Senate Economics References Committee

Trade Practices Act Review

From the Queensland Retail Traders & Shopkeepers Association

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SENATE ECONOMIES REFERENCES COMMITTEE
TRADE PRACTICES ACT REVIEW
QRTSA SUBMISSION

About QRTSA

The Association represents just over 3,000 members in Queensland, Northern New South Wales and the Northern territory.

QRTSA's membership is 56% non food and 44% food. In the non food sector we represent every type of retail outlet with the exception of the majors and large department stores. Our non food membership even includes retailers for whom there exists their own specialist organizations such as newsagents, a few pharmacies, service stations, hardware stores, hairdressing and florists.

The non food membership also includes organizations such as:
- Pillow Talk
- Retravision
- The Good Guys
- Australian Way
- Rebel Sports
- Super A Mart
- A Mart All sports etc.

The association's food sector membership includes all of the independent banner groups operating in Queensland such as:
- AUR Stores
- IGA
- Nightowl Convenience Stores
- United Star
- Four Square
- Seven Eleven, and
- FoodWorks

Much of this submission will concentrate on the food sector issues as this sector of retailing is the more vulnerable with respect to the ever increasing dominance of the major retail companies.

Nationally the QRTSA is affiliated to:
- The National Association of Retail Grocers of Australia (NARGA)
- The Council of Small Business Organisation of Australia (COSBOA)
- And the National Independent Retail Association (NIRA)

The QRTSA fully endorses and supports the submissions put in to this review by both COSBOA and NARGA.

QRTSA is committed to improving the welfare and viability of its members and, in doing so, does not seek handouts or protection. Rather, QRTSA seeks recognition of and a reduction in the compliance costs faced by small business, and the adoption of trade practices and competition policies that enable small business to compete vigorously in the marketplace.

The QRTSA is concerned to ensure that independents provide a competitive third force within the retail grocery industry to counter the market power of the two major supermarket chains, which already dominate the national grocery market. In order to be such a force, the independent sector must, when buying comparable quantities, be able to acquire its supplies at comparable prices to those obtained by the two major supermarket chains. In addition, independents must not be strategically targeted by below cost pricing or other predatory tactics that may be used by the major supermarket chains. In short, any anti-competitive conduct within the retail grocery industry must be able to be vigorously investigated and stamped out.

Where independents can be a competitive third force, consumers will benefit from more choice, better prices and services than those they may receive when faced with a duopoly comprising the two major supermarket chains. Indeed, a competitive third force within the retail grocery industry will protect consumers from the dangers of a cozy duopoly, where price competition is only within a limited range as determined by the duopolists; where there is a lack of real choice as a result of the duopolists refraining from competing on price or service; and where there is a lack of genuine innovation.

Key Aspects of QRTSA's pro-competitive philosophy

The QRTSA strongly believes that a competitive third force is critical to the maintenance of vigorous competition within the retail grocery industry. The promotion of competition and the prevention of anti-competitive conduct are an integral part of QRTSA's philosophy. The following are central to our pro-competitive philosophy:

- Ensuring that QRTSA members are not placed at a competitive disadvantage by regulatory compliance costs (Compliance costs tend to fall disproportionately on smaller compared with larger businesses). Given the cost sensitive, low profit nature of the retail grocery industry, any compliance costs incurred by independents place them at a cost disadvantage when competing with the major supermarket chains;

- QRTSA members expect to buy their supplies at the supplier's best price and if a supplier is selling to a competitor at a cost price lower than the cost price offered to QRTSA members, those members we believe are entitled to the same cost price where they make comparable purchases. This is embodied in the principle of 'like terms for like customers' which translates into comparable customers (by reference to volume and services provided) receiving comparable prices;

- Suppliers that discriminate against comparable customers must be identified and any anti-competitive price discrimination appropriately dealt with under the *Trade Practices Act*. Anti-competitive price discrimination arises where independents do not receive comparable prices to those received by the major supermarket chains and, therefore, cannot compete with those chains. Comparable supply prices translate into competitive pricing for consumers. Without comparable prices to those secured by the two major supermarket chains, the independent sector is not as competitive as it could be for the benefit of consumers. Price discrimination between comparable customers can be used strategically to undermine the ability of independents to compete on price. Where price discrimination is demanded by an entity having a substantial degree of market power, suppliers may become party to a tactic employed by the entity to secure for itself an obvious price advantage over rivals;

- Anti-competitive below cost pricing -- that is, pricing below cost in selective locations to strategically target an independent competitor - must be identified and appropriately dealt with under the *Trade Practices Act*. Pricing products below cost may give the appearance of being beneficial for consumers, but where below cost pricing is adopted as a strategy by the major retailers to undermine the independent sector, consumers will suffer as prices rise once independents have been eliminated or deterred from engaging in competitive conduct.

