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

ACCI SUPPLEMENTARY SUBMISSION
TO THE
SENATE ECONOMICS COMMITTEE
COMMENTING ON THE SUBMISSIONS MADE BY THE AUSTRALIAN COMPETITION AND CONSUMER COMMISSION

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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.

ACCC Submission

On 8 September 2003 the ACCC made its submission to the Inquiry. This was after the Australian Chamber of Commerce and Industry had made its own submission to the Inquiry. In its submission, ACCC states that it has moved its position from the one it took in its submission to the Dawson Review of the Trade Practices Act.

This second submission to the Senate deals entirely with the submission made by the Australian Competition and Consumer Commission.

It is important that the Trade Practices Act, and any changes which are made to it, do not add to the uncertainties that face business in engaging in commercial activities. Changing the words of the Act in the ways sought by the ACCC rather than being of benefit, may instead reduce the clarity of the existing law. It may leave the law open to even greater interpretation than exists at the present time.

The Act already identifies as well as black letter law can the necessarily vague dividing line between acceptable competitive practices and those which are not. The law is being clarified through court proceedings that are turning the Act into a more comprehensible living document that is more clearly understood both by business and the ACCC.

The changes identified by the Dawson Review, if introduced, will for the most part make the TPA more focused on what needs to

occur if competition is to be maintained. The existing legislation with changes as recommended by Dawson plus the ongoing interpretation of the courts should constitute the processes of evolution at this time. There is no need for the changes recommended by the ACCC which would impede the process that is currently in place.

SECTION 46

In the view of ACCI, the changes sought by the ACCC are not benign. They are not mere clarifications of existing protocols that will do no more than tidy up a few loose ends or clarify what the Parliament had originally intended. They represent instead a continuation of the agenda that the ACCC has pursued for many years and which were comprehensively rejected by the Dawson Review.

The three issues of concern, which were rejected by the Dawson Review Committee, were:

- the effects test
- the introduction of cease and desist orders
- extensions to s155 of the Trade Practices Act.

As is discussed in this submission, these are important themes that underlie the submissions that have been made by the ACCC. Making such changes will not make small business more secure but will make all business less secure.

Need to Protect Small Business

There is no disagreement about the need to protect small business from unfair market competition. The role of the Trade Practices Act is to ensure that competition in the marketplace is conducted fairly. Within this there is special need to recognise the particular position of small business. In dealing with large firms smaller businesses are often more vulnerable than their larger competitors and suppliers. It is essential that the problems faced by smaller firms are incorporated into the provisions of the Act as is actually the case.

But the Act is not intended nor should it be a means to shield smaller firms, or for that matter any firm from the forces of competition. The aim of most businesses is to capture as much of the existing trade as it can. In attracting custom a firm will lower prices, seek better arrangements with suppliers and introduce new innovations and superior products. These are not only acceptable practices, but they are encouraged and should be encouraged. It is

in this way that living standards rise and improvements are made in the goods and services provided to the public.

There are, however, particular practices which are forbidden because they are anti-competitive and therefore penalise the consumer by raising costs or which limit the improvements in the quality and variety of the goods and services sold. The most typical example is collusion between firms which can harm not only consumers but also other sellers in a market. Such practices are illegal and the TPA has been written to identify such practices so that they can be eliminated from the market.

There are other actions that firms may take that are also unacceptable where the aim is to injure a competitor through unfair trading practices. These are actions that are specifically designed to harm competitors rather than to build up one's own business that are proscribed. The outcome of such activities are often a greater market share for one particular firm but with no net benefit to the consumer. Predatory pricing is the classic example.

To use a football analogy the difference would be between playing the ball and playing the man. Playing the ball can often be extremely tough but there are rules within which the game is played. There are also, however, practices that may give one team or another an advantage but which are forbidden because the aim is specifically to harm the opponent. And while in the middle of a contest there are some instances of such practices which are difficult to distinguish from what is permissible, overall there are other situations which are clearly against the rule and spirit of the competition. For these there are usually very heavy penalties attached.

