURRAY ON BEHALF OF THE AUSTRALIAN DEMOCRATS

Reversal of the Onus of Proof

1.1 I believe the report may have been assisted by the following evidence concerning 'onus of proof':

1.2 That is, the reversal of the onus of proof is well established in Australian and international law in specific circumstances, such as when requiring individuals to prove the lawful origin of property in their possession in cases in which it is believed to have been acquired illegally.

1.3 The Australian Competition and Consumer Commission (ACCC) also pointed out that the provisions governing the onus of proof were developed to protect individuals and should not be automatically extended to protect companies, which are in a much better position to protect themselves.

> I think it is simply a basic fact that the whole jurisprudence that underlines the whole legal system was developed in the context of the rights of individual persons. When we turn to corporations, it does not seem to me that one should automatically assume that this jurisprudence translates into absolutely equivalent and identical rights….Corporations generally under the Trade Practices Act have excellent rights.[1]

Senator Andrew Murray

Member

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1 *Transcript of evidence,* Australian Competition and Consumer Commission, p. 8

APPENDIX 1

LIST OF SUBMISSIONS

Submission Number	Organisation/Individual
1	Mr Reg T Fisk
2	Confidential
3	Mr Chiu-Hing Chan
4	The Shell Company of Australia Limited
5	Confidential
6	AUSVEG
7	G & P Watts Pty Ltd
8	Chartered Secretaries Australia
9	Vegetable Council of the Tasmanian Farmers and Graziers Association
10	Spier Consulting
11	Wimmera Region -Victorian Farmers Federation
12	Motor Trades Association of Australia
13	Woolworths Ltd
14	Mr Weeliem Seah (private capacity)
15	Business Council of Australia
16	Australian Institute of Petroleum
17	Victorian Farmers Federation Egg Producers Group
18	Confidential
19	Australian Newsagents' Federation Limited
20	Queensland Fruit & Vegetable Growers Ltd
21	Confidential
22	National Association of Retail Grocers of Australia
23	Law Council of Australia
24	Haas School of Business, University of California
25	Australian Chamber of Commerce and Industry
26	Prof. Neville Norman, Department of Economics
27	Prof Warren Pengilley
28	Telstra Corporation Limited

APPENDIX 2

WITNESSES WHO APPEARED BEFORE THE COMMITTEE

Public Hearing, Wednesday 17 April 2002 (Melbourne) :

Mr Bob Alexander, General Counsel, Australian Competition and Consumer Commission

Mr Brian David Cassidy, Chief Executive Officer, Australian Competition and Consumer Commission

Professor Allan Fels AO, Chairman, Australian Competition and Consumer Commission

Mr Steven John Munchenberg, Assistant Director, Business Council of Australia

Mr Alan John Mckenzie, Director, National Spokesman, National Association of Retail Grocers of Australia

Mr Frank Zumbo, Consultant, National Association of Retail Grocers of Australia

Mr Brent Davis, Director, Australian Chamber of Commerce and Industry

Dr Steven Kates, Chief Economist, Australian Chamber of Commerce and Industry

APPENDIX 3

CONCURRENT DEVELOPMENTS LIKELY TO IMPACT ON S. 46 AND S. 50AA OF THE TRADE PRACTICES ACT 1974

1. Review of the Competition Provisions of the *Trade Practices Act 1974*

During the election campaign the Prime Minister announced a wide ranging review of the competition provisions of the Trade Practices Act and of their administration. The Prime Minister's statement envisaged that the review would:

- Continue to encourage an environment where Australian business can grow and compete internationally;
- Protect the balance of power between small and large businesses;
- Support the growth of businesses in regional Australia; and
- Deal fairly with the affairs of individual companies.[1]

On 9 May 2002, the Treasurer announced details of the review. It is to be chaired by Sir Daryl Dawson, AC KBE CB and to report by late November 2002.[2] Its findings can be expected to impact on sections 46 and 50 of the Trade Practices Act.

2. Treasury Review of the *Trade Practices Act 1974*

The Treasury review is looking at a range of issues including:

- Possible amendments to s. 47 provisions dealing with third line forcing;
- Clarifying certain aspects of s. 87B, dealing with the power of the Commission to obtain information, documents and evidence; and

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1 *SecuringAustralia'sProsperity,* http://www.pm.gov.au/news/media_releases/2001/media_release1338.htm

2 Details of the review, including its terms of reference, can be found in Treasurer Press Release No. 0.23 of 9 May 2002 entitled "Review of the Competition Provisions of the Trade Practices Act 1974" on http://www.treasurer.gov.au/tsr/content/pressreleases/2002/023.asp

The Committee will be chaired by Sir Daryl Dawson, AC KBE CB, former Justice of the High Court of Australia from 1982 to 1997. Sir Daryl is currently a Professorial Fellow at the University of Melbourne, an Adjunct Professor at Monash University and recently served on the Longford Royal Commission. The Members of the Committee are Ms Jillian Segal and Mr Curt Rendall. Ms Jillian Segal is currently the Deputy Chair of the Australian Securities and Investments Commission and Mr Rendall has considerable experience in the small business sector. He is currently Chairman of the Commonwealth Government's Small Business Consultative Committee.

- Possible amendments to s. 10 and s. 11, dealing with the appointment of a Deputy Chair to the Australian Competition and Consumer Commission and with arrangements for an Acting Chairperson, respectively

The Department of the Treasury produced a Discussion Paper in mid 2001.[3] It suspended its work on the Trade Practices Act after the Prime Minister announced his review because of concerns of possible overlap and duplication between the work of the two reviews. The Department of Treasury may continue its review if it is decided that its work will not duplicate that of the Dawson Review.

3. Productivity Commission Review of S. 2D of the *Trade Practices Act 1974*

This is a narrowly focussed review looking at s. 2D, which exempts certain activities from Part IV of the Trade Practices Act. Part IV deals with restrictive trade practices.

The review examines the options for bringing the exempt activities within the scope of Part IV. The exempt activities are the granting (or refusal to grant) licences, and any transactions between people working for the same local government body.

This review began in October 2001 and is to report by October 2002. Its findings are unlikely to impact upon s. 46 and s. 50.

4. Appeal to the High Court by Boral Masonry Ltd

Boral Masonry Ltd is appealing to the High Court against a finding by the Full Bench of the Federal Court that it had contravened s. 46 of the Trade Practices Act, which deals with misuse of market power. The Federal Court found that Boral had misused its market power by selling below cost and expanding its business with the intention of driving competitors out of business and of preventing new entrants to the market.

The High Court has allowed the appeal, which is set down for hearing on 21 May 2002.

The High Court case is likely to have important implications for the future interpretation of s. 46, and specifically for the definition of what constitutes predatory pricing.

3 *Discussion Paper – Possible Amendments to the Trade Practices Act,* Department of the Treasury, 2001