APPENDIX A.1: Executive Summary and excerpts from the Senate Economics References Committee report on 'The effectiveness of the *Trade Practices Act 1974* in protecting small business' [Senate Economics References Committee, Parliament of Australia, *The effectiveness of the Trade Practices Act 1974 in protecting small business* (2004)].

EXECUTIVE SUMMARY

AND LIST OF RECOMMENDATIONS

E.1 The Senate Economics References Committee's inquiry into the effectiveness of the *Trade Practices Act 1974* ('the Act') in protecting small business is the latest in a long series of government and parliamentary inquiries into the operation of this Act.

E.2 The most recent of these, the *Review of the Competition Provisions of the Trade Practices Act* ('the Dawson Report'), canvassed a number of areas relevant to this inquiry, particularly regarding the 'misuse of market power' provisions in Section 46 of the Act. After the Dawson Committee had completed its consultations with interested parties, however, several decisions were handed down from the Full Federal Court and the High Court which have raised questions about the application and operation of Section 46 of the Act. The decision of the High Court in *Boral Besser Masonry Ltd v ACCC* (the *Boral* case), in particular, raised these issues and forms a significant backdrop to this Committee's inquiry.

E.3 An issue which has been raised during many of these inquiries is the question of whether the Act should seek to protect *competition* or *competitors*. The Committee considers that the Act can best protect competition by maintaining a range of competitors, who should rise and fall in accordance with the results of competitive rather than anticompetitive conduct. This means that the Act should protect businesses (large or small) against anticompetitive conduct, and it should not be amended to protect competitors against competitive conduct. This inquiry considered how well the Act achieves this goal.

Misuse of market power

E.4 Section 46 of the Act prohibits corporations with a substantial degree of market power from taking advantage of that power for the purpose of eliminating or substantially damaging a competitor, preventing the entry of a competitor into the market or deterring or preventing a competitor from engaging in competitive conduct.

E.5 A number of submissions and witnesses argued in evidence that the High Court's decision in the *Boral* case has raised the threshold for determining that a corporation possesses a substantial degree of market power. They argued that the High Court's finding that Boral did not possess a substantial degree of market power means, effectively, that a corporation would have to be near dominant in the market to satisfy that element of section 46.

E.6 Accordingly, many including the ACCC argued that section 46 requires amendment to ensure that the lower threshold intended by Parliament is given effect in the legislation. The ACCC in fact informed the Committee that, as a consequence of the decision in *Boral*, it had discontinued four cases that had reached the 'second threshold' stage of its investigations in relation to section 46.

E.7 The Committee considers that the amendments suggested by the ACCC are consistent with the intention of Parliament in 1986, and that their inclusion in the Act would clarify the intentions of Parliament.

Recommendation 1

The Committee recommends that the Act be amended to state that the threshold of 'a substantial degree of power in a market' is lower than the former threshold of substantial control; and to include a declaratory provision outlining matters to be considered by the courts for the purposes of determining whether a company has a substantial degree of power in a market. Those matters should be based upon the suggestions outlined by the ACCC in paragraph 2.16 of this report.

E.8 The Committee received some evidence arguing that amendments are also required to section 46 in order to clarify what a court may have regard to in determining whether a corporation has 'taken advantage' of its market power.

E.9 Witnesses argued that the need for clarification arises from the Federal Court's decision in *Safeway,* which found that the business rationale for the conduct was relevant to considering whether the corporation had taken advantage of its market power. The ACCC was concerned that this reasoning left open the possibility of a defence on the grounds of 'rational business conduct' to corporations which had unfairly taken advantage of their market power.

E.10 The Committee considers that the Act should be amended to remove current uncertainty with regard to the meaning of 'take advantage.' The Committee considers that its proposed amendment would make clear and explicit the link between proscribed conduct and the possession of substantial market power, and would deal with the issue of 'rational business conduct.'