Going Forward

We all want fair competition. However, one of the important issues before the Senate Committee is the question whether we want the judgement of the ACCC to become an even more important prosecutorial standard than it already is in determining whether a firm should be taken through the very onerous and often extremely costly processes of defending an action in regard to a breach of the Trade Practices Act. There are obviously laws in place which are being tested through the courts. The precedents and legal analysis that will emerge are defining the contours of what is permissible within the Australian marketplace.

Moreover, there has just been a thorough review of the Trade Practices Act. The Dawson Review of the Competition Provisions of the Trade Practices Act provide formidable guidance on how the

legislation should now proceed. The Government has already accepted the recommendations of the Dawson Review and is implementing those recommendations. ACCI has also endorsed the overall approach taken by the Dawson Review. It is this Review that should be at the core of any amendments made to the Trade Practices Act.

In going forward at this time the process should involve the further accumulation of case law and the introduction of legislative changes based on the recommendations of the Dawson Committee.

The Boral High Court Case

What has brought this issue to the fore has been the decision in the Boral Case in the High Court which has been interpreted in some quarters as rendering the TPA of limited use in protecting small business. This is an interpretation of the Boral Decision that ACCI does not accept.

We note that the Dawson Committee was specifically asked to consider the Boral Case and advise the Government on its conclusions as they affected its recommendations for any changes to the TPA. In his release on the Dawson Report on 16 April 2003, the Treasurer specifically referred to Dawson's conclusions regarding Boral. He stated that:

> 'In March 2003, the Committee reaffirmed its recommendations in light of the High Court decision in *Boral v ACCC*, maintaining that no amendment should be made to section 46, although the position could be reviewed after a number of other cases are determined, such as *Safeway*, *Rural Press* and *Universal Music*. The Committee noted and endorsed observations by the High Court in the *Boral* case that the purpose of section 46 is to promote competition and that successful competition is bound to cause damage to some competitors.'

The High Court in Boral had focused on the actual circumstances facing the firm and had considered what would have been a reasonable response to the pressures it was under. In so doing it came to the conclusion that Boral, far from having substantial market power in actual fact had very little, and that its pricing decisions, rather than being an example of predatory pricing was instead an example of a firm being forced to respond to extremely adverse economic conditions.

Boral, in selling concrete blocks, for which there were many substitutes and for which there were a number of competing firms,

was driven to lower its prices in the face of a substantial fall off in demand because of a sharp contraction in the Victorian construction industry. As Mr Justice McHugh said in his written judgement, "cutting prices is not evidence of market power." That is, the fall in prices charged by Boral, which did no more than match the market elsewhere at the time, was not in any sense an example of an unfair competitive practice.

The decision of the High Court gives business the right to make commercial decisions in the midst of extreme circumstances without having to concern itself about being prosecuted under the TPA at a later date. If a firm cannot lower prices in the midst of a recession-driven price war without fear of being taken to court, then a very large and entirely unnecessary degree of business uncertainty will have been introduced into business decision-making. Such uncertainty will slow growth and reduce investment.

The ACCC sees the Boral case as a test case on predatory pricing. Predatory pricing, if it has any meaning in terms of the TPA, must involve decisions to lower prices during a normal trading environment with the specific intent of driving a competitor from the market.

But what should be an entirely different matter is that a firm should have lowered prices during a price war in which other firms were also lowering their own prices and in which there was a diminishing market for the product sold. The full expectation in this situation is that firms would lower prices. This is the determination of the High Court and there was nothing in that decision that should in any way suggest that small business has been deprived of an avenue for redress because of the decision made in Boral.

ACCC Interpretation of the Boral Decision

The ACCC infers that following Boral there is now evidence that the High Court has misapplied the intent of the Parliament. It believes that there is an urgent need to provide additional guidance through legislation to the courts and business so that the meaning of 'substantial market power' would become more evident. Yet in Boral, the question was not where the threshold lay, but was actually whether Boral possessed any market power at all. This was succinctly put by J McHugh:

> 'BBM did not have a substantial degree of market power in the relevant market – the sale of concrete masonry products – because it was not able to raise prices to supra-competitive levels without its rivals taking away customers. Nor was it in a position to recover the losses it made by pricing below relevant

> cost when and if the price-cutting finished. Accordingly, irrespective of its pricing, it did not have a substantial degree of market power of which it could take advantage.' (paragraph 199)

A non-colluding firm that is charging what others in the same market are charging, and is losing money at the same time, is not displaying any degree of market power. There is thus no evidence from this decision that the High Court, or anyone else, is in any need of clarification on the changes made by Parliament.