- The elimination or undermining of the independent sector is not in the consumer's best interest as independents provide a competitive third force to counter the dominance of the two major supermarket chains. An independent third force provides choice and convenience, and keeps the retail grocery industry competitive for the benefit of consumers. Any predatory conduct by the major supermarket chains aimed selectively at undermining the viability of the independent sector must be stamped out and any further acquisitions of independents by the majors must be closely scrutinized to prevent further increases in the level of market concentration to the detriment of competition in that market.

- A national competition policy that focuses on injecting competitive pressures into highly concentrated industries and ensuring the viability of independents when competing with dominant market players.

QRTSA views the above as essential ingredients in the promotion of competition primarily within the retail grocery industry (but it is also applicable to other sections of retailing) for the ultimate benefit of consumers. A competitive third force will mean a maintenance of competitive prices, greater choice in shopping and the prevention of a cozy duopoly between the two major chains. This situation has now become critical following the recent court decisions, especially the "Boral" case.

REFORMS TO PROTECT SMALL BUSINESSES FROM ABUSES OF MARKET POWER BY LARGE CORPORATIONS

A) Does s 46 of the *Trade Practices Act* deal adequately with predatory pricing and other abuses of market power by large corporations? We believe it does not!

The current prohibition against abuses of market power by large corporations is found in s 46(1) of the TPA. That section states:

> *46 (1) A corporation that has a substantial degree of power in a market shall not take advantage of that power for the purpose of:*
> *(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.*

In order to succeed in a s 46 case, three things need to be proven:

(i) that the corporation engaging in the conduct has a 'substantial degree of market power;'
(ii) that the corporation has 'taken advantage' of its market power; and
(iii) the corporation has done so for an anti-competitive purpose listed in paragraphs (a)(b) and (c).

Does s 46 operate as an effective deterrent against abuses of market power by large corporations? Following recent High Court decisions in the Boral and the Melway cases, the answer is no. This view is supported by our national body NARGA's analysis of key aspects of these decisions and by comments made by the ACCC during its appearance as part of the Senate Economics Legislation Committee's Consideration of Budget Estimates on 5 June 2003. During that appearance, the ACCC stated that following the Boral case it had discontinued 4 out of 15 s 46 cases, with the possibility of a few more cases being dropped by them in the near future.

Background to High Court's narrow interpretation of s 46

We are is concerned that following the High Court's decision in the Boral case (handed down in February 2003), the *Trade Practices Act*'s prohibition against abuses of market power by large corporations has been rendered impotent in dealing with predatory pricing conduct or other abuses of market power by corporations other than monopolists or those in a dominant position. Since 1986 when s 46 was amended to its current form, small business and consumers have been led to believe that s 46 adequately dealt with predatory pricing conduct or other abuses of market power by any corporation having 'a substantial degree of market power'.

The expression 'a substantial degree of market power' had been inserted in the 1986 amendments to s 46 with the clear parliamentary intention that s 46 was to apply not just to monopolists or those corporations in a dominant position in a market, but also to any other corporation that had substantial market power and, in particular, oligopolists.

A narrow High Court interpretation of 'a substantial degree of market power'

In contrast to that clear parliamentary intention, the High Court has, in the Boral decision, taken an extremely narrow view of the expression 'substantial degree of market power.' According to the High Court, only a corporation able to raise prices without losing custom will be considered to have a substantial degree of market power. In short, unless the corporation can price unilaterally without fear of losing custom, it will not come within s 46 of the TPA. Where a corporation is not within the terms of s 46, it can engage in predatory pricing or other abuses of market power without fear of s 46. Irrespective of how large the corporation or how financially powerful, a corporation will not presently come within s 46 unless it can raise prices without losing custom. Since only a monopolist or a corporation in a dominant position can set prices without losing custom, it is clear that s 46 does not prevent large and powerful oligopolists from engaging in abuses of market power such as predatory pricing.