Recommendation 2

The Committee recommends that the Act be amended to include a declaratory provision outlining the elements of 'take advantage' for the purposes of s.46(1). This provision should be based upon the suggestions outlined in paragraph 2.28 of this report.

E.11 A number of submissions and witnesses expressed concern about predatory pricing activities which, they argued, are not adequately captured by section 46. The Committee notes that predatory pricing has proven difficult to define or establish. Low, or below cost, prices may be evidence of predatory pricing but they may also occur as a consequence of normal, competitive behaviour.

E.12 The Committee considers that the Act would be strengthened by making predatory pricing a clearer target of section 46.

E.13 One factor which may indicate that the relevant pricing is predatory is where the price-cutting company plans to recoup its losses by increasing prices once its

opponents have been driven from the market. However, there was dispute in the evidence before the Committee over whether recoupment is a *necessary* feature of predatory pricing.

E.14 The Committee considers that, while evidence of a corporation's intention to recoup losses may well contribute to the proof of an allegation of predatory pricing, there is nothing in s.46 which makes recoupment an element necessary to prove predatory pricing. The Committee considers that the Act could be improved by stating that recoupment is a factor which the courts *may* examine when considering allegations of predatory pricing.

Recommendation 3

The Committee recommends that the Act be amended to provide that, without limiting the generality of s.46, in determining whether a corporation has breached s.46, the courts may have regard to:

- **the capacity of the corporation to sell a good or service below its variable cost.**

The Committee recommends that the Act be amended to state that:

- **where the form of proscribed behaviour alleged under s.46(1) is predatory pricing, it is not necessary to demonstrate an capacity to subsequently recoup the losses experienced as a result of that predatory pricing strategy**

E.15 The Committee received some evidence suggesting amendments designed specifically to deal with the use of financial power to support predatory pricing. The proposed amendments set out to capture predatory pricing conduct of firms with financial power but not market power, that might otherwise fall outside the scope of section 46.

E.16 The importance of such amendments was highlighted by the outcome of the *Rural Press* case, handed down in December 2003. In that case, Rural Press pursued a clearly anticompetitive business strategy, but was not found to be in breach of the Act, partly because it relied on its "economic and financial power" and not its market power. An attempt by the trial judge to link economic, financial and market power was overturned on appeal.

E.17 The ACCC supported the use of the concept of financial power in regulating conduct contrary to s.46, but considered that rather than introducing a financial power threshold in s.46, financial power should be listed as one of the factors contributing to a determination of substantial power in a market.

Recommendation 4

The Committee recommends that s.46 of the Act be amended to state that, in determining whether or not a corporation has a substantial degree of power in a market for the purpose of s.46(1), the court may have regard to whether the corporation has substantial financial power.

'Financial power' should be defined in terms of access to financial, technical and business resources.

E.18 Evidence raised the issue of whether amendments are required to ensure that s.46 applies where a corporation uses market power in one market to engage in proscribed conduct in a second market. This issue was determined by the High Court late in the Committee's deliberations, when in the *Rural Press* judgment the Court clearly stated that misuse of market power in a second market is not a breach of the Act.

E.19 The Committee considers that this should not be the case. The possession of market power in one market should not become the base for anticompetitive conduct in another market, and the Act should be amended to make this clear.

Recommendation 5

The Committee recommends that s.46 be amended to state that a corporation which has a substantial degree of power in a market shall not take advantage of that power, *in that or any other market*, for any proscribed purpose in relation to that or any other market.

E.20 The Committee, finally, considered the impact of coordinated market power on competition. The Committee considers that corporations which do not have a substantial degree of market power on their own, may obtain that power through 'conscious parallelism' or 'coordinated interaction' with other corporations. For this reason, the Committee considers that s.46 of the Act should be clarified to indicate that a company may obtain market power by virtue of its co-ordination with another company, and that such coordinated market power may amount to a substantial degree of power in a market.

