INQUIRY INTO THE EFFECTIVENESS OF THE *TRADE PRACTICES ACT 1974* IN PROTECTING SMALL BUSINESS

ACCI SUBMISSION
TO THE
SENATE ECONOMICS REFERENCES COMMITTEE

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Background

The Australian Chamber of Commerce and Industry (ACCI) is the peak council of Australian business associations. ACCI's members are employer organisations in all States and Territories and all major sectors of Australian industry.

Through our membership, ACCI represents over 350,000 businesses nation-wide, including the top 100 companies, over 55,000 enterprises employing between 20-100 people, and over 280,000 enterprises employing less than 20 people. This makes ACCI the largest and most representative business organisation in Australia.

Membership of ACCI comprises State and Territory Chambers of Commerce and national employer and industry associations. Each ACCI member is a representative body for small employers or sole traders, as well as medium and large businesses.

ACCI is well positioned to play a leadership role on the issues affecting the growth, investment and competitiveness of Australian small businesses. ACCI has a dedicated Small Business Adviser within its Industry Policy Unit and provides key support to two important Small Business forums – the ACCI Small Business Committee and the Small Business Coalition (SBC), which includes industry associations beyond those direct members of ACCI. ACCI is also a member of the Australian Tax Office Commissioner's Small Business Consultative Forum, the Australian Competition and Consumer Commission (ACCC) Small Business Advisory Group, and the Commonwealth Government's National Small Business Forum.

ACCI also undertakes regular surveys of its small business membership. The ACCI Small Business Survey is completed quarterly and provides key information on what factors are inhibiting small business investment and growth. ACCI also undertakes a Pre-Election Survey. This survey identifies factors inhibiting small, medium and large business growth.

Through member consultation, committee meetings and small business surveys, ACCI has an intimate understanding of the issues confronting small businesses today.

Introduction

The Senate Economics References Committee has sought submissions as to whether the *Trade Practices Act 1974* (the Act)

adequately protects small businesses from anti-competitive or unfair conduct.

This Inquiry closely follows a 'Review of the Competition Provisions of the *Trade Practices Act'* (Dawson Committee Review) that was completed in January 2003 and released mid-April along with the Government's response. Like this inquiry, the Dawson Committee also examined the effectiveness of section 46.

As indicated in ACCI's submission to the Dawson Committee, and as a broad statement, ACCI believes that the *Trade Practices Act 1974* adequately protects small businesses from anti-competitive or unfair conduct. Further, it should be noted that the findings of the Dawson Committee in relation to section 46 are highly consistent with ACCI's submission to it. The Dawson Committee conclusions in relation to section 46 and the arguments put forward by certain proponents for the inclusion of an 'effects test' include:

- 'Existing case law on section 46 does not substitute the view that purpose is an unnecessarily onerous hurdle to prove;
- The addition of an effects test would increase the risk of regulatory error and render purpose ineffective as a means of distinguishing between pro-competitive and anti-competitive behaviour;
- Overseas experience, so far as it is of assistance, does not indicate that the introduction of an effects test would be appropriate; and
- Cases presently before the courts provide an opportunity for the section to be further clarified and it would not be in the interests of consumers or competition to change this section at this stage'[1].

Stemming from these conclusions was the recommendation from the Dawson Committee that no amendment 'should be made to section 46.'[2]

ACCI fully supports this recommendation. The reasons why are discussed in this paper. In relation to the effectiveness of Parts IVA and IVB of the Act, ACCI believes that there are a number of areas that could be improved to assist small businesses.

As for additional measures to assist small businesses, ACCI believes there are aspects of authorisations and notifications, price discrimination, representative actions, and collective bargaining

[1] Review of the Competition Provisions of the Trade Practices Act, pg 88.
[2] Review of the Competition Provisions of the Trade Practices Act, pg 88.

that warrant closer scrutiny. Supporting views are discussed in detail under (a), (b), (c), and (d) of the terms of reference below.

Specific Comment

(A) WHETHER SECTION 46 OF THE ACT DEALS EFFECTIVELY WITH ABUSES OF MARKET POWER BY BIG BUSINESS, AND IF NOT, THE IMPLICATIONS OF THE INADEQUACY OF SECTION 46 FOR SMALL BUSINESSES, CONSUMERS AND COMPETITIVE PROCESSES.

ACCI believes that section 46 'deals effectively with abuses of market power by big business'. We do not support any change to the current provision. Supporting arguments are outlined below.

