

Motor Trades Association of Australia

Mr Peter Hallahan
Committee Secretary
Senate Economics Legislation Committee
Suite SG.64
Parliament House
CANBERRA ACT 2600

Dear Mr Hallahan

I write to you regarding the Senate Economics Legislation Committee Inquiry into the provisions of the *Petroleum Retail Legislation Repeal Bill 2006*.

As you will be aware, the Motor Trades Association of Australia (MTAA) made a submission to that inquiry and representatives from MTAA and one of its Member bodies, the Service Station Association (SSA), appeared at the public hearing that the Committee held in Sydney on Wednesday, 19 April 2006. At that hearing, the MTAA/SSA representatives, Mr Richard Halstead and Mr Ron Bowden, undertook to provide further information on a number of issues and MTAA would like to take this opportunity to fulfil those undertakings on behalf of Messrs Halstead and Bowden. To assist with ease of reference, those undertakings will be addressed individually in the order in which they were given during the course of the hearing.

1. **Chair (at E15) – “You say you acted on legal advice. Did you put forward to government a specific proposal, reduced to writing, as to what you wanted?...If the answer is yes, could you take that on notice and provide to the committee a copy of what you put to government?”**

While MTAA has not provided the Australian Government with a specific written proposal on the amendment of section 46 in the context of the Oilcode discussions, the Association has previously proposed specific written amendments to section 46 and to other sections of the *Trade Practices Act* in other contexts. However, in light of the time that has elapsed since MTAA developed those proposals and the fact that the debate on the reform of the *Trade Practices Act* has moved on since then, the Association considers that it probably is not useful or appropriate for those now somewhat overtaken proposals regarding section 46 to be the focus of the current debate.

As the Committee will be aware, however, MTAA has, throughout the course of the discussions that have taken place regarding the reform of the retail petroleum sector, continually reiterated the need for section 46 of the *Trade Practices Act 1974* to be strengthened to ensure that it deals effectively with all forms of

anticompetitive behaviour in the retail petroleum sector, including predatory pricing and the misuse of market power. In particular, the Association has clearly indicated to the Government that it supports the adoption of the seventeen recommendations contained in the majority report of the Senate Economics References Committee Inquiry into 'The Effectiveness of the *Trade Practices Act 1974* in protecting small business'.

As Committee Members may be aware, that report recommended a number of amendments to the *Trade Practices Act* in relation to section 46, including 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 of the ACCC in paragraph 2.16 of this report;*
- *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;*
- *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;*
- *to state that where the form of proscribed behaviour alleged under s.46(1) is predatory pricing, it is not necessary to demonstrate a capacity to subsequently recoup the losses experienced as a result of that predatory pricing strategy;*
- *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;*
- *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;*
- *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.¹*

¹ Senate Economics References Committee, Parliament of Australia, *The effectiveness of the Trade Practices Act 1974 in protecting small business* (2004) xii – xiv.

A copy of the Executive Summary of the report (along with relevant excerpts) is attached for the information of Committee Members.² Copies of some of the representations that MTAA has made to the Australian Government in relation to the reform of the *Trade Practices Act* are also attached for the information of Committee Members.³

MTAA considers however that generic amendments to the *Trade Practices Act* are unlikely to address some of the concerns it has regarding price discrimination. Under section 20 of the Franchise Act⁴, the major oil companies are prohibited from engaging in price discrimination in relation to the supply of motor fuels to two or more of their franchisees if those franchisees' franchise agreements are covered by the Act. That section plays a very important role in the maintenance of the presence of independent operators in the sector because it prevents the site-by-site predation of independent operators by the major oil companies. The repeal of the Franchise Act will remove the protections afforded to independents under section 20 and there is nothing in the Oilcode or the Government's proposed amendments to section 46 of the *Trade Practices Act* which will maintain or restore that right.

2. **Senator Stephens (at E15 - 16) – “I go back to your organisation’s concerns, Mr Halstead. You talk about guaranteed access to supply and transparent terminal gate pricing arrangements. In line with the chair’s question to you earlier, what would you propose to the government to address that concern?”**

Guaranteed Access to Supply

As MTAA noted in its original submission, access to a supply of petroleum products is a fundamental issue for all independent service station operators because without access to supply, those operators will not be able to continue in their businesses and that is likely, in MTAA's view, to have a significant impact on the level of competition in the retail petroleum sector. MTAA therefore considers that any proposed reform package for the sector needs to include measures designed to ensure that all market participants have access to a competitively priced supply of petroleum products.