Recommendation 6

The Committee recommends that s.46 be amended to clarify that a company may be considered to have obtained a substantial degree of market power by virtue of its ability to act in concert (whether as a result of a formal agreement or understanding, or otherwise) with another company.

Unconscionable conduct

E.21 Part IVA of the Act prohibits the anti-competitive behaviour known as 'unconscionable conduct'. Section 51AC, which seeks particularly to protect small

businesses from unconscionable conduct by large businesses, attracted most comment during this inquiry.

E.22 A number of submissions sought to extend s.51AC to proscribe 'unfair, harsh or unconscionable conduct'. The Committee considers that 'harsh' conduct is often a normal part of tough competitive dealing, and that the concept of 'unfair conduct' is much less legally certain than the concept of 'unconscionable conduct.' It is not clear that either of these proposed additions would enhance protection for small business under the Act, and as a result the Committee does not support their inclusion.

E.23 Subsections 51AC(9) and (10) limit the operation of s.51AC to the supply or acquisition of goods or services at a price in excess of $3,000,000. A number of organisations called for greater clarity around the $3 Million figure, suggesting it should operate on a per-invoice basis, and should be indexed. Other evidence suggested that the $3 Million threshold was fundamentally inappropriate, and should be removed.

E.24 The ACCC agreed with this view, saying that subsection 51AC(3)(a) already stated that the courts may have regard to the relative strengths of the bargaining positions of the companies, so no threshold is necessary.

E.25 The Committee noted these arguments and further noted that subsections 51AC(1) and (2) exclude publicly listed companies from the protection of the section. The Committee agrees that the removal of the thresholds will not reduce the current protection for small businesses, and will enhance protection for businesses involved in transactions over $3 Million, who are nevertheless subject to unconscionable conduct within the terms of s.51AC.

Recommendation 7

The Committee recommends that subsections 51AC(9) and 51AC(10) of the Act be repealed.

E.26 Submissions and witnesses also sought to extend s.51AC to proscribe a number of specific activities, including the unilateral variation of contracts, unilateral termination of contracts, and the presentation of standard form contracts. In relation to the behaviours identified in these activities, the Committee notes that many are already captured by the terms of s.51AC, particularly subsections (3)(j) and (k).

E.27 The Committee also notes evidence that there are occasions upon which the use of standard form contracts or unilateral variations of contracts may be pro-competitive and commercially beneficial for both parties. Standard form contracts, for instance, save both parties time and money when similar transactions are conducted regularly, and when the terms and conditions are well known and agreed by both parties. The Committee is concerned that the proscription of standard form contracts *per se*, would remove these cost saving benefits in addition to proscribing the unconscionable use of such forms.

E.28 The ACCC presented a slightly different proposal in relation to unilateral variation of contracts. The ACCC argued that, rather than proscribing such contracts, they should be added to the list of matters, contained in subsections 51AC(3) and (4), to which the courts may have regard in determining whether conduct is unconscionable. This proposal would not ban the unilateral variation of contracts outright, but would make it clear that such contracts could constitute conduct which is, in all the circumstances, unconscionable.

E.29 The Committee finds this argument compelling, since it would discourage the inappropriate use of unilateral variation of contracts, while allowing unilateral variation where such provisions are commercially necessary and pro-competitive.

Recommendation 8

The Committee recommends that subsections 51AC(3) and 51AC(4) of the Act be amended to include 'whether the supplier (in s.51AC(3)) or acquirer (in s.51AC(4)) imposed or utilised contract terms allowing the unilateral variation of any contract between the supplier and business consumer, or the small business supplier and acquirer.'

E.30 Witnesses indicated to the Committee that some government authorities, particularly at State and local levels, are not covered by s.51AC of the Act, despite being large scale purchasers of products, often from small businesses. The Committee agrees that such authorities should be subject to the Act.