A narrow High Court interpretation of 'take advantage'

Not only has the High Court given the expression 'substantial degree of market power' as used in s 46 an extremely narrow interpretation, but the High Court has also given an extremely narrow interpretation to another element of s 46, in this case the expression 'take advantage.' This occurred in the Melway case where the High Court took the view that a corporation would not be taking advantage of its power if it was merely doing something that it could also do in the absence of the market power. This is a very narrow interpretation as it requires proof that the corporation is doing something that it could not do in the absence of market power. This is a very hard threshold to satisfy. For example, a corporation can price below cost in the absence of market power and, therefore, on the High Court's reasoning a large corporation engaging in below cost (or predatory) pricing would not be taking advantage of its market power.

Thus, not only does the corporation need to be able to set prices unilaterally without losing custom, but it must also be shown that the corporation was doing something that it could not do in the absence of the market power. The threshold for succeeding in a s 46 case has been raised to such heights that the section now effectively applies only to monopolists or those in a dominant position, with the implication being that oligopolists will rarely be caught by s 46 and, therefore, be able to freely engage in predatory pricing or in other abuses of market power without fear of the TPA.

Key Problem to be addressed – restoring the parliamentary intention behind *'a substantial degree of market power'* and *'take advantage'*

The current inadequacy of s 46 of the TPA is clearly the result of the High Court's failure to give effect to the parliamentary intention behind the key concepts of *'a substantial degree of market power'* and *'take advantage.'*

According to the Explanatory Memorandum accompanying the 1986 amendments to s 46 the expression *'a substantial degree of market power'* was inserted with the intention of lowering the threshold for the operation of the s 46. It is clear that the expression referred to a lower degree of market power than that possessed by a monopolist or corporation in a dominant position in the market. Within this context, 'substantial' was intended to signify 'large or weighty' or 'considerable, solid or big.' In short, the expression *'a substantial degree of market power'* was intended to cover a corporation that had 'large or considerable' market power. While the expression suggested a 'greater rather than less' degree of market power, it was 'not intended to require' the high degree of market power possessed by a monopolist or a corporation in a dominant position in the market. Nor was it intended to require that the corporation have the power to determine the prices in a market.

Thus, while the expression *'a substantial degree of market power'* was intended to require an assessment of the degree to which the corporation could act without competitive constraint, such an assessment was not to be determined by reference to whether the corporation had the power to determine prices in a market. Rather, the absence of competitive constraint was to be determined by reference to the size of the corporation, its market share, and other advantages it enjoyed which enabled it to act to some degree unconstrained by competition.

Contrary to the clear parliamentary intention behind the expression *'a substantial degree of market power,'* the High Court in the Boral case decided to assess the issue of an absence of competitive constraint by reference to a corporation's ability to set prices, an approach that the explanatory memorandum expressly stated was not intended to apply when determining whether the corporation had *'a substantial degree of market power.'*

Furthermore, the explanatory memorandum states that 'more than one firm may have *"a substantial degree of market power"* in a particular market.' This statement recognizes that more than one corporation may have 'large or considerable' market power. This further highlights the level of divergence between the parliamentary intention behind the current s 46 and the High Court's approach in the Boral case. In particular, with the High Court's approach requiring that a corporation be able to raise prices unilaterally without losing custom, it is inconceivable that under that approach more than one corporation would have a substantial degree of market power.

Finally, the explanatory memorandum states that the expression 'take advantage' is intended to indicate 'that the corporation is able, by reason of its market power, to engage more readily or effectively in conduct directed to one or other of the objectives' set out in paragraphs (a)(b) or (c) of s 46(1). The explanatory memorandum goes on to state that the corporation 'is better able, by reason of its market power, to engage in the conduct.' In short, the parliamentary intention behind the expression 'take advantage' focuses attention on whether or not the corporation's market power makes its easier for it to engage in the conduct.