MTAA did address the issue of access to supply in the submissions it made to the Australian Competition and Consumer Commission (ACCC) in relation to the joint ventures between Shell, Coles, Caltex and Woolworths and their associated 'shopper docket' discount schemes. In those submissions, the Association urged the ACCC to ensure (by way of enforceable undertakings or other measures) that Shell and Caltex continued to make supplies of fuel available to independent wholesalers and retailers. Copies of the relevant correspondence have been included in Appendix B.1 for the information of Committee Members. MTAA considers that the Government could seek undertakings from the major oil companies regarding the continued supply of independent wholesalers and retailers as part of its reform package for the retail petroleum sector.

² Please refer to Appendix A.1.

³ Please refer to Appendix A.2.

⁴ *Petroleum Retail Marketing Franchise Act 1980* (Cth).

Transparent terminal gate pricing arrangements

The issue of terminal gate pricing arrangements was also dealt with in some detail in the correspondence which was attached to the Association's original submission to the Committee.⁵ As MTAA noted in that correspondence and in its original submission to the Committee, the Australian Government's proposed reforms to terminal gate pricing arrangements are, in the Association's view, unlikely to result in a more transparent and competitive wholesale pricing regime.

MTAA considers that its concerns in this regard could be alleviated through the introduction of truly transparent terminal gate pricing arrangements. Such arrangements would necessarily preclude suppliers from offering discounts at or before the terminal gate because otherwise the terminal gate price would not be reflective of the true wholesale price and may be subject to manipulation or distortion by suppliers. Other principles which the Association considers should underpin the terminal gate pricing arrangements are discussed in more detail in the MTAA paper, *Principles of a Terminal Gate Pricing Arrangement* and a copy of that paper is attached for the information of Committee Members.⁶ A copy of a letter of 9 May 2002 from Michael Delaney to Minister Macfarlane which further discusses terminal gate pricing arrangements, and MTAA's views on that issue, is also attached for the information of Committee Members.⁷

MTAA considers that the adoption of the principles contained in that paper would help to improve the level of transparency and competition in the sector by ensuring that the terminal gate price was actually a true reflection of the wholesale price. A truly transparent terminal gate price would in turn help to encourage competition at the wholesale level.

3. **Mr Halstead (at E16) – “All those points that I mentioned: getting the Trade Practices Act to support the areas we have already discussed, making the dispute resolution process wider – and we will provide those details for you – and ensuring access to supply seem important...”**

As discussed above, MTAA supports the adoption of the seventeen recommendations contained in the majority report of the Senate Economics References Committee Inquiry on 'The effectiveness of the *Trade Practices Act 1974* in protecting small business'. MTAA considers that the adoption of those recommendations would address the major concerns the Association has expressed about anticompetitive behaviour in the retail petroleum sector.

In relation to the dispute resolution scheme that is proposed to be introduced as part of the Oilcode, MTAA considers that the matters which can be mediated under the scheme should be extended to all matters which form part of the business relationship between the parties. Such an approach would be consistent

⁵ In particular, please refer to: bullet point 4 on page 2 of Michael Delaney's letter of 24 February 2005 to Mr Stephen Payne; and pages 3 (last paragraph), 5 and 7 (paragraph 3) of Michael Delaney's letter of 16 March 2005 to Minister Macfarlane. For the ease of reference of Committee Members, copies of both of those letters have been included in Appendix B.2.

⁶ Please refer to Appendix B.3.

⁷ Please refer to Appendix B.4.

with that of the Franchising Code of Conduct and would mean that the dispute resolution scheme might provide a more viable alternative to legal action. The Association notes however that as a mediator appointed under the scheme will only be able to make a non-binding determination about a dispute, such determinations are unlikely to be of much value in a commercial environment.