Recommendation 9

The Committee recommends that s.2B(1) of the Act be amended so that it is clear that Part 1VA of the Act applies to the Commonwealth Government; and that the Government consult with the states and territories with a view to amending subsection 2B(1) of the Act, so that Part IVA of the Act applies to state, territory and local governments.

E.31 The Committee examined, in some detail, unconscionable conduct in retail tenancy arrangements. Some witnesses argued that ACCC has not pursued retail tenancy issues with sufficient vigour, despite the introduction of s.51AC which was intended to strengthen the remedies available to retail tenants who were the victims of unconscionable conduct.

E.32 The Committee observed, however, that since a number of State and Territory jurisdictions have drawn down versions of 51AC into their respective retail tenancy regimes the full impact of s.51AC on retail tenancies may be larger than is suggested by a simple observation of the ACCC's activity.

E.33 The Committee recommends that the Commonwealth government work with its State and Territory counterparts to harmonise retail tenancy laws.

E.34 The Committee noted that there are inconsistencies and areas where the law could be strengthened, including in relation to the common practice of 'secret pricing' in retail tenancies. While the Committee does not support the compulsory disclosure of rental terms, the Committee does not support arrangements which prevent such disclosure. Such arrangements inhibit, rather than support, an informed market for retail tenancies. In particular, retail tenants who utilise the collective bargaining notification arrangements proposed in the Dawson Report and supported in this report should be able to freely share information about their rental prices and conditions. If this process fails to deliver satisfactory outcomes over time, the Government should consider the adoption of a mandatory code.

Recommendation 10

The Committee recommends that the Commonwealth Government negotiate with state and territory governments, with a view to introducing measures which would prohibit retail lease provisions compelling tenants to keep their tenancy terms and conditions secret.

Codes of conduct

E.35 The Committee considered Part IVB of the Act, which enables voluntary or mandatory industry codes to be prescribed under the Act, so that contravention of a relevant code also contravenes the Act. The Committee further noted the ACCC's proposals to endorse codes of conduct which meet its quality criteria.

E.36 The Committee concurs with the scepticism expressed by a number of small business representatives about the extent to which voluntary codes of conduct can address entrenched problems within particular industries.

E.37 The Committee does not support the general use of voluntary codes as a substitute for sensible regulation. The Committee notes that the recommendations it has made in this report are likely to accomplish more to support successful competition than the most well-meaning ambitions of developing voluntary codes.

Collective bargaining

E.38 The Committee generally supports the Dawson Report's recommendation for a notification process rather than an authorisation process for proposed collective bargaining arrangements. The Committee notes that these recommended collective bargaining arrangements include provision for collective boycotts, where these are judged to be in the public benefit.

E.39 Although the government accepted the recommendation of the Dawson Report in relation to collective bargaining, the Committee notes that it has yet to introduce the legislation to implement that proposal.

Recommendation 11

The Committee recommends that the Government immediately bring forward legislation to introduce a collective bargaining notification scheme, including the right to boycott, and excluding the proposed $3 million threshold for notifications.

Creeping acquisitions

E.40 Submissions before the inquiry suggested that in the retail grocery sector and the retail liquor sector, large chains are acquiring the stores of independent competitors in a program of 'creeping' acquisitions. Witnesses expressed concern that s.50 of the Act, designed to prevent acquisitions that would have the effect of 'substantially lessening competition in a market', is inadequate in dealing with piecemeal acquisitions because no single purchase is likely, by itself, to lead to a substantial lessening of competition.

E.41 The ACCC itself expressed concern about this issue, but also noted that it has not yet determined whether creeping acquisitions in general (as opposed to specific case) do substantially lessen competition and so cause economic detriment. Further, if they do have this effect, the ACCC expressed uncertainty about whether the current section 50 provisions would be adequate to deal with that issue.