Any change to section 46 may jeopardise the distinction between pro-competitive and anti-competitive behaviour and may impede the 'objective' of the Act.

The overriding reason why Australian governments of all persuasions began to move away from the former public policy approach of 'cosseting and caring' in the 1950s and 60s, to one of market de-regulation and diminished 'protectionism', was essentially because of the benefits of 'competition'.

The basic belief is that when markets are competitive (that is, when there is free entry and actual or potential competition for market share), markets tend to produce more innovation, make higher profits, achieve better output and greater economic prosperity and growth as compared to less competitive markets.

The objective of competitive markets is fully supported by ACCI. However, it is not without its 'grey areas'. For example, behaviour that is pro-competitive may appear to be anti-competitive because a competitor has been adversely affected. As the Australian economy evolves, issues such as these must be continually monitored to ensure equity and efficiency in the operating environment. However, changes to the regulatory environment should only be made after a rigorous Regulatory Impact Statement process determines that there are benefits in making regulations or changes to regulations.

Changing the "purpose test" as currently applied in section 46 to an "effects test" has in recent times been advocated by the Australian Competition and Consumer Commission (ACCC) and other groups. This is not supported by ACCI for a number of reasons. The recent *Review of the Competition Provisions of the Trade Practices Act*

best describes the distortion that would result if an effects test was introduced*:*

> '…such an amendment…would change the focus of section 46 from that of conduct with a proscribed purpose to that of conduct with a proscribed effect, the effect being the substantial lessening of competition in a market. Since the effect of legitimate competitive activities may result in the lessening of competition in the market, the section, as amended, would be likely to catch pro-competitive as well as anti-competitive conduct. Competitive behaviour would be discouraged by the prospect of proceedings under section 46'.[3]

Section 46 effectively targets the correct market players and has allowed the courts to rule on a case-by-case basis

The specific activity that is prohibited under section 46 includes activity that: eliminates or substantially damages a competitor; creates barriers to entry; and deters or prevents competitive conduct. However, distinguishing between pro-competitive and anti-competitive behaviour under section 46 in relation to these three specific prohibitions may not always be easy.

Given the dynamic and uncertain nature of markets distinguishing between pro-competitive and anti-competitive behaviour is difficult with little scope to implement a fully 'black and white' objective test.

Ultimately, section 46 is about proving on the *balance of probabilities that* a firm deliberately engaged in anti-competitive conduct. Section 46 must be specific enough to 'capture' and 'dissuade', and allow courts to penalise those firms that have abused their market power whilst ensuring that pro-competitive behaviour is not deterred.

A review of market dynamics in Australia, and the courts' recent application of section 46, would indicate that section 46 is working effectively and is achieving its objective.

The recent Boral decisions by the Federal and High Courts have reaffirmed that section 46 is a provision that specifically targets those firms that 'have a capacity to abuse their market power'. Further, these decisions highlighted the need to consider each case on its merit to be able to distinguish between what may be pro-

[3] Review of the Competition Provisions of the Trade Practices Act, pg 85.

competitive behaviour, but because of the market situation at the time, behaviour can be misconstrued as anti-competitive.

Section 46 cannot be assessed in isolation as a means to prevent market abuse

The pursuit of efficiencies through the promotion of competition and competitive markets will inevitably contain a number of 'grey areas' for small business.

Not all markets are perfectly 'competitive'. Market structures such as natural monopolies, monopolies, and some oligopolies (assuming collusion) are 'imperfectly competitive', and by their very nature, do not achieve 'competitive', and hence, economically efficient outcomes[4].

Imperfect competition structures such as monopolies occur for example because firms can develop economies of scale and scope; they can successfully differentiate their products from those of their competitors; and they can develop superior technological and commercialisation skills in advance of their competitors.

Economic theory and recent Australian case law tells us that market power exists when economic agents can set prices. This compares to firms operating in a competitive market who cannot set prices. This is because they are price takers and the market determines what is a fair price for their good or service.

There can be no denying that there are clear examples where larger firms with greater market power and the ability to cross-subsidise a loss-making operation can put immense pressures on its smaller competitors.

In response to these concerns, and in light of the significant economic benefits that can be accrued from 'competition policy'[5], the creation and encouragement of competitive markets, and prevention of market abuse, has been a major function of Australian governments in the past. As such, much attention (see Section

[4] An 'economically efficient outcome' is defined as an outcome that is productive and allocative efficient. Productive efficiency refers to the ability of industry to produce the maximum output of goods and services from given resources and technology. Allocative efficiency on the other hand means that an economy is producing a mix of goods and services that maximises the welfare of consumers.