This clearly involves the corporation using its substantial market power to achieve a prohibited purpose under paragraphs (a)(b) and (c). If that substantial market power places the corporation in a better position to engage in conduct aimed at achieving one or more of prohibited purposes in s46(1), then the corporation is taking advantage of its market power by virtue of it using that market power to achieve such a purpose. Clearly, the greater the market power of the corporation, the easier it becomes for the corporation to use that market power to achieve a prohibited purpose under paragraphs (a)(b) and (c).

Contrary to the High Court's decision in the Melway case, the question to be asked regarding the issue of taking advantage is whether or not the corporation's market power makes it easier for the corporation to engage in conduct aimed at achieving a prohibited purpose under paragraphs (a)(b) or (c). Where the corporation does in fact use that substantial degree of market power to achieve a prohibited purpose under paragraphs (a)(b) or (c), then in accordance with the explanatory memorandum it is taking advantage of that power.

The question should not, as put by the High Court in the Melway case, be how the corporation would behave in the absence of market power, but rather should be how the corporation does in fact use its market power when it does have a substantial degree of market power. What the corporation would have done in the absence of market power is a hypothetical question detracting from what should be the real issue of how the corporation uses its substantial degree of market power. The *use* of the substantial degree of market power should, in keeping with the explanatory memorandum, be the key question to be resolved when determining if there has been a breach of s 46.

Solutions to the key problem – Restore the Parliamentary intention by inserting a statutory definition of *'a substantial degree of market power'* and *'take advantage'* into s 46

Given that the High Court has, contrary to the parliamentary intention, narrowly defined the concepts of *'a substantial degree of market power'* and *'take advantage,'* it is critical that statutory definitions of these terms be inserted into s 46 as a matter of urgency. Those statutory definitions would merely spell out in clear language what was the original parliamentary intention behind those concepts. In particular, a statutory definition of *'a substantial degree of market power'* would emphasize that the concept is to be considered by reference to the size of the corporation, its market share and other advantages the corporation enjoys which enable it to act to some degree unconstrained by competition. Similarly, a definition of *'take advantage'* should focus on the corporation's *use* of its substantial market power for a prohibited purpose under paragraphs (a)(b) or (c).

B) Anti-competitive below cost or unreasonably low pricing

Anti-competitive below cost or unreasonably low pricing is one example of conduct that, where engaged in strategically by an entity having a substantial degree of market power, would undermine competition in a market where independent small businesses could not match or sustain prices set by a dominant corporation. The problem would be magnified in those circumstances where a supplier engages in **anti-competitive price discrimination** whereby a dominant corporation receives better prices or trading terms than the independent small business sector, even though the latter buys comparable quantities of products and provides the supplier with comparable services. Being sold products at prices higher than those offered to dominant corporations places the independent small business sector at a clear price disadvantage and prevents the sector from being competitive with dominant corporations. Being at a competitive disadvantage forces independent small business to go out of business or sell out to the dominant corporations. Simply stated, if the independent small business sector was not at a price disadvantage they would be in a better position to provide effective competition to the dominant corporations to the benefit of consumers.

Prohibiting **anti-competitive below cost or unreasonably low pricing** would ensure that dominant corporations would not price goods below their acquisition cost plus normal selling costs as a way of destroying the independent small business sector. Since a dominant corporation could sustain below cost or unreasonably low prices for longer periods of time, it is critical that no below cost or unreasonably low pricing strategy is implemented (unless, for example, it is implemented to match a competitor's price or there is a genuine commercial reason for sustaining losses on a particular product, i.e. where it is highly perishable or the product is a discontinued line). Similar provisions within the Act to legislation already operating in many European countries (please see attachment 1) would be a very positive move.

International precedent – Canada

In Canada, unreasonably low pricing is dealt with in s 50(1)(c) of their *Competition Act:*

> "50. (1) Everyone engaged in business who
>
> ...
>
> (c) engages in a policy of selling products at prices unreasonably low, having the effect or tendency of substantially lessening competition or eliminating a competitor, or designed to that effect, is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years."

Importantly, this international precedent recognizes the potentially anti-competitive impact of unreasonably low pricing and deals with it in the strongest terms, with provision of imprisonment. In contrast, QRTSA's prohibition will only give rise to civil remedies under the *Trade Practices Act.* Nonetheless, the possibility of imprisonment in the Canadian provisions is clear evidence of the importance attached in that jurisdiction to dealing with such anti-competitive conduct. Indeed, it is particularly noteworthy that this has occurred in Canada, a jurisdiction having an economy comparable in size to that of Australia.