E.42 The Committee considers, as a matter of logic, that creeping acquisitions must, if continued indefinitely, at some point result in a very concentrated market. The clear consensus of evidence before the Committee supported this view, and no substantial arguments were raised to oppose it. Current merger law does not effectively address this issue. Section 50 of the Act should be strengthened to take account of the cumulative effects of acquisitions which over time may substantially lessen competition.

Recommendation 12

The Committee considers that provisions should be introduced into the Act to ensure that the ACCC has powers to prevent creeping acquisitions which substantially lessen competition in a market.

Divestiture

E.43 Divestiture powers are powers which enable a Court to order that a dominant corporation be broken up into several smaller corporations in order to prevent the anticompetitive domination of a market by one player.

E.44 Such powers are currently available under s.81 of the Act, but cannot be applied to creeping acquisitions, nor to offences under s.46. The Committee considers that the application of s.81 should be expanded, so that divestiture becomes a remedy for other breaches of the Act, including section 46 (Misuse of market power) and any

new section introduced in line with the Committee's recommendation 12 (relating to the regulation of creeping acquisitions).

E.45 As divestiture is a quite severe remedy, it is appropriate to provide "warning mechanisms" to ensure that a corporation which is expanding its business is able to comply with its obligations under the Act. A suitable warning mechanism could be based around a "trigger" market concentration.

E.46 This trigger should not operate as a *de facto* cap on market share. Rather it would require companies proposing acquisitions in concentrated industries to notify the ACCC. The Commission would then assess whether the acquisition would result in a substantial lessening of competition. The Committee notes that this already occurs in the retail grocery industry.

Recommendation 13

The Committee recommends that s.81(1) of the Act be amended so that s.81 can be applied where a corporation is found to have contravened section 46, section 46A, or any new section introduced to regulate creeping acquisitions.

Powers of the ACCC

E.47 Before the Dawson Committee, the ACCC argued that it should be given the power to issue 'cease and desist' orders to stop anti-competitive conduct. Other organisations supported the extension of these powers before this Committee. The Committee considers that cease and desist powers are a vital tool for the ACCC if it is to prevent anti-competitive conduct from resulting in substantial damage to small business. The ACCC requires a tool which will enable it to act in 'real business time' yet which will protect the rights of companies against whom the cease and desist orders are sought.

Recommendation 14

The Committee recommends that the Act be amended to provide for cease and desist orders, modelled on the orders provided for in sections 74A to 74D of the *Commerce Act 1986* (NZ), appropriately modified to conform with Australian constitutional law.

E.48 The ACCC argued, before this Committee, for an extension of its powers under s.155 of the Act beyond the commencement of injunctive court proceedings. The Committee is reluctant to interfere in the powers possessed by the ACCC once a matter is before the courts. However the Committee considers that the ACCC should be able to apply to the courts for its s.155 powers to continue after the commencement of injunctive proceedings.

Recommendation 15

The Committee recommends that s.155 of the Act should be amended to enable the ACCC to seek the permission of the court (whether as part of a warrant application or otherwise) for the continued use of its powers under s.155 after the commencement of injunctive proceedings. The use of s.155 powers should cease prior to the commencement of substantive proceedings.

Resources of the ACCC

E.49 The ACCC acknowledged to the Committee that it is often constrained in its ability to pursue legal proceedings in relation to s.46 and s.51AC, because of the lack of availability of funding. The Committee wishes to rectify this problem.

Recommendation 16

The Committee recommends that the ACCC should be adequately funded to undertake its role as the principal litigant in s.46 and s.51AC cases.

Judicial arrangements

E.50 One organisation suggested to the Committee that jurisdiction for s.46 and s.51AC matters should be extended to lower courts and tribunals, in order to increase access to justice for small businesses. The Committee supports this proposal, and considers that the Federal Magistrates Court has developed expertise in resolving issues without requiring the expense of a fully contested court case. This expertise could resolve a substantial number of s.46 and s.51AC matters with cost savings for all sides. Recourse to the Federal Magistrates Court may also enable more small businesses to utilise the provisions of section 83 of the Act to seek damages where anti-competitive conduct has already been established by the courts.