[5] Australia's economic benefits from the pursuit of competition are well documented – for example, the Productivity Commission estimates that Australia's GDP is now two and a half per cent higher than it would otherwise have been, and Australian households' annual incomes are on average around $7000 higher as a result of competition policy.

below) has been placed on refining and modifying the Act to, amongst other things, reduce the various 'forms' of market abuse that can occur.

The Act today contains a number of provisions to dissuade market power abuse. These provisions effectively address the means by which firms can typically abuse their market power. For example, Section 45 prohibits contracts, arrangements and understandings that have the purpose or effect of fixing, controlling or maintaining prices for goods or services supplied or acquired by the parties. These arrangements are prohibited regardless of their impact on competition.

Section 47 regulates vertical arrangements between corporations at different levels in the production chain. For example, goods cannot be supplied on the condition that the acquirer will not acquire goods from a competitor or that the acquirer will not resupply the goods in a particular place or classes of place.

Section 48 deals with resale price maintenance. It prohibits the establishment of minimum resale for prices for goods. Minimum resale prices would restrict competition in the retail market.

Price discrimination used to be outlawed under Section 49. This section has now been repealed. However, charging discriminatory prices may constitute an arrangement that substantially lessens competition under section 45. Extreme price discrimination may amount to misuse of market power under section 46. Also, discriminatory trading may be evidence of exclusive trading under section 47.

Further, the unconscionability provisions in the Act also act as an effective measure to deter certain forms of market power abuse.

Therefore, section 46 should not be assessed in isolation as a means to 'deal effectively with [all] abuses of market power with big businesses'. This is because this provision complements other provisions that collectively seek to achieve the same objective. ACCI would consider that the Act, as a suite of measures contained in multiple provisions, is an effective instrument to promote competition, and deter and penalise incidences of market power abuse.

Past examination of section 46 has not found legitimate cause for amendment

Since the implementation of *'The Trade Practices Act Proposals for Change'* reforms in 1986, numerous House of Representatives,

Senate Standing, Joint Selection and Independent Inquiries into the adequacy of section 46 have found that the provision should not be altered. In all cases, no legislative amendments were made by parliaments (of the day). Although it is prudent to continually assess the adequacy of the Act in light of changes in domestic and international operating environments, ACCI believes that the reasons why section 46 have not been altered[6] are likely to remain relevant regardless of changing dynamics in operating environments, and as such, provisions such as an effects test and cease and desist orders should not be introduced.

Recommendations in relation to section 46

As a statement of broad principle, ACCI contends that section 46 is an effective instrument as: it 'captures' those firms that abuse their market power; it allows courts to make findings consistent with its original intent; it complements other provisions of the Act whereby firms that abuse their market power can be penalised; it promotes competition; and no previous examination of its effectiveness has found cause to amend it.

(B) WHETHER PART IVA OF THE ACT DEALS EFFECTIVELY WITH UNCONSCIONABLE OR UNFAIR CONDUCT IN BUSINESS TRANSACTIONS

The Government, announced in its *Giving Small Business a Fair Go* ('New Deal: Fair Deal') statement its intention to amend the Act by introducing a specific small business unconscionability section similar to the existing consumer protection provision. Hence, the provision *s51AC Unconscionable Conduct* in business transactions now exists.

The new s51AC effectively lists a number of factors (over and above the existing equitable doctrines) that the courts may consider in deciding whether conduct was unconscionable. They include, but are not limited to:

- the relative bargaining strength of the parties;
- whether the stronger party imposed conditions that were not necessary to protect their legitimate business interest;
- the use of undue influence or pressure tactics;
- whether the weaker party could obtain supply on better terms elsewhere;
- whether the stronger party made adequate disclosure to the weaker party;

[6] The primary argument being that an 'effects test' would challenge the competitive process itself.

- the willingness of the stronger party to negotiate;
- the extent to which each party acted in good faith; and
- the requirements of any relevant industry code.

Since the introduction of the new unconscionability legislation on 1 July 1998, there have been a number of important cases heard in the Federal Court. As will be discussed, the outcomes of these cases demonstrate that Part IVA does deal effectively with unconscionable or unfair conduct in business transactions. However, there are areas that can be improved and areas that need to be explored further. These are discussed below.