(i) Clarifying the Meaning of "Substantial Degree of Market Power'

Boral has not provided a test of the 'substantial degree of market power' issue. There is no reason to believe based on the Boral decision that the High Court does not have a lower threshold than its former threshold of 'substantial control'.

It is also evident that the High Court does not require 'an *absolute* freedom from constraint'. It is clear, for example, from the quotation from McHugh J that there is a test in mind, which is whether a firm can raise prices above competitive levels prevailing in the market without losing market share.

But finally, it is ironic that the ACCC should seek to have it more clearly stated in legislation that 'evidence of a corporation's behaviour in the market is relevant to a determination of substantial market power' when it is precisely that criterion that lay behind the decision the High Court made in Boral. That is the criterion now being applied.

(ii) Clarifying 'Take Advantage'

The ACCC has laid down a series of tests against which it would seek to define the standard against which a firm in the market could be said to have taken advantage of its market power. It need hardly be pointed out that Boral does not provide an example where the present tests have failed since the High Court found that there had been no market power to take advantage of.

Yet the ACCC sees a need to clarify the meaning of 'take advantage'. In stating what any new legislation might entail, it has provided vague descriptions of the standard against which a firm's behaviour might be measured. The first of these is this:

> 'whether the corporation would be likely to engage in the conduct in a competitive market.' (p 21)

This cannot legitimately be raised in the context of the Boral decision. But going beyond this, the notion of a 'competitive market' seems to mean the notion of a 'perfectly competitive market' where every firm is a price taker and in which each firm produces a product identical to those produced by competitors. It is very difficult to see how this could be a standard that can have a bearing in such judgements. If it is not the standard, then other than in the case of a genuine monopoly, it is a criterion that has no force since with more than one firm there is competition and in most markets there are generally far more firms than just two.

The concern here is that there appears to be an unstated series of assumptions by the ACCC about how firms will behave in such markets and which it believes it can and should apply to actual market behaviour. Yet the reality is that firms at different times and in different circumstances will follow different strategies.

The second and third points raised by the ACCC are then these:

- 'whether the conduct of the corporation was materially facilitated by its substantial degree of market power;' or

- 'whether the conduct was otherwise in reliance upon or related to its substantial degree of market power.' (p 21)

Again neither of these matters was tested by the decision in Boral. Since Boral had no relevant market power in terms of the Act, there is no perceived need for clarification that results from the case specifically. Whether conduct was 'facilitated by' or 'in reliance upon' the presence of market power is anyway intrinsic to the Act and hardly needs further statement. It would be redundant to amend the Act to state what is already explicitly stated and is already being used by the High Court in framing its judgements.

Predatory Pricing

The issue in Boral was one of predatory pricing. Predatory pricing refers to actions which are on the surface pro-competitive – that is, reductions in price – but which have an anti-competitive intent – the forcing of competitors from the market. It is normally presumed that such actions are rationally based so that the surviving firm will be able to raise prices substantially and recoup the losses incurred when it originally drove the price level down.

In demonstrating predatory pricing, it is the intent of the business lowering prices that is of prime importance. Lowering prices is part and parcel of competition. It cannot be made *per se* illegal to lower

prices with the intention of capturing a larger share of the market. Firms reduce their prices all of the time, for a wide variety of legitimate business purposes. Such price reductions put pressure on competitors and it must be the case that on some occasions other firms leave the market because they are unable to match the lower price. And that too must be seen as legal.

How to distinguish predatory pricing, which is designed to limit competition so that prices can thereafter be raised, from normal aggressive market behaviour is one of the most difficult issues in both economic and legal theory.

