



**Australian Competition and  
Consumer Commission**  
**Promoting Competition and Fair Trading**

**Speech to the Small Business Forum  
Parliament House  
Canberra, 19 September 2003**

**Competition Law, Fair Trading and Consumer Protection –  
Small Business and the Trade Practices Act**

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**1. Introduction**

I would like to thank Minister Hockey for this opportunity to speak today.

Many of you here may have heard some of my thoughts and comments on a number of subjects, however, I do welcome this opportunity to reinforce a couple of key messages.

Today marks my 80<sup>th</sup> day in the position – whilst I haven't yet managed to travel around the world – a lot has happened.

The past few months have seen some important Trade Practices decisions in the Federal and High Courts. The recommendations from the Dawson Committee continue to be shaped and move towards implementation. More recently the ACCC has submitted a submission to the Senate Economics References Committee Inquiry into the Trade Practices Act in protecting Small Business.

I want to emphasise that in everything that the ACCC has done in the past few months it has been "business as usual".

There have been some preconceptions and also some misconceptions about what my appointment would bring to the ACCC.

I trust that it is quite clear that there will be no changes in the philosophy, substance or direction of the ACCC. We will continue to enforce the Act to ensure that there is a dynamic competitive marketplace, there is fair trading in that market and that consumers are protected.

The Trade Practices Act continues to create a lot of buzz amongst the business community. There continues to be comment and speculation surrounding the effectiveness of the Act to promote competition and ensure there is fair trading in the various markets.

Looking around the room I realise that the membership of this group is diverse and representative of a broad range of small and micro businesses. But there is a common goal amongst attendees – providing an opportunity for your members to continue operating their businesses in the most efficient manner possible in a fair trading environment.

Small businesses are often called the lifeblood of the economy. They are often the innovators and instigators of smart, new and efficient practices.

From the ACCC's perspective we recognise that small businesses are an essential feature in the competitive marketplace. Small business provide competition and keep big business "on edge" by their quick response to market dynamics.

However there continues to be a challenge for small business. Increased compliance costs are something that I know worries the business community. Unfair trading can harm innovative businesses and anti-competitive conduct can drive some businesses out of the market.

I would like to address a number of points which I believe are important for small businesses.

First, I will discuss the importance of competition and consumer law.

Then I would like to outline the ACCC's approach to both enforcement and compliance with the Act.

Thirdly I will cover the more general subject of how small business is treated under the Act.

Finally I will examine some of the developments which have occurred which I think can provide assistance to small businesses.

## **2. Competition and consumer law**

The ACCC's essential role is to promote competition and facilitate the provision of consumer protection in the market place for the benefit of all Australians.

Competition law is not about preserving specific competitors or protecting certain sectors of business from the rigours of competition.

There are clear benefits that result from tough but fair competition.

Small businesses have developed a great capacity to adapt more quickly than big business to satisfy consumer demand.

Businesses that are able and motivated to take advantage of the competitive environment through innovation, improved efficiencies, keen pricing, quality service standards and other forms of vigorous competition should thrive. But businesses that are unable or unwilling to respond to the challenges of competition will languish and may ultimately fail.

It may be the case that to promote and nurture competition in a market, it is necessary to intervene to protect competitors or a class of competitors in that market from substantial damage or indeed elimination as a result of a course of behaviour by another competitor. However as noted, where this is done it should be in the interests of furthering competition.

The difficult task is to distinguish between vigorous but lawful conduct that is likely to lead to significant benefits for consumers, and unlawful anti-competitive behaviour which may disadvantage consumers.

A strong Trade Practices Act generates advantages for small businesses. It contributes to a strong and vibrant industry sector. It inhibits unethical practices by competitors. And it can promote confidence in consumers that they are dealing with a business or industry that adheres to high standards.

Small businesses are often the suppliers, the customers and the competitors of big business and, as such, they have a right to be treated in a fair, competitive and ethical manner.

The ACCC has an outstanding reputation as a vigorous enforcer of the Trade Practices Act.

And in this, I want to reassure you that the ACCC will continue to pursue unlawful practices that harm competition, competitors, small businesses and consumers.