Unconscionable Conduct Case Law

ACCC v Simply No Knead (Franchising) Pty Ltd [2002] FCA 1365 (22 September 2000) and CG Berbatis Holdings Pty Ltd v ACCC [2001] FCA 757 (27 June 2001)

In this case, Judge Sundberg found that 'unconscionable' in section 51 AC is not limited to cases of equitable or unwritten law as found in section 51 AA (ie the 'old' common law definition of unconscionability'). In effect, sub−section (3) permits 'an enlarged notion of unconscionability' than what would typically be applied in unconscionability in 'equity'.

Further, there is evidence to suggest that the courts since this determination have readily applied the 'broadened' factors that should be taken into consideration when determining whether a 'business to business' action was unconscionable. Ultimately, it would appear that the Courts have been able to give 'new meaning' to unconscionability (ie as intended by the government to reduce the adverse affects on small business) and s 51 AC has become an effective statute (ie in terms of protecting small business).

ACCC v Berbatis Holdings Pty Ltd (2000)

In this case, Judge French examined at length the ambit of the unwritten law of unconscionability. His Honour said there was no reason to suppose that the unconscionable conduct prohibited by section 51AB and section 51AC is limited by reference to 'specific equitable doctrines', and pointed out that the factors to which the Court is required to have regard for the purpose of determining whether there has been a contravention, 'include undue influence and duress and other issues falling outside the equitable doctrines to which reference has been made.'

These two cases have demonstrated a willingness by the courts to adopt the list of matters that were introduced as part of the 1998 amendments to the TPA.

Monroe Topple & Associates Pty Ltd v The Institute of Chartered Accountants in Australia [2001] FCA 1056 (6 August 2001)

In this case, The Institute of Chartered Accountants (ICAA) changed the training requirements that persons seeking admission to their membership must satisfy. It had done so for the purpose of maintaining or raising the standards of its members. The changes had the effect of disappointing the expectations of those who had developed businesses from the selling of Professional Year (PY) support services (ie of the kind that Monroe Topple [MTA] did) but, and as Judge Lindgren noted, it fell short of unconscionable conduct.

MTA was effectively a third party to the actions of ICAA. That is, MTA was seeking a claim of unconscionability as a 'third party' as a result of the transaction/s that commonly occurred between the 'consumer (of the similar training products that both ICAA and MTA produced) and the ITAA. Judge Lindgren found that the purpose of s51AC was to protect small businesses in their dealings with 'big business', and thus the expression of 'in connection within s51AC requires that the conduct impugned 'company' 'go with' or 'be involved in' the supply of the goods or services.

This case demonstrates that section 51AC does not apply to third parties in a business unconscionability case.

Australian Competition and Consumer Commission v CG Berbatis Holdings Pty Ltd [2003] HCA 18 (9 April 2003)

The High Court of Australia in mid April 2003 handed down an important decision in relation to small business and unconscionability. The *Berbatis* case alleges that a shopping centre landlord acted unconscionably towards three tenants. After being heard before the Federal Court, the Full Federal Court and to the High Court on appeal, the High Court found that the landlord had not acted unconscionably when it stated that the tenants' lease arrangements would be extended on the proviso that the tenants drop other court action against the landlord.

By a four-one majority, it was the decision of the court that 'superior bargaining power' was inevitable in business, and actions only become 'unconscionable' when a party exploits another's inability, or diminished inability to 'conserve his or her own interests', not when there is an inequality of bargaining power.

Provisions relating to unconscionability in the TPA have recently been strengthened to make it relatively easier to mount a case, however, this decision re-iterates that 'unconscionability' is a legal term requiring strict interpretation.

Recommendations in relation to Part IVA

From the four cases presented, section 51AC appears to be working well, with a number of defendants being successfully prosecuted for 'business to business' unconscionability. Further, ACCI would consider that although there is limited case law, the courts have successfully incorporated into their decision making the (non-exhaustive) list of matters to which the Court has been authorised to have regard for the purpose of determining whether a corporation has contravened the provision.

However, ACCI suggests that the following modifications to Part IVA warrant consideration. These changes may assist small businesses with their dealings with larger businesses.

