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## CHAPTER 6

### MISUSE OF MARKET POWER

*...unrestricted business gives an advantage to the strong, the clever, the selfish and the unscrupulous. It is the rule of the jungle.*<sup>1</sup>

#### **Predatory pricing**

6.1 A significant amount of anecdotal evidence alleged instances of predatory pricing by the major chains.

6.2 Predatory pricing occurs where a firm temporarily reduces its prices below the level justified by competitive conditions in order to force a competitor from the market, and having achieved this purpose, then expects to be able to raise prices above the competitive level.<sup>2</sup>

6.3 Where a corporation which has a substantial degree of market power is found to have engaged in predatory pricing, then that will be evidence of a breach of section 46 of the *Trade Practices Act*.

6.4 Predatory pricing may be established in a number of ways:

- By express admission;
- By inference from facts other than the extent of the price cuts themselves; or
- By analysis of the effects of the price cuts, giving rise to an inference as to the purpose behind their adoption.<sup>3</sup>

6.5 The ACCC believes that the present market structure of the grocery industry and the pressures on the retailers to cut costs may result in conduct which is anti-competitive:

A supply side market power issue that can arise in this respect relates to the possibility of the chains exercising their market power by engaging in predatory conduct. That is, conduct may be engaged in whereby a particular chain will drive out independent competition in its locality through low cost pricing. Specialty stores and independent retailers engaging in discount pricing may face very aggressive responses from those with deep pockets.<sup>4</sup>

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1 Clarence Darrow, 1857-1938, Arthur and Lila Weinberg, *Verdicts Out of Court*, 1963.

2 *Section 46: Oligopoly and Predatory Pricing*, Rhonda Smith and David Round, 6 (1998) *Competition and Consumer Law Journal*, p 112.

3 *Wilcox, J Eastern Express Pty Ltd v General Newspapers Pty Ltd* (1991) ATPR 41-128 at 52, 895.

4 Australian Competition and Consumer Commission, Submission 191, pp 35-36.

6.6 Mr John Brownsea, Executive Director, SA Small Retailers, sees predatory pricing as a major problem in the industry:

My concern about predatory pricing is that recently in one Adelaide suburb a major supermarket was selling cans of Coke for 50c. My member was buying cans of Coke for 97c. How predatory was that pricing?<sup>5</sup>

6.7 Mr Brownsea said that the problem lies with the fact that the major chains are prepared to lose money indefinitely in certain sites to wipe out the competition:

So there is a difference, I think, between fair competition, which is where something should be capable of being matched without a trader going broke, and a predatory price which is meant to destroy people if they do try and compete.<sup>6</sup>

6.8 Fellow South Australian small retailer, Mr Jon Symons, said that Coles and Woolworths 'have got products on their shelves which we cannot even buy at through our warehouse':

There is a huge problem. We would be better off going and purchasing the goods from these stores than buying them from our warehouse.<sup>7</sup>

6.9 At the Melbourne hearing, small retailer, Mr Ray Veal, told of one instance at the Gippsland Centre, Sale, where Safeway started 'aggressively pushing pre-made bunches of cut flowers':

Within three months, the florist at the other end of the complex – within the same complex, not out in the general shopping centre – was out of business because they could not compete with the cut flower arrangement and there was not enough income to sustain the business in the complex.<sup>8</sup>

6.10 Mr Veal said that, after the demise of the florist, the prices 'have gone back up'.<sup>9</sup>

6.11 In Western Australia, Mr Neville Gale, Managing Director of Advantage Supermarkets, told of his experiences with Coles:

The sales were two to one in Advantage's favour. To say that this got up the nose of Coles is an understatement. They put every resource that they possibly had, including the Melbourne office, to assist them to fight Advantage. One of their tactics was that, no matter what price I set on meat, they would meet my specials and then they would undercut it by five per cent. That is still the policy today. I can put rump steak out at \$5 per kilo

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5 *Hansard*, Adelaide, 8 April 1999, p 183.

6 *Hansard*, Adelaide, 8 April 1999, p 183.

7 *Hansard*, Adelaide, 8 April 1999, p 181.

8 *Hansard*, Melbourne, 7 April 1999, pp 106-107.