The issue of the proposed dispute resolution scheme was also dealt with in some detail in the correspondence attached to MTAA's original submission to the Committee. In particular, I would draw the attention of Committee Members to: bullet point 8 on page 3 of Michael Delaney's letter of 24 February 2005 to Mr Stephen Payne; and pages 4 (first paragraph) and 6 of Michael Delaney's letter of 16 March 2005 to Minister Macfarlane.⁸

4. **Senator Watson at E20 – “I know you have talked about it. It was not until the commencement of this hearing that I asked about the Oilcode. That seemed to be the linchpin. Then we looked at the linchpin and saw that it lacks teeth.”**

Mr Halstead – “One of the issues is that this committee was convened fairly quickly and not necessarily everything has been addressed. We are certainly happy to take that on notice and deliver more of a reply on that.”

Senator Watson – “So you will take that question on notice.”

MTAA agrees with Senator Watson's observation that the proposed Oilcode “lacks teeth”. Committee Members will be aware that in its submission the Association outlined a number of major concerns that it has with the proposed Oilcode. Those concerns included the potential ability of suppliers to circumvent the minimum tenure arrangements provided under the Oilcode, the lack of protection in relation to the tenure rights of existing Franchise Act franchisees, the failure of the Oilcode or other aspects of the Government's proposed package to provide transparent terminal gate pricing arrangements and to address issues such as access to supply and the misuse of market power, and the limited coverage of the Oilcode's dispute resolution scheme. All of these issues are discussed in more detail in MTAA's original submission and the correspondence which was attached to that submission.

For the reasons identified in that submission and attached correspondence, MTAA considers that the Oilcode is unlikely to provide a regulatory framework which protects the existing rights of the service station operators that MTAA represents, or to address the key threats to vigorous and effective competition in the sector. MTAA also considers that the lack of any meaningful penalties for breaches of the Oilcode further compounds the “toothless” nature of the Oilcode.

5. **Mr Halstead (at E23 in relation to collective bargaining authorisations) – “I do not know that the MTAA in the past has felt that it was its area in any way to get involved in this. Individuals may have, but the MTAA – I am answering on its behalf – certainly has not. We have tended to stay out of any commercial arrangement. If there was to be one, it would be done by the state body.”**

⁸ Copies of the relevant correspondence have been included in Appendix B.2.

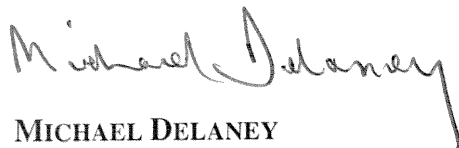
MTAA would like to clarify that it has not sought authorisation from the ACCC to collectively bargain on behalf of its service station members due to the prohibitive costs, both time and financial, associated with such an application and the onerous task of satisfying the Commission that the public benefits of the proposed conduct will outweigh the public detriment.

MTAA would also like to express serious concern about the existing rights of some Franchise Act franchisees following the Government's decision to pre-empt the Parliament's consideration of the future of both the Sites⁹ and Franchise Acts by amending the *Petroleum Retail Marketing Sites Regulations 1981* ('the Regulations') in a manner which effectively renders the Sites Act nugatory. As MTAA noted in its submission to the Committee, some current franchise agreements contain a clause which allows the franchisor to bring the agreement to an end in the event of a mandatory law change. MTAA notes that it is possible that the amendment of the Regulations could be regarded as a 'mandatory law change' and might therefore give rise to a right to bring the agreement to an end. The provisions of the proposed Oilcode which purport to protect the existing rights of franchisees will be of little assistance in those circumstances as the Government failed to table the *Trade Practices Act (Industry Code – the Oilcode) Regulations 2005* simultaneously with the regulations that amended the Regulations. Equally, the Association believes that it is quite inappropriate that an Act be made inoperative through regulation while the Parliament is considering the fate of that Act.

I would also like to take this opportunity to apologise for my inability and that of my deputy, Ms Sue Scanlan, to attend the Committee's hearing on 19 April 2006. I unfortunately had prior unavoidable commitments and Ms Scanlan was overseas. While Sue and I were unable to attend that hearing, we are willing to appear before the Committee at its convenience if it deems that appropriate. I have also attached additional copies of the MTAA publication, *The Australian Oil Industry*, as it may assist Committee Members in their consideration of this matter.

I trust that these comments are of assistance in the Committee's consideration of this matter and please do not hesitate to contact me on (02) 6273 4333 if you wish to discuss any aspect of this submission further.

Yours sincerely



MICHAEL DELANEY
Executive Director

2 May 2006

⁹ *Petroleum Retail Marketing Sites Act 1980* (Cth).