C) Anti-competitive price discrimination

Prohibiting **anti-competitive price discrimination** would prevent suppliers from discriminating between competitors where they buy the same products in like quantities having regarding to the nature of the buyers and the relationship between the buyers and suppliers. Where similar customers are buying at unexplained price differences, the level of competition in the market is distorted by the fact that one customer has a price advantage over another similarly placed customer. In these circumstances, the price-disadvantaged customer, i.e. the independent small business person, cannot offer the same level of discount to consumers. This acts to the detriment of the independent small businesses, as they cannot match the prices offered by the price advantaged dominant corporation, unless they work on a lower trading margin, which in turn, inhibits the extent to which funds can be reinvested into the business to sustain its viability, growth and continued innovation to meet customer expectations. As independent small businesses go out of business, or cannot compete and are acquired one by one by a dominant corporation, consumers suffer as they are faced with less choice and convenience, and with prices dictated by dominant corporations left with no effective competition from the independent small business sector.

International precedents – The United States, United Kingdom and Canada

The prohibition against anti-competitive price discrimination by QRTSA is not novel. Indeed, it has long been part of United States antitrust law. Indeed, the American jurisprudence has long recognized that price concessions extracted by customers abusing their market power can be anti-competitive and not in the customer interest.

The United States prohibition against anti-competitive price discrimination between comparable customers is found at 15 USC 13 and is more popularly known as part of the Robinson-Patman Antidiscrimination Act and also as the Robinson-Patman Price Discrimination Act enacted in 1936:

> "Sec 13. – Discrimination in price, services or facilities
>
> (a) Price: selection of customers
>
> It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchases of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either them: Provided, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers, sold or delivered: Provided, however That the Federal Trade Commission may, after due investigation and hearing to all interested parties, fix and establish quantity limits, and revise the same as it finds necessary, as to particular commodities or classes of commodities, where it finds that available purchasers in greater quantities are so few as to render the differentials on account thereof unjustly discriminatory or promotive of monopoly in any line of commerce; and the foregoing shall then not be construed to permit differentials based on differences in quantities greater than those so fixed and established: And provided further, That nothing herein contained shall

prevent persons engaged in selling goods, wares or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade: And provided further, That nothing herein contained shall prevent price changes from time to time where in response to changing conditions affecting the market for or the marketability of the goods concerned, such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sale in good faith in discontinuance of business in the goods concerned.

(b) Burden of rebutting prima-facie case of discrimination

Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: Provided, however, That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing or services or facilities to any purchaser or purchases was made in good faith to meet an equally low price of a competitor, or the services of facilities furnished by a competitor.

(c) Payment or acceptance of commission, brokerage, or other compensation

It shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid.

(d) Payment for services or facilities for processing of sale

It shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the procession, handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities.

(e) Furnishing services or facilities for processing, handling, etc.

It shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale, with or without processing, by contracting to furnish or furnishing, or by contributing to the furnishing of, any service or facilities connected with the processing, handling, sale, or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms.

(f) Knowingly inducing or receiving discriminatory price

It shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section."

The United Kingdom anti-competitive price discrimination can be dealt with under s 18 of the *Competition Act 1998 (UK)*:

"18. – (1) Subject to section 19, any conduct on the part of one or more undertakings which amounts to the abuse of a dominant position in a market is prohibited if it may affect trade within the United Kingdom

(2) Conduct may, in particular, constitute such an abuse if it consists in-

(a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions

...

(c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage

...

(3) In this section-

"dominant position" means a dominant position within the United Kingdom;

and

"the United Kingdom" means the United Kingdom or any part of it.

(4) The prohibition imposed by subsection (1) is referred to in this Act as "the Chapter II prohibition".