9 *Hansard*, Melbourne, 7 April 1999, p 107.

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when the rest of the market is \$10 and they will go under by five per cent under the \$5. They will not be beaten.<sup>10</sup>

6.12 Tobacconists also came forward with complaints of what they believed to be predatory pricing. Mr Trevor Beynon, Managing Director of Free Choice Stores, said that where tobacconists work on a five per cent gross profit, the major chains are working on minus one and minus two:

...so it is very difficult for an independent, especially when you have a situation right across Australia where the major chain and grocery stores come into every store two or three times a week, take your prices, and go back.<sup>11</sup>

6.13 Mr Roger Drake owns 21 stores in South Australia and employs around 1,200 people:

I find it difficult when you have got a store that is alongside and wants to gain market share that it can sell a product for 89c and the rest of the chain can sell it for \$1.69. If they are going to have a pricing it should be right across Australia and subject obviously to freight, which covers the country stores and covers the freight component.<sup>12</sup>

6.14 During the first stage of the inquiry, the Committee asked Woolworths to explain their pricing policy. Mr Roger Corbett, Chief Executive Officer, assured the Committee that Woolworths did not engage in predatory pricing, and that it does not set out to undercut others:

We would match pricing from competitors. We would vigorously compete with Coles and Franklins. If it were a small retailer, we would never reduce our selling price as a matter policy. I cannot say there is not an exception across all our stores in Australia, but as a policy we would never reduce our price below their selling price of a particular item.<sup>13</sup>

6.15 Mr Corbett said that Woolworths endeavour to deliver to country Australia at prices which are 'very comparable to city prices'. Mr Corbett said that the only differential is freight, which applies in limited examples. Mr Naum Onikul, Chief General Manager of Supermarkets, explained Woolworths' pricing policy as it applies to country New South Wales:

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10 Mr Neville Gale, Managing Director, Advantage Supermarkets WA, *Hansard*, Perth, 9 April 1999, p 248.

11 *Hansard*, Brisbane, 16 April 1999, p 513.

12 *Hansard*, Adelaide, 8 April 1999, p 216.

13 *Hansard*, Canberra, 6 April 1999, pp 10-11.

In a majority of rural areas right throughout New South Wales we sell at the same price as we do in metropolitan areas. We do not recover freight around New South Wales.<sup>14</sup>

6.16 During the second stage of the inquiry the Committee took *in-camera* evidence at Dubbo, and tabled newspaper advertisements, which revealed a marked difference between Woolworths' Sydney and Dubbo prices for Wednesday, 7 July 1999. Table 6.1 compares like items advertised in Sydney and Dubbo on that day.

Table 6.1

*Woolworths Sydney/Dubbo prices, Wednesday, 7 July 1999*

<b>Sydney</b>	<b>Item</b>	<b>Dubbo</b>
\$3.49/kg	Pork Forequarter Roast	\$2.99/kg
\$2.99/kg	BBQ Blade Steak	\$2.79/kg
\$5.99/kg	Beef Roasting Pieces	\$5.49/kg
\$4.49/kg	Roasting Leg of Pork	\$3.99/kg
\$3.29	500g Bega Cheese Slices	\$2.47
\$2.77	Sargents Frozen Meat Pies	\$1.99
\$0.99	1.25 litre Pepsi	\$0.79
\$5.99	McCain Frozen Pizza	\$4.99
\$3.99	800g Corn Flakes	\$2.99

Source: Sydney Daily Telegraph (7 July 1999), Dubbo Daily Liberal (7 July 1999).

6.17 When asked to explain this pricing differential at the second round of Canberra hearings, Mr Corbett said:

I cannot comment, without doing some homework, on individual marketing situations that may have existed. There might have been a promotion in that town: there might have been a competitive situation in that particular town. There might have been promotional activity for a reason that I am not aware and I cannot, I am sure you would understand, be aware of each individual situation.<sup>15</sup>

6.18 On 2 August 1999, Woolworths provided the Committee with additional information on this matter. This additional information stated that, each week, there is a State-wide 'pricing specials' advertising package produced for Woolworths' stores, which is customised for particular areas. This means that some State-wide standard prices may be reduced in some stores to reflect competitor activity, and in addition, for 'special occasions' such as new store openings and the re-opening of refurbished stores:

14 *Hansard*, Canberra, 6 April 1999, p 22.