The ACCC believes that recoupment should not be the distinguishing criterion. It should not matter, according to the ACCC, whether a firm can subsequently raise prices and make higher profits. In reaching this conclusion it takes a different view from that taken by the High Court. In the Boral decision, recoupment was in the mind of at least one High Court justice. McHugh J stated:

> 'A firm does not possess "substantial market power" if it does not have the power to recoup all or a substantial part of the losses caused by price-cutting by later charging supra-competitive prices. If it cannot successfully raise prices to supra-competitive levels after deterring or damaging or attempting to deter or damage competitors by price-cutting, the conclusion is irresistible, that it did not have substantial market power at the time it engaged in price-cutting.' (paragraph 278)

There may be deficiencies in using this as a standard to judge business pricing behaviour, but at least it has the benefit of being an objective test by which others can judge. Without such objective standards, firms are left without any ability to protect themselves from accusations of anti-competitive behaviour since they do not have any way to tell in advance whether a regulator will construe their actions as illegal.

As evidence that in rejecting the recoupment criterion the ACCC is merely expressing the will of the Parliament, it quotes the Explanatory Memorandum accompanying the 1986 amendments to s46 where it was stated:

> 'It is not the intention of s.46 that pricing, in order to be predatory, must fall below some particular cost. The prohibition in the section may be satisfied notwithstanding that it is not below marginal or average variable cost and does not result in a loss being incurred.' (quoted, p 22)

What is significant about this passage cited by the ACCC is that it has nothing to say about recoupment. What is refers to is whether the firm is pricing below average variable costs (ie avoidable costs) and could therefore lose less money by closing its operation than by continuing to produce. In such circumstances there might well be reasons for questioning a firm's motivation but there are always longer-run considerations as well as the circumstances of a market at a particular point in time that would need to be examined.

But if one rejects recoupment as a criterion and one also rejects an examination of the cost structure of a firm, it is difficult to identify any objective standard to distinguish predatory from normal aggressive pricing behaviour.

The ACCC must specifically state how it would recognise predatory pricing in the absence of any of the traditional tests. Since predatory pricing is such a difficult activity to identify, and may be genuinely rare in business, the ACCC should be explicit why it looks for a legislative solution when it appears that judicial decisions are in the process of giving the needed clarification.

More importantly, the ACCC must explain what it believes should trigger an investigation for predatory pricing.

The ACCC has rejected both of the elements in the standard predatory pricing case: a fall in price below average variable costs or a subsequent ability to raise prices afterward to recoup one's losses. It appears that to the ACCC neither should matter, but if neither matters, then what does? How is one to distinguish a predatory fall in prices, which is solely designed to damage a competitor and which will do consumers no good, from a fall in prices that is within the compass of acceptable business behaviour?

Yet the ACCC does not stop there. It also deals with what it describes as 'anti-competitive behaviour by firms without substantial market power' (pp 27-28), that is, **predatory pricing by small firms**. The ACCC states:

> 'There is no provision under the Act that prohibits a corporation without substantial market power from engaging in illegitimate unilateral conduct to create or increase its market power....
>
> 'Section 46 does not capture predatory pricing conduct in circumstances where the predator does not have substantial market power *at the time* of the conduct in question. This possible "gap" was specifically identified in several judgements of the High Court in *Boral*....

> 'Such a "gap" may enable corporations to engage in predatory conduct with impunity, including targeting of particular businesses, without contravening the Act.'

The great risk we run is that the approach proposed by the ACCC would possibly abolish serious price competition in the marketplace since it would potentially open for prosecution any firm, large or small, that had lowered prices. There is no criterion advanced by the ACCC to allow a firm to determine for itself whether its actions are acceptable to the regulator. Not the size of the firm, nor the fact that costs were being covered, nor the inability to recoup one's lost profits at a later date, would apparently be an acceptable defence from prosecution.

Need for a Business Rationale

It is important that the law is designed so that actions reasonable within the context of a market situation and which are perfectly understandable given the market situation which confronts a firm are not capable of being deemed illegal or actionable.