In Canada, anti competitive price discrimination is dealt with in s 50(1)(a) of the Canadian *Competition Act*

> "50. (1) Every one engaged in a business who
>
> (a) is a party or privy to, or assists in, any sale that discriminates to his knowledge, directly or indirectly, against competitors of a purchaser of articles from him that any discount, rebate, allowance, price concession or other advantage is granted to the purchaser over and above any discount, rebate, allowance, price concession or other advantage that, at the time the articles are sold to the purchaser, is available to the competitors in respect of a sale of articles of like quality and quantity,
>
> ...
>
> is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years."

When considered together these international precedents offer recognition of the importance of competition laws dealing with anti-competitive price discrimination. It is apparent from these international precedents that Australian is out of step with other modern market economies in not having laws that specifically address anti-competitive price discrimination. Indeed, on this issue Australia is out of step with even Canada, an economy of comparable size to that of Australia. The introduction of a new prohibition to address the gap in Australia's *Trade Practices Act* left by the repeal of the former s 49 should be seen as a key pro-competitive reform in a market place which is becoming increasingly concentrated.

D) Prohibiting coercive or intimating conduct by entities having a substantial degree of market power

The QRTSA is concerned that as corporations become even more dominant and industries become more concentrated, they are more likely to behave in a coercive or intimating manner towards those with which they deal. This is a particular issue where the dominant corporation is a substantial customer of a smaller, or even large, supplier. Suppliers may be coerced or intimidated into doing things that they would not have otherwise done. For example, suppliers may be coerced or intimidated into withdrawing discounts offered to customers other than the dominant corporation. Withdrawal of such discounts following approaches by a dominant corporation is anti-competitive as it deprives consumers of the ultimate benefits of those discounts.

Similarly, a supplier may be coerced or intimidated by a dominant corporation into treating the dominant corporation more favorably than other customers of the supplier. By being coerced or intimidated into discriminating against other customers, suppliers are being forced to tilt the competitive playing field in favor of the dominant corporation. The disadvantaged customers are not able to be as competitive as they could have been in the absence of discrimination and, therefore, consumers are deprived of the benefits of having an independent small business sector that can compete vigorously with a dominant corporation.

Accordingly, The QRTSA advocates that a new prohibition against coercive or intimidating conduct by entities having a substantial degree of market power be inserted into the Trade Practices Act or a broadening of s51AC. A provision of this kind should then result in easier prosecution of this type of activity under the Act.

There is a recent occurrence which by itself amply demonstrates the need for changes to the Act in order to curb the often coercive and or intimidating conduct by entities (in the case of Coles Myer) having a substantial degree of market power.

Following the Victorian Governments decision to gradually eliminate the cap on packaged liquor sales in that state, Coles Myer CEO John Fletcher was quoted as stating the following "Coles Myer was going to start using its size to become more aggressive". He singled out retailers in the liquor sector and was further quoted as saying that small independent retailers would feel Coles Myers market power. He said "the consequences of that is I am sure that there will be more independent liquor store operators that, with the shackles off (Coles Myer) it may be time to think about selling". We would submit that this is a clear example of intimidating conduct by an entity with a substantial degree of market power.

International Precedent – Canada

Than Canadian *Competition Act* provides an example of where a jurisdiction has expressly identified in the legislation itself conduct that is considered to be anti-competitive:

"78. (1) For the purposes of section 79, "anti-competitive act", without restricting the generality of the term, include any of the following acts:

(a) squeezing, by a vertically integrated supplier, of the margin available to an unintegrated customer who competed with the supplier, for the purpose of impeding or preventing the customer's entry into, or expansion in, a market;
(b) acquisition by a supplier of a customer who would otherwise be available to a competitor of the supplier, or acquisition by a customer of a supplier who would otherwise be available to a competitor of the customer, for the purpose of impeding or preventing the competitor's entry into, or eliminating the competitor from, a market;
(c) freight equalization on the plant of a competitor for the purpose of impeding or preventing the competitor's entry into, or eliminating the competitor from, a market;
(d) use of fighting brands introduced selectively on a temporary basis to discipline or eliminate a competitor;
(e) pre-emption of scarce facilities or resources required by a competitor for the operation of a business, with the object of withholding the facilities or resources from a market;
(f) buying up of products to prevent the erosion of existing price levels;
(g) adoption of product specifications that are incompatible with products produced by any other person and are designed to prevent his entry into, or to eliminate him from, a market;
(h) requiring or inducing a supplier to sell only or primarily to certain customers, or to refrain from selling to a competitor, with the object of preventing a competitor's entry into, or expansion in, a market;
(i) selling articles at a price lower than the acquisition cost for the purpose of disciplining or eliminating a competitor;
(j) acts or conduct of a person operating a domestic service, as defined in subsection 55(1) of the Canada Transportation Act, that are specified under paragraph (2)(a); and
(k) the denial by a person operating a domestic service, as defined in subsection 55(1) of the Canada Transportation Act, of access on reasonable commercial terms to facilities or services that are essential to the operation in a market of an air service, as defined in that subsection, or refusal by such a person to supply such facilities or services on such terms."