15 *Hansard*, Canberra, 12 July 1999, p 1082.

The example provided by Mr Nairn at the recent Canberra hearing concerning discrepancies between advertised meat prices in Dubbo and Sydney on the same day fits into the 'special occasion' category. Woolworths Dubbo store was recently closed to enable it to be renovated and refurbished and was offering some special prices to attract customers back to the store following its re-opening.<sup>16</sup>

6.19 The Committee conducted further investigations into this matter. Those investigations revealed that:

- Woolworths Supermarket at the Riverdale Centre, Macquarie Street, Dubbo, was never closed prior to, during, or after the period of extensive renovations at the Centre; and
- During the period between 7 July 1999 and 4 August 1999, price discrepancies continued to occur between Woolworths' Dubbo stores and other State-wide stores as evidenced by Tables 6.2, 6.3, 6.4 and 6.5 below.

Table 6.2

*Woolworths Sydney/Dubbo prices, Wednesday, 14 July 1999*

<b>Sydney</b>	<b>Item</b>	<b>Dubbo</b>
\$8.99/kg	Prime quality rump steak	\$7.99/kg
\$4.99	Nestle Milo	\$3.99
\$3.49/kg	Lamb forequarter chops	\$2.99/kg
\$5.29/kg	Roasting leg of lamb	\$4.99/kg
\$2.49/kg	Country style thick sausages	\$1.99/kg
\$10.99/kg	Double smoked leg ham	\$8.99/kg
\$0.99 each	Chicken kebabs	\$0.79 each
\$2.59/kg	Chicken drumsticks	\$2.29/kg
\$6.99/kg	Sliced silverside	\$5.99/kg
\$3.97	Daily juice fruit juice	\$3.47
\$2.47	McCain Frozen Pizza	\$1.99
\$1.87	Lucky dog food	\$1.79
\$3.95	Sorbent toilet tissue	\$3.49
\$1.97	Spree laundry powder	\$1.69

*Source: Sydney Daily Telegraph (14 July 1999), Dubbo Daily Liberal (14 July 1999).*

16 Woolworths, Additional Information, 229D, p 2.

Table 6.3

*Woolworths Sydney/Dubbo prices, Wednesday, 21 July 1999*

<b>Sydney</b>	<b>Item</b>	<b>Dubbo</b>
\$0.99	Campbells tomato soup	\$0.79
\$4.49/kg	Roasting leg of pork	\$3.99/kg
\$3.49/kg	Pork forequarter roast	\$2.99/kg
\$5.89	Family roast chicken	\$5.79
\$8.99/kg	Chicken breast fillets	\$7.99/kg
\$8.99/kg	Sliced honey ham	\$7.99/kg
\$8.99/kg	Sirloin T-bone steak	\$7.99/kg
\$3.49/kg	Bacon bones	\$2.99/kg
\$7.49/kg	Pork midloin or rib loin chops	\$6.99/kg
\$1.97	Arnott's chocolate biscuits	\$1.75
\$1.39	Flora spread	\$1.37
\$0.95	Birds eye frozen peas	\$0.79

Source: Sydney Daily Telegraph (21 July 1999), Dubbo Daily Liberal (21 July 1999).

Table 6.4

*Woolworths Sydney/Dubbo prices, Wednesday, 28 July 1999*

<b>Sydney</b>	<b>Item</b>	<b>Dubbo</b>
\$9.99/kg	Sliced lite leg ham	\$8.99/kg
\$7.99/kg	Chicken thigh fillets	\$6.99/kg
\$3.99/kg	Thin frankfurts	\$2.99/kg
\$5.99/kg	Diced bacon	\$4.99/kg
\$5.99/kg	Australian fetta cheese	\$5.49/kg
\$7.99/kg	Prime grilling boneless rib steak	\$7.49/kg
\$3.49/kg	Chuck steak	\$2.99/kg
\$8.99/kg	Prime veal leg steak	\$7.99/kg
\$1.99/kg	Tangelos	\$1.89/kg
\$0.99each	Lettuce (Iceberg)	\$0.89 each
\$2.97	Sorbent toilet tissue (pkt 4)	\$2.69
\$1.37	Yoplait yoghurt (2x200g)	\$1.17
\$5.99	Size 21 frozen chicken	\$4.99

Source: Sydney Daily Telegraph (28 July 1999), Dubbo Daily Liberal (28 July 1999).

