

Inquiry into the effectiveness of the *Trade Practices Act 1974* in protecting small business

Supplementary Submission by the Australian Competition and Consumer Commission to the Senate Economics References Committee

At the 31 October and 7 November 2003 public hearings conducted by the Senate Economics References Committee (“the Committee”) where the Australian Competition and Consumer Commission (“ACCC”) representatives attended, the ACCC took on notice certain questions from the Senate Committee members.

This supplementary submission addresses the issues where the ACCC has a concluded view at this stage and is divided into the following parts:

- Part I deals with the ACCC’s views on the proposal to amend section 46 of the *Trade Practices Act 1974* (“Act”) to include a non-exhaustive list of factors analogous to the factors enumerated under section 50(3) of the Act;
- Part II deals with Senator Andrew Murray’s request for the ACCC to comment further on its original proposal contained in its first submission to remove the \$3 million transactional limit in section 51AC and the proposal to include in the section the Australian Bureau of Statistics’ definition of small business;
- Attachment A is the ACCC’s Guidelines for developing and endorsing effective voluntary industry codes;
- Attachment B is the ACCC Issues Paper on the discussion on the relationship between the Australian motor body/smash repair industry and the general insurance sector; and

- Attachment C is a confidential response to questions raised by Senator Stephen Conroy concerning recent complaints and investigations of matters under section 46 of the TPA.

Part I: Section 46

1. At the public hearing before the Committee on 31 October 2003, at which representatives of the ACCC appeared, the Committee requested that the ACCC prepare a submission in respect of a proposal to amend section 46 of the Act to include a non-exhaustive list of factors (analogous to the factors set out in section 50(3) of the Act that the Court must take into account in determining whether an acquisition would have the effect, or be likely to have the effect, of substantially lessening competition in a market) that the Court would take into account in assessing whether a firm has a substantial degree of market power and whether a firm has taken advantage of such power.
2. This supplementary submission addresses the proposal.
3. The ACCC's first written submission indicated its concern that the Federal and High Courts in recent decisions have not consistently applied section 46 of the Act in accordance with the policy intention of Parliament. The ACCC noted that these decisions have, to some degree shifted the focus of the section to the "market power" and "taking advantage" elements of the provision, in a way that is of concern to the ACCC (see page 4 of the first submission).
4. Accordingly the ACCC put forward a number of specific proposals for amending section 46 that were directed at clarifying these two elements.
5. In respect of assessing whether a firm has a substantial degree of market power, the ACCC proposed in its first submission that section 46 be amended to make it clear that:
 - (a) a firm will be deemed to have such power if it is not constrained to a significant extent by competitors, potential competitor or customers of the firm;
 - (b) a firm may have a substantial degree of power in a market notwithstanding that other firms also have a substantial degree of power in the same market;

- (c) it is relevant to determining whether a firm has substantial degree of power in a market, if the firm engages persistently in conduct in that market of a kind that in a competitive market it would be unlikely to engage in.
- 6. Similarly, the ACCC proposed adding certain criteria to section 46 for determining whether a firm has taken advantage of its substantial market power, namely whether:
 - (a) the conduct of the corporation is materially facilitated by its substantial degree of market power;
 - (b) the corporation engages in the conduct in reliance upon its substantial degree of market power;
 - (c) the corporation would be likely to engage in the conduct if it lacked a substantial degree of market power; or
 - (d) the conduct of the corporation is otherwise related to its substantial degree of market power.
- 7. As indicated in its first submission, the ACCC is also of the view that section 46 should be amended so that it clearly applies to:
 - (a) any use of substantial market power with a proscribed purpose whether the conduct takes place in the market where the power exists or in any other market; and
 - (b) the coordinated use of market power by unrelated firms.
- 8. In light of the discussions that its representatives have had with Committee members, the ACCC is of the view that greater attention needs to be given in the context of section 46 to the role that financial power and financial resources play in enabling and facilitating both predatory pricing conduct and other unilateral anti-competitive conduct. The ACCC would be supportive of amending the section to make clear that, in determining whether a firm has a substantial degree of market power, the Court may have regard to the financial resources available to the firm, including the financial resources of any related firm.