As is readily apparent Canadian statutory list of anti-competitive conduct is much more extensive that that proposed by QRTSA. QRTSA commends the Canadian approach to the Committee as an example of where the express identification of anti-competitive conduct has been undertaken by a jurisdiction. QRTSA would also commend the approach to the Committee as a way of providing certainty as to what conduct is considered to be anti-competitive.

E) Unconscionable Conduct (Section 51AC)

Many of our members have shared their concerns regarding Unconscionable Conduct in the market place. The Dawson Review considered Section 51AC outside its Terms of Reference. QRTSA believes and recommends that Section 51AC would provide greater support to business in their dealings with larger corporations if the Section proscribed *unfair, harsh* as well as unconscionable conduct as at present.

QRTSA also recommends that Section 51AC be amended to proscribe the following conduct:

- unilateral variation of contract or associated documents;
- the termination of contract by one party without just cause or due process (though it is not intended that the rights of parties to repudiate a contract be removed);
- creating, imposing documents or policies post-signing of the contract which distort the original contract; and
- the presentation of 'take it or leave it' contracts or agreements.

Section 46 with the amendments that both COSBOA and QRTSA suggested will protect small business from market power but Section 51AC will provide more certainty and act as an effective safe-guard for those small businesses that are in direct contractual relationships. This will provide certainty for small against large.

A number of our members are most concerned that the public sector that competes in the private sector should be subject to the same unfair, harsh and unconscionable conduct provisions of the Trade Practices Act and that that be explicitly stated in the Act. The public sector is a significant purchaser of goods and services in our economy and should be subject to the same rules as any other purchaser of goods and services.

QRTSA is aware that some may argue that Section 51AC needs more time to be tested by the Courts. QRTSA opposes this view in light of the difficulties that Section 46 has experienced in its progress through the Courts. It is time that the Trade Practices Act be sufficiently clear that the Courts do not need to make new interpretations that changes the intent of Parliament. In a society where big is getting bigger, small needs this protection immediately for both unconscionable, unfair and harsh conduct.

F) Part IVB – Codes of Conduct

Section 51AD prohibits contraventions by corporations of applicable industry codes of practice. An applicable is one which is mandatory for the industry in questions or a voluntary code that binds the corporation; such codes must be declared either as mandatory or voluntary by regulations under Section 51AE. Currently franchising is specifically defined as an industry for the purposes of Part IVB.

The QRTSA is concerned by mandatory codes because the regulatory impact is at a much higher cost for small business than large business. QRTSA is supportive of industries developing best practice principals that lead to fair trading and benefits to the consumer but not at the destruction of the small business sector.

G) Other Issues

Anti-competitive creeping acquisitions – Nature of the problem

A new specific prohibition against anti-competitive creeping acquisitions is called for in view of the difficulties faced by the ACCC under the current s 50 in assessing a proposed acquisition by a dominant corporation by reference to previous small acquisitions by that corporation in the particular market. While a large acquisition by a dominant corporation can, as in the case of the Franklins break-up, be subject to close scrutiny by the ACCC, a series of minor acquisitions that together would substantially lessen competition are less likely to be subject to the same scrutiny. Where in fact scrutinized, the ACCC faces considerable limitations on its ability to assess the cumulative effect of the creeping acquisitions on the level of competition.