Table 6.5

*Woolworths Sydney/Dubbo prices, Wednesday, 4 August 1999*

<b>Sydney</b>	<b>Item</b>	<b>Dubbo</b>
\$2.69/kg	Honey murcott mandarins	\$1.99/kg
\$0.99/kg	Loose carrots	\$0.89/kg
\$1.49/kg	Butternut pumpkin	\$1.29/kg
\$9.99/kg	Sliced premium leg ham	\$7.99/kg
\$5.99 each	Large roast chicken	\$4.99 each
\$4.99/kg	Roasting leg of lamb	\$4.49/kg
3.99/kg	Cocktail frankfurts	\$2.99/kg
\$2.39/kg	Country style thick sausages	\$1.99/kg
\$4.99 each	Fresh No. 15 chicken	\$3.99 each
\$3.49	Large block carrot cake	\$2.99
\$5.99/kg	Diced ham	\$4.99/kg
\$1.67	Meadow Lea Margarine 500g	\$1.19
\$2.67	Sargents Frozen Meat Pies	\$1.99
\$9.97	Moconna Freeze Dried Coffee 200g	\$8.99
\$2.79	Symphony Ultra Toilet Tissue	\$1.99
\$9.99	44 litre container	\$8.99

Source: Sydney Daily Telegraph (4 August 1999), Dubbo Daily Liberal (4 August 1999).

6.20 Mr Alan Williams, Managing Director of Coles Supermarkets, said that there is only one time when Coles would go down on price:

If you are selling ten cartons of bananas a day and, for whatever reason, yesterday you only sold three and you have got three cartons left over, you need to move them through. So the floor manager does have the flexibility to take them down from \$2.99 to \$1.99 and to clear that stock before it gets thrown out.<sup>17</sup>

6.21 In 1993, South Australian retailer, Mr Mark McLauchlan, saw an opportunity in Alice Springs to open an independent store in competition with Woolworths and Coles. Mr McLauchlan said that his price checks of Woolworths and Coles revealed that there were 'very healthy margins and that perhaps we could go in there and make a statement about price and get a share of the business':

So we went in with a 35,000 square footer. I guess the mistake I made was making a big noise about how much cheaper we were going to be than Coles

17 Hansard, Canberra, 6 April 1999, pp 40-41.

and Woolworths. We applied what was a normal retail margin in an Adelaide metropolitan store but with a freight component added in. We thought, 'We know we can run a business on these costs and that at that margin we will make a dollar'. We found that that was substantially cheaper than Coles and Woolworths, so we thought, 'Here's an edge', and we really pushed it. Of course, what happened was that Coles and Woolworths overnight dropped their across-the-board pricing on every product in the store to a level that was equivalent to our cost price into the warehouse in Adelaide.<sup>18</sup>

6.22 Mr McLauchlan said that the store is now owned by Coles.<sup>19</sup>

6.23 Mr Ian Cornell, Chief Executive Officer of Franklins, said that if Franklins are undercut by a competitor then they will drop their price to match, but will not initially set out to undercut a competitor:

We set our price; we set it on the basis of having a discount strategy. That means being marginally cheaper, and if someone then is undercutting us, as a policy we will go out and match them. I do not see that as predatory pricing, I see that as trying to maintain your competitive situation and your business.<sup>20</sup>

6.24 Mr Joe Natoli, who operated fruit and vegetable stores in the Maroochy Shire not long ago, told the Committee of his experiences with Franklins 'Big Fresh':

I can remember one day we advertised sultana grapes at \$1.79 a kilo, only to find that Big Fresh had them at \$1.99 a kilo. What an embarrassment it was for them to be seen in the paper to have a price that was higher than ours, because their policy was it had to be lower. When I got back they had already dropped their price to \$1.69 and I said, 'Lets have it out. Let's see how far we can take it'. We did and within two hours they had their sultana grapes at 49c a kilo. I paid \$1.20 a kilo for those sultana grapes and they were selling them for 49c a kilo. By the end of the afternoon they went up to 69c a kilo.<sup>21</sup>

6.25 The Committee has raised these concerns and others relating to pricing by the major chains with the ACCC in private hearings. The Committee notes that the ACCC intends to actively investigate allegations of predatory pricing, and that it is currently reviewing information provided by South Australian retailer Mr Roger Drake (see para 6.13) with a view to re-opening an investigation into a matter raised by him in the past.