ACCI strongly disagrees with the ACCC where it states in is submission that:

> "An inquiry as to the business rationale for the relevant conduct *may be* a relevant circumstance, *but it is not critical*, to determining whether a corporation has taken advantage of it substantial market power in any particular matter" (p 21; italics added)

Nothing should be seen as more critical to the determination of whether there has been a breach of the Act than an understanding of the commercial purpose involved from the perspective of the business making what it believes is a valid business decision. It should be seen as a matter of the deepest concern that it would not be a mandatory aspect of any ACCC prosecution that an explanation for one's actions should not be a proper defence against prosecution.

In the view of ACCI, to accept such a change would for all practical purposes place an effects test into the legislation since it would deprive a firm of the ability to argue commercial considerations in a prosecution by the ACCC.

Section 155 and Cease and Desist Orders

One of the serious concerns that business has of the ACCC is the manner in which it seeks to use its powers in ways that damage business. In its submission to the Dawson Committee it sought the introduction of cease and desist powers which would provide it with the ability to compel a business in the midst of a competitive market situation to reverse a decision it had made.

The ACCC states that it is 'concerned with its ability to address anti-competitive conduct quickly' and therefore 'considers that it would be appropriate to amend the Act to extend the application of s.155 powers until substantive enforcement proceedings have commenced' (p 26). It therefore believes that:

> 'The ACCC should have the ability to seek an interim injunction from the court, maintaining the status quo in the market, *without limiting its ability to investigate and gather evidence of the substantive allegation*.' (p 27; italics added)

This was an issue specifically examined by the Dawson Review Committee and rejected by it. The Review made the following statements in relation to this proposal:

> 'The powers of the ACCC to obtain information under section 155 are compulsive and wide reaching. They extend to authorising an officer to enter premises and inspect documents. Non-compliance is an offence punishable upon conviction by a substantial fine. *Whilst these powers may be appropriate to enable the ACCC to gather evidence to determine whether a case can be made out, they are not appropriate, as has been held, once civil proceedings have commenced….*
>
> 'It has been submitted that the Act could be amended to continue the ACCC's powers under section 155 after the commencement of proceedings. This could be done, but it would involve one party to civil litigation (the ACCC) having compulsive powers to extract information from its opponent, even by the entry of its premises, not subject to the supervision of the court in the action. This would be a serious inroad upon the court's ability to maintain a balance between the parties during the pre-trial stages of the action and would risk one party being placed at an unfair disadvantage to the other. Moreover, it has not been demonstrated that the court's processes for compelling the disclosure of evidence are inadequate. Parties are subject to continuous and close supervision by the court, with the aim of enabling each party to present its case speedily and fairly.' (Dawson Review p 103; italics added)

The ACCC, having had its submission rejected by the Dawson Committee, nevertheless presents its case again.

Moreover, there are ongoing concerns over the uses that might be made of interim injunctions. The situations in which such injunctions are required in order to preserve a firm from bankruptcy are generally few and far between. They are judicial cease and desist orders, and represent the appropriate approach. As the Dawson Committee noted:

> 'No material was placed before the Committee to demonstrate why the process of obtaining an interim, or temporary, injunction, particularly an ex parte injunction, is cumbersome.... Nor is it apparent that it is unduly burdensome to require an applicant for an injunction to establish that there is a serious question to be tried and that the balance of convenience is in its favour, particularly when the applicant is the ACCC, *which is not required to give an undertaking as to damages*.' (p 101; italics added)

It is also important to bear in mind the observations made by the Dawson Committee in regard to the effects of the interim injunction on business. Such injunctions prevent a firm from engaging in competitive activity which it believes to be legal and about which the ACCC takes a different view. The firm against which an interim injunction is taken has its ability to engage in market activity severely constrained, which is why the courts must mediate between the ACCC and the specific firm. The Dawson Review made the following observations on the tests that the courts ask the ACCC to substantiate before an injunction is granted:

> 'These tests have been established by the courts in the interests of justice, having regard to the potential serious interference of an interim injunction with a respondent's rights.' (p 101)

It is for this reason that the Dawson Committee was so strongly opposed to the introduction of cease and desist orders.