9. The ACCC is of the view that amendments to section 46 of the kind referred to above are critical to:
 - (a) achieving certainty and clarity in the application by the Courts of the section; and
 - (b) securing a proper understanding by the Australian business community of the scope of the section.
10. In the ACCC's view, its proposed amendments pick up all of the matters the ACCC considers significant that otherwise may be thought could be included in the proposed non-exhaustive list. The proposed amendments may even remove the perceived need for such a list.
11. There is now a considerable body of learning both economic and judicial as to the core concepts in section 46 such as market power and taking advantage of such power. Including in a list factors such as barriers to entry, level of concentration in the market, countervailing power or other restraints and the nature and extent of vertical integration would not be of much assistance, especially if their consideration was discretionary, as these are factors that the Courts consider as a matter of course and on the basis of clear authority.
12. The ACCC has some concerns that the clarifying amendments that it is proposing could not be adequately dealt with in a list. Some of the principles the ACCC considers should be clarified are not aptly described in a list format, for example, the concept that a firm may have a substantial degree of power in a market notwithstanding that other firms also have a substantial degree of power in the same market.
13. Further, even if the list picked up the factors and matters the ACCC considers should be incorporated into the section, the impact of the amendments the ACCC considers critical may be diluted and the guidance the amendments should give the Courts may not be sufficiently focussed. The ACCC therefore favours amendments such as it has proposed that focus on specific clarifications, rather than a list of relevant factors. Such a list may not provide the Courts with sufficient guidance as to the Parliament's policy intentions.
14. On balance, the ACCC considers that amending section 46 as proposed above is the preferable course to take rather than including a non-exhaustive list of

matters the Courts would take into account in assessing the “market power” and “taking advantage” elements of the section.

Part II: Section 51AC

1. At the Senate inquiry hearing on 7 November 2003, the ACCC was requested by the Committee to give further comments on:
 - the ACCC's proposal in its first submission that the \$3 million transactional limit in section 51AC of the Act ("s.51AC") is no longer warranted; and
 - Senator Andrew Murray's proposal to include in section 51AC the Australian Bureau of Statistics' (ABS) definition of small business.
2. The ACCC considers that the key to determining whether a business should be eligible for relief under s.51AC is the extent to which there is a disparity in the relative bargaining positions between the parties to a transaction.
3. Although the Act does not define the term 'small business', it currently has two additional limitations on the eligibility of businesses to seek relief under s.51AC, specifically that:
 - the party seeking relief must not be a publicly listed company (ie have its shares listed on a financial market such as the Australian Stock Exchange); and
 - the value of the relevant transaction must not exceed \$3 million¹.
4. The ACCC, in its first submission, has suggested that the \$3 million limitation may no longer be warranted:

'It is also suggested that it appears to be an arbitrary distinction to draw a difference in applicability of section 51AC based on whether the quantum of the transaction is above or below \$3 million. The limit suggests that the legislation is intended to protect not merely individual small businesses but corporate consumers of a commercially significant size. The limitation therefore no longer seems to be warranted.'²
5. The ACCC notes that in some cases, the value of the transaction may not be known at the time of the alleged contravention, and further that in ongoing

¹ This has been increased from the previous limit of \$1 million.

² Australian Competition and Consumer Commission, *Submission to the Senate Economic References Committee Inquiry into the effectiveness of the Trade Practices Act 1974 in protection small businesses*, September 2003, page 41.

supply contracts, it may be difficult to isolate the value of each individual transaction as opposed to the contract taken as a whole. There has been no judicial indication of the courts' approach to interpreting the \$3 million threshold where a contract relates to a series of supplies which in total may exceed \$3 million (for example, insurances, ongoing retail or wholesale supply, etc) but the individual components are of a value less than \$3 million.

Proposal to include definition of small business under section 51AC

6. The ACCC has been asked to comment on the proposition that an additional provision be added to the Act to the effect that all businesses that fall within the ABS definition of 'small business' would be eligible to seek relief under s.51AC.
7. The ACCC considers it highly unlikely that there would be any small businesses that would meet the ABS definition of small business, but would not come within the existing thresholds under s.51AC. The ACCC does not consider, therefore, that the inclusion of the ABS definition would extend the range of businesses that were afforded protection under s. 51AC.

Risk of confusion

8. The ACCC considers that inserting additional definitions of small business into s.51AC, such as the one proposed, risks confusing small businesses and others regarding the protections afforded to them.
9. The ACCC also considers that factors relating to a company's size, turnover, or number of employees and financial position are appropriately dealt with in respect to relative bargaining positions under s.51AC rather than as threshold questions for eligibility.
10. Additionally, the ACCC considers that the inclusion of the ABS definition would not extend the protections offered to small businesses under s.51AC, and may risk causing confusion in the market. For example, the ABS definition of 'small business' is unclear on the issue of whether the definition applies to heads of staff, or full-time equivalents. If no clarification were made, businesses with a high number of casual or part time staff may fall outside the definition. Similar uncertainties arise with regard to agents and contractors as opposed to employees.

11. For these reasons, the ACCC recommends against the inclusion of the ABS definition of small businesses in s.51AC.
12. In the ACCC's view, while it believes that the \$3 million threshold is not warranted, it would be preferable to retain this threshold than to remove the threshold and replace it with the proposed inclusion of a small business definition.