6.26 The current state of the law with regard to predatory pricing was also criticised by some industry participants. Mr Alan McKenzie, Director/National

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18 *Hansard*, Adelaide, 8 April 1999, p 221.

19 *Hansard*, Adelaide, 8 April 1999, p 222.

20 *Hansard*, Sydney, 15 April 1999, p 373.

21 *Hansard*, Brisbane, 16 April 1999, p 487.



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Spokesman of NARGA, said that the problem with predatory pricing is getting hard evidence:

You hear a lot of anecdotal evidence about predatory activity, but the hard thing is getting someone to stand up and give the commission the evidence because the commission will not undertake cases unless they believe they are on very strong grounds.<sup>22</sup>

6.27 Mr Chris Rankin, Executive Officer of the Newsagents Association of South Australia, called for a less onerous test of proof to be set in place in section 46 of the *Trade Practices Act*, such as a reverse rebuttal or reverse onus test:

The difficulty you have with predatory pricing is if you look through the Act nobody wants to touch it because it is really hard to prove. It is exceedingly difficult to prove.<sup>23</sup>

6.28 With regard to a reverse onus test, instead of the applicant having to prove its case, the onus shifts to the defendant or respondent to show that it is not guilty. Mr Brian Kewley, Chairman of the Law Council of Australia's Trade Practices Committee, said that this suggestion is 'contrary to the whole tradition of our law and is most unreasonable'.<sup>24</sup> The Law Council Committee believes that reversing the onus of proof would add little to section 46, particularly in light of section 46(7), and the existing rules about onus of proof in litigation.<sup>25</sup>

6.29 In 1989, the High Court decision in *Queensland Wire Industries Pty Ltd v Broken Hill Propriety Co Ltd (QWI v BHP)*<sup>26</sup> clarified the operation of section 46, which seeks to prevent large companies from misusing their market power to the detriment of smaller companies. The Committee therefore sought the views of the Law Council Committee as to why, during the course of the inquiry, so many witnesses consistently complained of the difficulty in proving predatory pricing under section 46. Mr Kewley said:

...I have not done an update but, in a submission in 1991 when similar issues arose, we said that, where section 46 was pleaded as a primary basis of relief, five of the cases were successful out of nine. This is obviously out of date now; it is quite a long time ago. But it is some indication that it is not true to say that there are not many cases and they all fail.<sup>27</sup>

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22 *Hansard*, Canberra, 6 April 1999, p 87.

23 *Hansard*, Adelaide, 8 April 1999, p 234.

24 *Hansard*, Canberra, 13 July 1999, p 1148.

25 Law Council of Australia, Submission 283, p 6. In addition, section 46(7) enables a court to look at all the surrounding circumstances in relation to the particular matter. If it is by inference drawn from those circumstances that misuse of market power (eg. predatory pricing) can be found, then that is enough to prove a case.

26 (1989) 167 CLR 177; [1989] ATPR 40-925.

27 *Hansard*, Canberra, 13 July 1999, p 1150.

6.30 The Committee referred Mr Kewley to an Australian Law Journal article of January 1998 titled: *QWI v BHP: A Flash in the section 46 Pan?*,<sup>28</sup> which argued that the early promise of *QWI v BHP* had not been realised. Out of 29 cases brought under section 46, five had been successful – a failure rate of around 80 per cent.<sup>29</sup>

6.31 The Committee therefore sought the views of Professor Allan Fels, Chairman of the ACCC, on the merits of a reverse onus of proof test. Professor Fels said:

There may be scope for some further strengthening of section 46 in terms of that kind of thing; that, if the effect can be shown, then there is a reverse onus of proof on purpose. That would essentially keep it to purpose. There is a problem at the moment with the test, in that the Commission or private litigants have to embark on a cops and robbers type search for purpose in particular cases. They are just not going to succeed in that, even though one has a fair idea that the purpose is anti-competitive. So there is a case for reversing the onus without departing from the underlying notion that, in the end, it would be a purpose test.<sup>30</sup>

6.32 The merits of supplementing the present ‘purpose’ test of section 46 with an ‘effects’ test was also considered during the course of the inquiry. One view is that an ‘effects’ test would not address the central issue of how to distinguish between socially detrimental and socially beneficial conduct. In order to avoid frivolous and capricious actions, any such change to section 46 might require only the ACCC or the Minister to bring actions in highly concentrated markets. Once proved, in order to protect private rights, damages claims would be open to affected parties. In conjunction with this, it was also considered that it may be appropriate to provide for authorisation in respect of conduct which is likely to breach the ‘effect’ provisions, but not the ‘purpose’ provisions (where the anti-competitive conduct would have been intentional and thus ought not be able to be authorised). However, the Committee is of the view that such far reaching changes to the law may create much uncertainty in issues dealing with misuse of market power.

6.33 Further consideration was given to recommending a reversal of the onus of proof, whilst maintaining the current ‘purpose’ test in section 46. For example, if the ACCC could establish that a firm, which has a substantial degree of market power, has used that power, the firm would bear the onus of proving that it did not have one of the requisite purposes. Another alternative would be to remove ‘purpose’ as an element, but make the absence of purpose of defence. This would involve the firm, which has used its market power, to be presumed to have used it for an anti-competitive purpose, but with such a presumption able to be rebutted.

6.34 The Committee also considered the merits of recommending that the ACCC be empowered to undertake representative actions and to seek damages on behalf of

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28 The Australian Law Journal, Volume 72, January 1998, p 53, by Mr Peter J Shafron (LLM, General Counsel, James Hardie Industries Ltd).

29 *Hansard*, Canberra, 13 July 1999, pp 1150-51.

30 *Hansard*, Canberra, 13 July 1999, p 1163.

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individuals under Part IV of the *Trade Practices Act*. Mr Hank Spier, General Manager of the ACCC, said:

We have been on the record as strongly supporting moving from a fairly odd situation, where we can get representative action for some of the Act, especially Part V, but not for the competition provisions. We can use witnesses in court for a price fix or a misuse of market power case. We can say, ‘Thank you very much for helping us. As to damages, you have to take your own action’. Telling people that is not easy and it is not very efficient. We think strongly that there should be an amendment.<sup>31</sup>

6.35 The Committee notes that the Law Council Committee supports the view that the ACCC should be given additional powers to bring representative actions on behalf of small business to enforce the provisions of Part IV of the *Trade Practices Act*.<sup>32</sup> The Committee agrees. Litigation is extremely expensive, long running and disruptive to small retailers. The Committee considers that their interests in this regard would be best served by the ACCC.

6.36 With regard to reversing the onus of proof in section 46 of the *Trade Practices Act*, the Committee notes the arguments presented from proponents on either side of the debate. However, the Committee believes that its core recommendations will address predatory conduct, but as a safeguard, intends to re-visit the ‘reverse onus of proof’ test when the Committee is re-constituted in 3 years time.

### **Unconscionable conduct**

6.37 Conduct is deemed unconscionable where it can be seen in accordance with the ordinary concepts of humanity to be so unfair and against conscience that a court would intervene,<sup>33</sup> or so unreasonable and oppressive so as to affront minimum standards of fair dealing.<sup>34</sup> A transaction will be set aside as being unconscionable wherever one party by reason of some condition or circumstance is placed at a special disadvantage vis-à-vis another, and unfair or unconscionable advantage is then taken.<sup>35</sup>

6.38 The new unconscionable conduct provision of the *Trade Practices Act* – section 51AC – is designed to give small business the same legal protection available to consumers under the *Trade Practices Act*. However, it applies only to transactions of less than \$1 million.

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31 *Hansard*, Canberra, 13 July 1999, p 1171.