### **3. Enforcement of the Act and compliance**

The ACCC is not so naïve as to believe that compliance is regarded by business as an altruistic nicety to be pursued in the public interest. For the reality is that regulation exists to deal with misconduct and its strength flows directly from the effectiveness of its **enforcement regime**. Where the Commission believes that the Act has been breached in a serious way, we will not hesitate to take enforcement action.

Compliance with the Act is much preferred to chasing unlawful conduct with remedies and court action.

Individuals, and the community, may be made worse off by the unlawful conduct of others – even if the conduct was stopped and penalties have been obtained.

Enforcement is the ‘sharp point’ of the ACCC’s compliance approach.

The ACCC is creating a culture of compliance, by helping businesses understand the Act and putting in place strategies to achieve this. Compliance is not just about educating people about the Act; the organisational culture in a business must be attuned to compliance.

Some CEOs work closely with the ACCC, and some oppose the ACCC. Opposition by CEOs can breed a culture of disdain for the Act. Businesses should not be looking for ways around the Act, which can result in individual employees tarnishing the reputation of their whole organisation.

While a number of concerns about market conduct are resolved without recourse to litigation, blatant contraventions will not be tolerated.

The approach of the ACCC reflects this. Enforcement and compliance strategies range in intensity from contested hearings in the courts, which may result in monetary penalties and other costly orders, through settlement by court consent enforceable undertakings, administrative settlement, informal resolution and education programs.

#### **4. Small businesses and the Trade Practices Act**

There have been reports and comments recently that I am overly concerned with the interest of consumers to the detriment of small businesses. I am sure that this is a marginal improvement on previous comments that I am too close to big business. However both comments are simplistic and indicate a lack of understanding of the different roles the ACCC has under the Act.

Let me now turn to some specific issues pertinent to small business under the Act.

##### ***Unconscionable Conduct***

A key focus of the Act is the promotion of fair trading.

The most important, for small businesses, of these fair trading provisions in the Act are the unconscionable conduct provisions.

These provisions were introduced to redress the imbalance of bargaining power between small and large business. These provisions protect small businesses who deal with larger, more powerful enterprises. But bargaining power is not solely dependant on the size of the participants. Some small businesses do have a superior bargaining power when they deal with other small businesses.

The provisions, and in particular s.51AC, are still relatively new and are the subject of a number of cases currently before the courts. They have been successful in protecting some retail tenants, primary producers and franchisees.

Although the unconscionable conduct provisions do not have the backing of the pecuniary penalties which are attached to breaches of the misuse of market power provisions, they still remain an effective tool.

Many small businesses are not looking to penalise other businesses. Instead, what they seek is an opportunity to run their own business in a fair and competitive environment. They just want a fair go.

In our submission to the Senate Small Business Review, the ACCC has not called for widespread changes to the unconscionable conduct provisions of the Act. I am aware that a number of organisations have called for a number of issues to be addressed, these include:

- late payments;
- access to justice for small businesses;
- big businesses misusing a market power to the detriment of small businesses;
- termination of contracts without just cause or due process; and
- standard form contracts offered on a take it or leave it basis.

On the second of these points, the ACCC welcomes the recent legislative change which allowed state jurisdictions to draw down the unconscionable conduct provisions of the TPA. New South Wales, the ACT, Queensland and Victoria have already done this.

By doing this, small businesses will have easier access to justice, often in a less expensive and quicker environment such as a tribunal.

We will note with interest the outcomes in this area.

In its submission the ACCC does recommend that the imposition or exploitation of an unfettered unilateral variation clause, by businesses in a superior bargaining position, should be a factor that a court may consider.

Generally the ACCC's view is that the unconscionable conduct provisions of the Act is currently a flexible mechanism which does address examples of unconscionable conduct.

### ***Misuse of Market Power***

There has been a lot of discussion surrounding recent court decisions involving section 46, the misuse of market power provisions of the Act.

Many of you are aware that this was covered as part of the Dawson Review and will also be examined by the Senate Inquiry into Small Business.

The misuse of market power provision plays a crucial role in the policy framework and objectives of the anti competitive conduct provisions of the Act.

Section 46 prohibits a corporation that has a substantial degree of power in a market from taking advantage of that power for the purpose of:

- eliminating or substantially damaging a competitor
- preventing the entry of a person into that or any other market, or
- deterring or preventing a person from engaging in competitive conduct in that or any other market.