Prohibiting anti-competitive creeping acquisitions would prevent further anti-competitive concentration in already highly concentrated industries. With dominant corporations already controlling key industry sectors and s 50's inability to deal with small, yet cumulatively anti-competitive acquisitions, all further acquisitions by such dominant corporations should be placed under the competitive microscope to assess their impact on competition in the relevant market. Where a proposed new acquisition would, when taken together with previous acquisitions in the market, substantially lessen competition in the market, that acquisition should not be allowed. Given the importance of preventing anti-competitive creeping acquisitions, it is imperative that the ACCC be notified of such proposed acquisitions by dominant corporations.

Additional reforms for dealing with anti-competitive creeping acquisitions

Where markets are highly concentrated, consumers do not get the benefits that ordinarily flow from vigorous competition. In those circumstances, there is a danger that what little competition is present in the market may be removed through the acquisition of independent small business rivals by entities having a substantial degree of market power. The removal of independent rivals merely acts to further concentrate the market to the detriment of consumers. Backed by their considerable market power, entities having a substantial degree of market power can simply undermine an independent small business rival or acquire it. Indeed, a process of undermining an independent small business rival in a highly concentrated market can be part of an obvious strategy of lowering the value of the independent's business with a view of acquiring it subsequently at a reduced price. Over time, an entity having a substantial degree of market power can simply cherry pick independent small businesses at leisure to the detriment of consumers. Often these independents feel they have little choice other than to sell out as they are unable to remain competitive as a result of the unleveled playing field favoring dominant corporations.

The QRTSA is concerned that the continuing concentration of industry sectors not only undermines the independent small business sector, but more importantly is highly detrimental to consumers. There must be a point at which a market is too highly concentrated and any further acquisitions need to be carefully reviewed. Without a divestiture power for intentional breaches of s46, more attention needs to be focused on ensuring that no further concentration occurs, through acquisition, in those markets already viewed as too highly concentrated.
One proposal for identifying highly concentrated markets and ensuring that no further concentration occurs without appropriate scrutiny involves giving the ACCC the power to issue what Small Business describes as a 'concentrated market notice'.

Anti-competitive creeping acquisitions – The role of a Concentrated Market Notice

A concentrated market notice should be issued after the ACCC has formed the view that an identified market is highly concentrated by reference to pre-determined criteria. QRTSA would submit that a highly concentrated market is one in which four or less market participants control 75% or more of the market. Given that four or less market participants control 75% or more of the market, it is quite likely that a majority of those participants already have a substantial degree of market power. In such circumstances, acquisitions by such participants can only increase their level of market power and more than likely to the detriment of consumers.

With the danger of further concentration continuing to impact negatively on the level of competition, it is important that further acquisitions in concentrated markets are placed under the spotlight. Thus, while a concentrated market notice is in place, no acquisitions in the market identified by the notice can take place unless authorized under the Act or allowed by the ACCC subject to an appropriate s 87B undertaking.

Such a concentrated market notice would not prevent further acquisitions, but rather would ensure that if any such acquisitions were to take place their impact on competition is carefully assessed. The clear advantage of a concentrated market notice is its transparency. That is, once a notice is issued, market participants are well aware that any further acquisitions need to be justified on public benefit grounds or a trade off needs to be made by which the acquirer undertakes to divest existing assets or operations to offset the increase in market concentration arising from the proposed acquisition.
An alternative to a concentrated market notice would be to give the ACCC the power to issue, on a case by case basis, what Small Business describes as an 'anti-competitive acquisition notice'.

Anti-competitive creeping acquisitions - An Anti-Competitive Acquisition Notice as an alternative

Rather than identify concentrated markets beforehand and deal with further acquisitions in a pre-emptive, yet transparent manner, the ACCC could be put into a position to respond to particular acquisitions that, when taken together with previous acquisitions, substantially lessen competition in a market. By taking each acquisition on its merits, the ACCC could carefully weigh up whether or not a particular acquisition, when taken together with previous acquisitions, substantially lessens competition. If the ACCC forms the view that it does, then it could issue an anti-competitive acquisition notice. Once such a notice is issued the acquirer must divest itself of the acquisition or not proceed with it unless it has been authorized or subject to a s 87B undertaking accepted by the ACCC. In these circumstances, an anti-competitive acquisition notice has the advantage of allowing the ACCC to consider each acquisition on a case by case basis and to act only where it forms the view that the acquisition is detrimental to competition and consumers.

We thank you for the opportunity to provide comment on these very important issues.

Yours sincerely,