At a broader level, there is a need to ensure that the 'new' unconscionability laws have not resulted in a 'shying away' effect. Although the assumptions underlying the doctrine of contract hold, that is, contracts are always based on the mutual agreement of fully informed individuals and they arise out of free choice, it would be useful to ascertain whether the new laws have had the effect of 'eroding' the validity of contracts. There is anecdotal evidence to suggest that as a result of the perceived risk of being penalised for 'inadvertent' unconscionable behaviour, big business, at times, may make a conscious decision to not interact with small business to protect against potentially costly litigation.

In response to the Government's commitment to introduce section 51AC in 1997, ACCI called on the Government to ensure that the Courts interpretation of 'unconscionable' would not extend beyond what was intended by the Government. This remains a concern for ACCI. However, and as the recent *Berbatis* case demonstrated (see above), this concern may have been alleviated somewhat. This case essentially found that 'superior bargaining power' was inevitable in business, and actions only become 'unconscionable' when a party exploits another's inability, or diminished inability to 'conserve his or her own interests', not when there is an inequality of bargaining power. ACCI considers this shows the provision working well as it did not limit small business access to the unconscionability provisions in any way; it maintained the parliamentary 'intent' of section 51AC; and it promoted 'fair' competition.

Further, amendments to the Act proclaimed on 1 October 2001 provided the States with the opportunity to draw down on section 51AC so as to include the provision within their own retail legislation. Inconsistencies in legislation, especially in retail tenancy, are an issue, and uniform legislation should be encouraged. The Senate Committee is encouraged to examine the progress and success (or otherwise), of jurisdictions in 'drawing down' section 51AC. ACCI encourages the committee to give adequate attention to the current retail tenancy problems that stem from the inconsistent application of legislation at the state and territory level.

(C) WHETHER PART IVB OF THE ACT OPERATES EFFECTIVELY TO PROMOTE BETTER STANDARDS OF BUSINESS CONDUCT, AND, IF NOT, WHAT FURTHER USE COULD BE MADE OF PART IVB OF THE ACT IN RAISING STANDARDS OF BUSINESS CONDUCT THROUGH INDUSTRY CODE OF CONDUCT

Following on from the Government's *New Deal: Fair Deal* statement, the Act was amended by creating a new provision which allowed the development of industry and consumer developed codes of practice as either mandatory codes or voluntary codes with enforceable provisions.

Underpinning this amendment was the introduction of a *Prescribed Codes of Conduct* which sets the policy guidelines on making codes of conduct enforceable under the Act. Consistent with ACCI's position, the Government is of the view that prescribed or mandatory codes, enforced by the ACCC, are not necessary when industry self-regulatory schemes are working effectively and efficiently.

To date, few mandatory codes of conduct have been introduced since the legislative amendments were made to the Act in 1998. The Franchising Code of Conduct is mandatory. It effectively closed a number of gaps in relation to disclosure requirements, minimum standards for franchise agreements and dispute resolution procedures. Although there were concerns originally that the regulation would create a high amount of additional paperwork, indications from the Government, franchisers and franchisees is that the Code is working well in addressing some of the identified problems.

ACCI is pleased to see that the regulatory impact on small businesses is a core consideration when deciding whether to adopt a mandatory code of conduct. The completion of Regulation Impact Statements (RISs) is a critical component of sound policy

formulation, and if completed correctly, they provide an invaluable cost/benefit analysis. ACCI encourages this continued approach.

ACCI agrees with the recommendation on mandatory codes by the Office of Regulation Review in its September 1999 *Report of the Commonwealth Interdepartmental Committee on Quasi-Regulation:*

> 'Prescription under the TPA should proceed only if all the following prerequisites have been met:
>
> - a market failure has been identified that will, in the absence of government intervention, have a significant detrimental impact on a substantial group in the community or there is a social policy objective that, if not pursued by government, will lead to a significant detrimental impact on a substantial group in the community;
>
> - a systemic enforcement issue exists, for example with breaches of voluntary industry codes and lack of agreement on fair trading principles, which has led to the failure of self-regulatory or quasi-regulatory arrangements;
>
> - there are significant deficiencies in any existing regulatory regime which cannot be remedied (for example, inadequate industry coverage); and
>
> - a range of self-regulatory options and 'light handed' quasi-regulatory options has been examined and demonstrated to be ineffective.'[7]

Although the legislation concerning certain aspects of the adoption of voluntary and mandatory codes of conduct remains relatively infant, all indications are that they are working well and are achieving their desired results.