> 'If the proposed cease and desist order were to be made on the basis of something less than the existence of a serious question to be tried and the balance of convenience, there could be a risk of injustice if a breach of the Act were not eventually made out. The risk would be the greater in that the proposed cease and desist order would be made by the regulatory body without independent intervention by a court.' (p 101)

Demonstrations of a *prima facie* case that a breach of the law has occurred may be sufficient justification for the issuance of an interim injunction from a court, but the reminder by Dawson that these are an interference with the rights of individuals, must be explicitly recognised. That they are also an impediment to business must also be recognised, since interfering in market outcomes, once it becomes established practice, will limit the ability for firms to demonstrate greater efficiency by producing better products at lower prices.

INDUSTRY ISSUES

Apart from issues about section 46 which have been dealt with above, the ACCC has made a number of suggestions which ACCI either does not support, or believes warrants further consideration, namely the:

- removal of $3 million barrier for unconscionable conduct cases;
- addition of the imposition and exploitation of unfettered unilateral variation clauses to the list of factors that may indicate unconscionable conduct; and
- proposed ACCC endorsement of high standard voluntary industry codes of conduct.

Comments on these proposals follow:

Removal of $3 million threshold for Section 51AC

ACCI is concerned that the ACCC has suggested removing the $3 million threshold for Section 51AC. We do not support the removal of the transactional limit.

Although the Dawson Review did not examine section 51AC, it is clear from comments relating to the proposed threshold of $3 million for notification that the Dawson Committee believed a transaction value approach was preferable.

> 'There appears to be two main approaches to the definition of a small business. One uses the features of the business – for example, turnover, employee numbers or ownership structure – and the other makes reference to the value of the transactions involved. The latter approach is adopted in section 51AC of the Act. That section imposes a prohibition against unconscionable conduct in connection with transactions involving a price of $3 million or less. The protection is not extended to publicly listed

companies and the amount of $3 million may be varied by regulation.

> 'In the Committee's view the transaction value approach is the preferable one.'[1]

ACCI also believes that the intention of the Parliament is critical to understanding any statutory provision. An examination of explanatory memoranda and the second reading speeches show clearly that the intent of Section 51AC was to give small business greater protection from unconscionable conduct than existed under common law.

> 'Pivotal to the Government's response [to the report of the Fair Trading Inquiry of the House of Representatives Standing Committee on Industry, Science and Technology] and this Bill [Trade Practices Amendment Fair Trading Bill] is an acceptance that the Trade Practices Act must be made to work for small business. The Government's approach will strengthen the substantive legal rights available to small business against unfair business conduct and, as well, improve enforcement of rights and access to remedies for small business.
>
> 'The Government will achieve these objectives through legislative amendment of the Trade Practices Act in four areas:
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> - a new provision that will give small business genuine access to protection against unconscionable conduct [section 51AC].'[2]

It is clear that the parliamentary intent when Section 51AC was introduced that it was a protection for small business, and when the threshold was increased from $1 million to $3 million in 2000 it was also clear that it is a small business provision.

> 'Section 51AC currently extends the unconscionable conduct provisions of the Act to business transactions involving the supply, or acquisition of goods or services of under $1million … The increase in the transactional limit was recommended by the Joint Select Committee on the Retailing Sector, as a means

[1] Review of the Competition Provisions of the Trade Practices Act, p 119
[2] Second Reading Speech, The Hon Peter Reith MP, Trade Practices Amendment (Fair Trading) Bill 1997, 30 September 1997

> of enhancing small business access to the unconscionable conduct provisions.' [3]

ACCI does not believe that it is appropriate to remove the transactional limit of section 51AC as it would potentially open it up to many businesses, that could not by any definition be classified as small business. That would be totally inconsistent with Parliament's intent, and therefore we cannot support the ACCC's proposal.