32 Law Council of Australia, Trade Practices Committee, Submission 283, p 1.

33 *Zoneff v Elcom Credit Union Ltd* (1990) 94 ALR 445; ATPR 41-058.

34 *Commonwealth v Verwayen* (1990) 170 CLR 394; 95 ALR 321.

35 *Commercial Bank of Australia Lt v Amadio* (1983) 151 CLR 447; 46 ALR 402; *Blomley v Ryan* (1956) 99 CLR 362.

6.39 The ACCC recently launched its guideline, *Fair game or fair go?* ACCC Chairman Professor Allan Fels said that the guideline reflects real life issues that have arisen in the course of 'settling in' the new 51AC provision:

The guideline will help small business to get a fuller understanding of whether or not they have been subjected to unconscionable conduct under the Act. Importantly, it also provides practical advice on avoiding problems in commercial relationships and tips on maintaining such relationships and resolving differences.<sup>36</sup>

6.40 Professor Fels said that in the first six months of this year, 552 inquiries/complaints that included allegations of unconscionable conduct had been received by the ACCC. Of these, 161 have received further action by the ACCC, while some are now with legal counsel for further advice.<sup>37</sup>

6.41 Professor Fels believes that the ACCC is liaising more actively with small businesses, which he believes is one of the reasons why more complaints are coming forward. However, Professor Fels said that many of the complaints do not raise *Trade Practices Act* issues, and therefore the ACCC does not take them further:

So the strength or weakness of the ACCC is that it will only really deal with illegal behaviour.<sup>38</sup>

6.42 The National Farmers Federation (NFF) raised concerns that the ACCC have been inactive in the area of grocery retailing.<sup>39</sup> Professor Fels said that the ACCC acts fast when the law is clear:

But the reason for the delay is, first and foremost, that the law is somewhat complicated. Typically, you are dealing with big business represented by such excellent people as those we heard from the Law Council today, who usually can think up a few reasons why anything is lawful. We then have to bring in heavier guns.<sup>40</sup>

6.43 In May 1997, the Reid Report recommended that:

The Australian Competition and Consumer Commission be proactive in promoting compliance with the proposed new unfair conduct provision of the *Trade Practices Act 1974*.

Due to the ineffectiveness of the Australian Competition and Consumer Commission in small business matters in the past, the Committee believes

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36 Australian Competition and Consumer Commission, Media Release, *Fair Game or Fair Go?*, 9 July 1999.

37 Australian Competition and Consumer Commission, Media Release, *Fair Game or Fair Go?*, 9 July 1999.

38 *Hansard*, Canberra, 13 July 1999, p 1173.

39 National Farmers Federation, Submission 225, p 2.

40 *Hansard*, Canberra, 13 July 1999, p 1173.

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there is an urgent need to establish a body of precedents under the new provisions as quickly as possible.<sup>41</sup>

6.44 Professor Fels said that the ACCC was not applying any special attention to ‘create’ section 51AC cases:

There has been some anxiety about a Ministerial Direction, and special funding, for cases relevant to section 51AC and small business. But the Ministerial Direction does not force the Commission to run a section 51AC case to conclusion even though it could be better settled administratively. Nor does it require a case with little merit to be run by the Commission.<sup>42</sup>

6.45 The evidence suggests that there is widespread confusion, particularly in regional and more remote parts of Australia, about the legal rights of small businesses and the opportunities that they have to take action. The consequence has been that unfair business conduct continues to undermine and damage those in less powerful positions.

6.46 Despite this, the Committee acknowledges that many of the complaints and concerns raised during the course of the inquiry may not raise competition-related issues under the *Trade Practices Act*. The Committee is therefore of the view that there is a lacuna, or gap, with respect to ‘remedies’ available to small retailers in their dealings with big business. The Committee believes that the establishment of a Retail Industry Ombudsman through which small business can bring complaints or queries for speedy resolution will address this problem. In order to enhance transparency, the Committee sees the need for the Retail Industry Ombudsman to produce a bi-annual report to the Parliament.

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41 House of Representatives Standing Committee on Industry, Science and Technology, *Finding a balance: towards fair trading in Australia*, May 1997, p xv.

42 Australian Competition and Consumer Commission, Media Release, *Fair Game or Fair Go?*, 9 July 1999.