Recommendation 17

The Committee recommends that the jurisdiction of the Federal Magistrates Court be extended to enable it to deal with Misuse of Market Power (s.46 and s.46A where cases rely upon s.83), Contravention of Industry Codes (s. 51AD) and Unconscionable Conduct (Part IVA).

Approaches adopted in OECD economies

E.51 In its discussion of the effectiveness of the *Trade Practices Act 1974*, the Committee has compared the provisions of the Act with those in the competition laws of a number of OECD economies. In particular, the Committee has considered approaches adopted in relation to the following issues:

- UK and US legislation regarding predatory pricing and recoupment (para 2.51);
- US legislation regarding definitions of 'unfairness' (para 3.29);

- UK legislation regarding the regulation of contracts (para 3.54ff);
- UK legislation regarding a 'trigger' of market concentration for the purpose of assessing acquisitions (para 4.76ff)
- New Zealand legislation regarding cease and desist powers (para 5.10ff)

2.13 NARGA supported the view that the threshold for market power had been raised to a level of market dominance. Professor Zumbo appearing for NARGA argued that, as a result, the court may not consider whether certain forms of behaviour are a misuse of market power, because the case does not satisfy the first hurdle, that is, establishing substantial power in a market:

> It is a fundamental issue and we believe that it ought to be addressed. It could be addressed if the problems evident in section 46—the critical threshold issues of 'substantial abuse of market power' and 'take advantage'— were addressed. We could then get into the conduct and see whether it was anticompetitive or just down to other factors—normal competitive factors. But we will never know unless we have an effective section 46.[6]

2.14 This view was supported by the Liquor Stores Association of Victoria in its evidence to the Committee:

> What seems to be happening with section 46 is that we actually never get to the anticompetitive conduct itself; we seem to spend a lot of time deciding who is or who has a substantial degree of market power or power in the market and we never really get right down to the conduct itself.[7]

2.15 The Law Council of Australia (LCA), however, rejects the argument that the Boral decision has either rendered the interpretation of section 46 uncertain, or narrowed the parliamentary intention in the 1986 amendments. They argue that the High Court did not raise the threshold to dominance in Boral:

> ...it is being suggested that the 1986 amendments to section 46, which were designed to achieve a shift from dominance to a substantial degree of market power, have not been effective. We do not think that the High Court has raised the threshold to dominance. The High Court did not have to decide whether two or more firms can have market power. The Boral decision leaves this issue open. In fact, a majority of the Federal Court in the Safeway case found that Safeway had a substantial degree of market power with only 16 per cent of the relevant market, which is evidence that more than one corporation can have a substantial degree of power in a market. Further, the High Court will have the opportunity in the short term in any appeal from the Safeway decision to further clarify this issue.[8]

2.16 The ACCC argued that since, in its view, the courts have interpreted s.46 in a manner inconsistent with Parliament's intent, clarificatory amendments to the Act are required. The ACCC proposed:

> The policy intention behind s.46 should be given effect by amending s.46 to clarify the following principles:

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6 *Transcript of Evidence*, Zumbo, 7 November 2003, p. 52.

7 *Transcript of Evidence*, Wilkinson, 31 October 2003, p. 53.

8 *Transcript of Evidence*, Castle, 7 November 2003, p. 21.