Moreover, to counteract the trend of 'channelling' all contentious issues through section 51AC, and thus, exposing small businesses to the expense of court proceedings, codes of practice that underpin section 51 and complement the ongoing application of State and Territory-based mediation and tribunal structures (for dispute resolution), should be encouraged. Whether these codes of practice should be of a voluntary or mandatory nature is the contentious

[7] Grey Letter Law – Report of the Commonwealth Interdepartmental Committee on Quasi-regulation , Office of the regulation review, Sept 1999

issue. Invariably, there will be those that will complain that voluntary codes 'lack teeth', whilst there will be those that demand flexibility and responsiveness. ACCI's position is that self-regulatory codes should be supported, and that mandatory codes should only be considered once a voluntary code fails.

ACCI supports the policy initiative announced on 11 August 2003 by the ACCC that it will endorse high standard voluntary industry codes of conduct. Essentially, if participants to the code are successful in terms of achieving: 'transparency of processes; independent complaints handling procedures; sanctions for non-compliance, monitoring; and performance indicators',[8] the ACCC may 'endorse' the code.

However, ACCI has a small note of caution that although 'endorsement' may be beneficial for industry and that it may 'provide the consumer with some reassurance that the business they are dealing with operates in a fair, ethical and lawful manner'[9], it may become a 'defacto' benchmark or standard. As a result, what initially was a voluntary code that allowed industry to formulate flexible strategies may in effect become a quasi-mandatory code. This development would bring with it the same concern that ACCI has on mandatory codes, that is, a third party enforcing behaviour is not appropriate as it does not allow flexibility in approach. It also may impact disproportionately on small business.

Recommendations in relation to Part IVB

In relation to codes of practice, ACCI believes that the most effective means to 'promote better standards of business conduct' is for Government to reinforce its position that prescribed or mandatory codes, enforced by the ACCC, are not necessary when industry self-regulatory schemes are working effectively and efficiently. Furthermore, the ACCC should work with industry to develop voluntary codes where appropriate. The Senate Committee should also assess the likely effect of ACCC endorsement of voluntary codes on consumers and industry, particularly whether they are in the interests of small business.

(D) WHETHER THERE ARE ANY OTHER MEASURES THAT CAN BE IMPLEMENTED TO ASSIST SMALL BUSINESSES IN MORE EFFECTIVELY DEALING WITH ANTI-COMPETITIVE OR UNFAIR CONDUCT

[8] ACCC Media Release – ACCC to endorse high standard voluntary industry codes of conduct.
[9] ACCC Media Release – ACCC to endorse high standard voluntary industry codes of conduct.

ACCI believes there are a number of other measures that could be implemented to assist small businesses.

Authorisations and Notifications in Respect of Restrictive Trade Practices

Pursuant to the recommendations of the Dawson Committee, ACCI believes there is merit in examining whether the authorisations process can be streamlined further.

For example, and in light of these changes, there is considerable merit in reviewing, updating and republishing the ACCC's guidelines for authorisations and notifications. ACCI recommends that this task be given high priority, and that, as far as possible, the objective of the guidelines would be to make the process as simple as possible, explain the process in plain English, and minimise the need for expert legal advice.

Representative Actions

Following the 1999 Baird Report, the Government enacted legislation that gave the ACCC the power to undertake representative actions and to seek damages on behalf of third parties under Part IV of the Act. Further, the Hon Joe Hockey MP, Minister for Small Business and Tourism, in May 2003 introduced the *Trade Practices Amendment (Small Business Protection) Bill 2002* which proposes to amend section 87 of the Act.

This legislation would effectively enable the ACCC to bring representative actions in respect of breaches of sections 45D and 45E. The effect of this change would be to enable the ACCC to seek orders from the Federal Court on behalf of one or more persons who have suffered, or are likely to suffer, loss or damage by conduct of another person where the conduct engaged is in contravention of sections 45D or 45E.

To date, this Bill has not been successful in the Senate. ACCI would encourage the Senate Committee to recommend passage of the Bill in the Senate, given that the passing of previous 'representative action' bills have benefited small business.

ACCI supports the introduction of this legislation and a possible widening of the representative action provisions to encompass other sections in the Act.

ACCI believes that the ability of the ACCC to take representative action against a party considered to be in contravention of the Act is

important as it effectively protects and empowers small businesses as well as contributing to the development of case law that otherwise may never occur.

ACCI recommends that consideration be given to whether increased funding for the ACCC to undertake broadened representative actions, especially under section 51AC, would deliver additional benefits for small business and consumers.