Unfettered Unilateral Variation Clauses

ACCC has correctly identified that on some occasions there may be concerns with unilateral variation clauses[4]. ACCC in particular is concerned how such unfettered clauses affect parties with relatively lesser bargaining power, and secondly is concerned about the conduct of those seeking to unreasonably exploit such clauses.

ACCI believes that these concerns are already able to be considered as part of the non-exhaustive list of factors that the court may have regard to in considering whether there had been unconscionable conduct under Section 51AC(4). The section provides:

(4) Without in any way limiting the matters to which the Court may have regard for the purpose of determining whether a corporation or a person (the ***acquirer***) has contravened subsection (1) or (2) in connection with the acquisition or possible acquisition of goods or services from a person or corporation (the ***small business supplier***), the Court may have regard to:

(a) the relative strengths of the bargaining positions of the acquirer and the small business supplier; and

(b) whether, as a result of conduct engaged in by the acquirer, the small business supplier was required to comply with conditions that were not reasonably necessary for the protection of the legitimate interests of the acquirer; and

(c) whether the small business supplier was able to understand any documents relating to the acquisition or possible acquisition of the goods or services; and

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[3] Explanatory Memorandum, Trade practices Amendment Bill (No 1) 2000

[4] a unilateral variation clause allows terms or conditions of an agreement to be varied by one of the parties without further negotiation with or agreement by the other party to such variation.

(d) whether any undue influence or pressure was exerted on, or any unfair tactics were used against, the small business supplier or a person acting on behalf of the small business supplier by the acquirer or a person acting on behalf of the acquirer in relation to the acquisition or possible acquisition of the goods or services; and
(e) the amount for which, and the circumstances in which, the small business supplier could have supplied identical or equivalent goods or services to a person other than the acquirer; and
(f) the extent to which the acquirer's conduct towards the small business supplier was consistent with the acquirer's conduct in similar transactions between the acquirer and other like small business suppliers; and
(g) the requirements of any applicable industry code; and
(h) the requirements of any other industry code, if the small business supplier acted on the reasonable belief that the acquirer would comply with that code; and
(i) the extent to which the acquirer unreasonably failed to disclose to the small business supplier:
    (i) any intended conduct of the acquirer that might affect the interests of the small business supplier; and
    (ii) any risks to the small business supplier arising from the acquirer's intended conduct (being risks that the acquirer should have foreseen would not be apparent to the small business supplier); and
(j) the extent to which the acquirer was willing to negotiate the terms and conditions of any contract for the acquisition of the goods and services with the small business supplier; and
(k) the extent to which the acquirer and the small business supplier acted in good faith.

Therefore we do not believe that it is necessary to add to the factors already listed.

Endorsement of Voluntary Codes of Conduct

The Chairman of the ACCC on 11 August 2003 announced an initiative to introduce a system of endorsement for high quality voluntary industry codes of conduct. The ACCC believes that effective voluntary codes deliver benefits for both businesses and consumers and are more likely to deliver increased compliance and reduced regulatory costs.

ACCI also supports voluntary codes of conduct initiated by industry. There are a number of voluntary codes already in operation without the 'endorsement' of the ACCC.

Under the proposed endorsement model, it is understood that for a code to be endorsed by the ACCC it will need to meet criteria, namely: addressing specific consumer concerns; consultation with stakeholders; clarity; transparency; coverage; complaints handling; sanctions for non-compliance; independent review of complaints handling decisions; consumer awareness; data collection; industry awareness; monitoring; accountability; review of the code; and competitive implications and performance indicators. The code would have to be in operation for 12 months before it could be endorsed and will be 'hard to get and easy to lose'.

Potentially codes offer business a less prescriptive framework than regulation, but there are risks for business associated with the ACCC's endorsement model. An industry sector would incur considerable costs to develop and then run a code for a year. It could then be severely damaged in the marketplace if for some minor reason, the ACCC did not endorse it after a year's operation. The ACCC has already said that it would publicise that it had refused endorsement of an industry code. A sector would need to carefully weigh up the benefits of seeking endorsement, and even whether to develop a code.

Consequently, ACCI has concerns with the endorsement proposal, but we note that the ACCC is yet to produce guidelines and we await those with interest.