> 1. the threshold of 'a substantial degree of power in a market' is lower than the former threshold of substantial control;
> 2. the substantial market power threshold does not require a corporation to have an *absolute* freedom from constraint – it is sufficient if the corporation is not constrained to a *significant* extent by competitors or suppliers;
> 3. more than one corporation can have a substantial degree of power in a market;
> 4. evidence of a corporation's behaviour in the market is relevant to a determination of substantial market power.[9]

2.17 The Committee considers that the suggestions made by the ACCC are consistent with the intention of Parliament in 1986, and that the inclusion of these points in the Act would clarify the intentions of Parliament without unduly extending or restricting the scope of the section. While the Committee recognises the Law Council's point that a High Court decision in *Safeway* may yet consider the meaning of substantial market power, the Committee considers that these points of clarification can be added immediately, so that the law is plain, rather than waiting to see whether the courts interpret s.46 as Parliament intended. Further, the Committee notes that the ACCC has already dropped section 46 cases which, prior to *Boral*, would have proceeded. Further delays in clarifying the law are unnecessary, and the Committee therefore endorses the ACCC's proposal.

Recommendation 1

The Committee recommends that the Act be amended to state that the threshold of 'a substantial degree of power in a market' is lower than the former threshold of substantial control; and to include a declaratory provision outlining matters to be considered by the courts for the purposes of determining whether a company has a substantial degree of power in a market. Those matters should be based upon the suggestions outlined by the ACCC in paragraph 2.16 of this report.

Take advantage

2.18 In order to contravene s.46, a corporation with substantial power in a market must *take advantage* of that power for one of the purposes proscribed in subsections (1)(a) (b) or (c). The initial interpretation of 'take advantage' was that it meant little more than 'use'. Importantly, it was held that 'take advantage' did not imply that the power was used with a hostile purpose:

> It is true that the words 'take advantage of' can be used with an adverse moral implication. This is particularly the case where the words are used with another person as their object. Of themselves, however, the words 'take advantage of ... power' are morally indifferent. As a matter of language, a Parliament can 'take advantage' of its legislative power to make good laws; a government can 'take advantage' of its executive power to protect and benefit the community; a trading corporation can 'take advantage' of its

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9 Submission 30, ACCC, p. 19.

2.26 The Committee concurs with the views of the ACCC. The words of the majority judgment seem quite clear since, in rejecting the ACCC's argument that the 'could' test should not be used, the judgment states that:

> The Commission's criticism of the Full Federal Court for asking whether Rural Press and Bridge 'could' engage in the same conduct in the absence of market power must be rejected ... The Commission did not demonstrate either that [the Court, in *Melway*] did not mean what it said, or that what it said should be over-ruled.[17]

2.27 In his dissenting judgment, Justice Kirby described this reasoning as based upon 'a narrow, formalistic and substantially verbal ground'[18], thus suggesting that the actual words used in the majority judgment – in this case, 'could' – should be given the highest weight. This tends to support the view expressed above by the ACCC.

2.28 The ACCC has submitted that s.46 should be amended to clarify that in determining whether a corporation has taken advantage of its market power, the courts should consider whether:

- the conduct of the corporation is materially facilitated by its substantial degree of market power;
- the corporation engages in the conduct in reliance upon its substantial degree of market power;
- the corporation would be likely to engage in the conduct if it lacked a substantial degree of market power; or
- the conduct of the corporation is otherwise related to its substantial degree of market power.[19]

2.29 The ACCC would also amend the section to make it clear that 'an inquiry as to the business rationale for the relevant conduct may be a relevant circumstance, but is not critical, to determining whether a corporation has taken advantage of its substantial market power in any particular matter.'[20]

2.30 The Law Council of Australia argued against the ACCC's amendments, claiming that they had the potential to 'remove the filter in section 46 which requires a link between the conduct and the market power.'[21]

2.31 The Committee concurs with the views of the ACCC, and considers that the recommended amendments would make the Act more clear and remove current

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17 *Rural Press* ([2003] HCA 75) at para 52 per Gummow, Hayne and Heydon JJ.

18 *Rural Press* ([2003] HCA 75) at para 121 per Kirby J.

19 Additional information, dated 18 November 2003, p.4.

20 Submission 30, ACCC, p. 21.

21 *Transcript of Evidence*, Castle, 7 November 2003, p. 22.