Collective Bargaining

The Government has agreed to implement the recommendations of the Dawson Committee on collective bargaining by small business[10]. However, there are issues in relation to this proposal that need to be explored further if small business is to fully utilise this useful recommendation.

To assist in addressing the imbalance between small and big business, collective bargaining should be supported in principle. That is, it should be recognised that at times, concerted conduct such as suppliers coordinating aspects of their operations can result in greater efficiencies/public benefit than what may occur otherwise.

The fact that price fixing is currently a *per se* prohibition in the Act indicates that when it was drafted there was perhaps a high level of distrust with respect to business practices - perhaps in response to a higher level of collusion and concentration that existed at that time. Today's microeconomic reform agenda has dismantled many of these market behaviours meaning that price fixing may not be as prevalent or harmful as earlier thought. Industry would argue that there is scope to improve and relax (legislatively) the 'stringency of prohibition' in relation to those provisions of the Act concerning collective bargaining.

However, with the proposed collective bargaining changes, there must be: checks and balances and robust eligibility criterion to ensure that the objective of the TPA remains (i.e promotion of competition occurs and efficiencies/net public benefit occurs); there is a 'reasonable' 'balancing' of the imbalance of power that sometimes exists; enough certainty is given to small business to access the legislation with some confidence and at minimal compliance cost; and big business is not inundated with requests to negotiate collective bargaining proposals that are not meritorious.

[10] See recommendations 7.1, 7.2, 7.3 and 7.4 Review of the Competition Provisions of the Trade Practices Act, pg 121.

Essentially, small businesses that access collective bargaining must remain accountable for their actions under Part IV of the Act.

Interplay of section 93 and 'substantial degree of market power' needs to be clarified

Complicating what may appear to be a fairly objective test (i.e section 93) is the Committee's suggestion that '…collective bargaining arrangements should be available only to small business, and …should also only be available in the public interest where it is big business on the other side with whom the bargaining is taking place, that is to say, where there is a corporation with a substantial degree of market power'[11]. The Committee goes on to say that 'The ACCC submits that rather than make the degree of market power an eligibility criterion, it should form part of that body's [ACCC] assessment of the notification to determine whether the notified conduct would result in a net public benefit. The Committee accepts this submission. Such a procedure would allow the issues of market power and competition to be considered together.'[12]

Interpreting this finding is not easy. That is, it is not clear as to what will be the exact interplay between the test already applied in section 93 (and proposed for collective bargaining) and what appears to be an adjunct to this test – the *substantial degree of market power* criterion.

This is an ambiguous finding of the Dawson Committee, and as such, we simply do not have enough clarity in the Committee's recommendations or associated text to make assumptions about the importance, or otherwise, of *substantial degree of market power.*

Separately on page 76 in a discussion on section 46 of the TPA, the Committee notes that in order to allow non-monopolies to be caught by that section, the Act was amended in 1986 … " to lower the threshold requiring a corporation to have only a 'substantial degree' of power in a market. At the same time, the heading of the section was changed from 'Monopolisation' to 'Misuse of market power".[13]

While this makes clear that in the Committee's view non-monopolies are included in this definition, ACCI raises the question whether for the purposes of a new collective bargaining provision, the use of the term *substantial degree of market power* is unnecessarily restrictive.

[11] Review of the Competition Provisions of the Trade Practices Act, pg 119
[12] Review of the Competition Provisions of the Trade Practices Act, pg 119-120
[13] Review of the Competition Provisions of the Trade Practices Act, pg 76

We think it would defeat the purpose of the Committee's recommendations on collective bargaining if too narrow a definition were applied here.

Alternatively, one could also interpret the Committee's findings as meaning it could be assumed that the ACCC has been afforded the latitude to define 'big business', with perhaps a definition applied on a case-by-case basis – with *substantial degree of market power* merely a guide to assist.

As a side but related issue, industry would argue that the new collective bargaining provisions must adequately and clearly recognise that conduct which reduces competition – and hence would breach a *substantial lessening of competition* test – might nonetheless confer net benefits on the public.

Conclusion

On balance, ACCI believes that the *Trade Practices Act 1974* works well in promoting competition. The purpose of the Act is not to protect any particular sector or industry, but rather to protect the competitive process. The Act does this well. Small business is then well served by the *Trade Practices Act*. Our suggestions are about improving the operation of existing provisions, and making sure the proposed collective bargaining provision for small business works in the interest of business and consumers.