Section 46 is a necessary complement to other prohibitions against cartel arrangements and vertical restrictions.

Section 46 is an essential pillar of the Act. It is about protecting the process of normal competition, dealing with a situation where a business with substantial market power uses that power to damage a competitor.

It is important not to confuse the protection of competition with the protection of individual competitors.

Following recent court decisions on section 46, the ACCC believes that there is a need to give guidance to the courts and certainty to the business community, and to bring the section on to line with what Parliament intended.

Further guidance could be provided to afford clarity for businesses and the courts on:

- the threshold of 'a substantial degree of power in a market' is lower than the former threshold of substantial control;
- that 'substantial market power' does not mean a business is absolutely free from constraint;
- that more than one business can have a substantial degree of power in a market; and
- evidence of a business's behaviour in the market is relevant to determining substantial market power.

There should also be clarification of the concept of 'taking advantage' in regard to market power of section 46 as it has proved difficult to understand and has been creating uncertainty.

The ACCC believes that in predatory pricing cases a finding of recoupment of losses should not be required to establish a breach of the Act. The latter amendment would be consistent with Parliament's original, stated intent.



These issues will be debated in more detail as part of the inquiry and we welcome the opportunity to comment in more detail at that time.

### ***Collective Negotiation***

A further area which could assist small business in its dealings with big business is through collective negotiation.

Collective negotiation by competing small businesses, particularly on issues such as price or conditions of supply, may be at risk of contravening the restrictive trade practices provisions of the Act.

The Act recognises that in certain circumstances anti-competitive conduct which would be illegal under the Act may have certain public benefits and should be allowed to occur.

One mechanism used in the past by small business has been to seek authorisation. This process allows the ACCC to confer immunity on anti-competitive conduct like collective negotiation if it is demonstrated to be in the net public benefit.

The Dawson review accepted the ACCC's recommendation that a simpler and faster process for granting immunity to collective negotiation should be available for smaller business dealing with larger businesses where it is in the public interest. There has already been widespread acceptance of these recommendations.

Whilst the finer details still must be worked out, the ACCC has welcomed this significant step forward for small business.

However, it is important to note that collective negotiation will not be allowed by the ACCC when it may result in significant harm to the competitive process and is not in the public interest. Nor will it fix all problems that might arise for every small business. It is a tool that can be used where appropriate.

Collective negotiation has already been effectively used by a diverse range of groups. The ACCC has in the past granted authorisations allowing collective negotiations to occur by dairy farmers, sugar cane growers, lorry owner-drivers and lottery agents.

## **5. Developments to assist small businesses**

A further initiative to assist small businesses to position their business in the market place is by establishing effective voluntary codes of conduct.

We believe that a system of ACCC-endorsed voluntary codes of conduct has the potential to deliver real benefits to businesses and consumers with the least possible compliance costs.

The endorsement regime by the ACCC is not an example of “hands off” regulating or an abandonment of the Act. We believe that a code of conduct can simply provide a higher level of ethical business behaviour than that required by the Act. It can also form the basis of ensuring fair dealings between small and big businesses in an industry sector.

It is pleasing to hear that many organisations also see the benefits of this initiative. We have already been approached by a number of associations seeking endorsement of their codes.

An effective code can provide a sensible course of action toward small business protection – some codes are designed and have been effective in addressing small business sector concerns regarding their dealings with big business. Some examples of this are the cinema industry and the retail grocery codes.

Codes present an opportunity to deal with situations where it is not deemed appropriate to legislate, but where scope exists to raise standards.

Under the ACCC endorsement process, an industry will need to demonstrate that its code is achieving its objectives and meeting the ACCC’s stringent criteria for effective codes before it will provide endorsement.

Endorsement from the ACCC will be hard to obtain and easy to lose.

The aim of such endorsement is to reassure businesses and consumers that the code participant they are dealing with operates in a fair, ethical and lawful manner.

As many of you are aware we are currently developing guidelines for endorsed codes. We anticipate issuing this guideline shortly.

Today we are releasing the ACCC's summary of the issues raised in round table discussions involving the smash repair and insurance sectors. This paper recognises that there is scope to use codes of conduct, whether they be corporate or industry wide, to ensure fair dealings between small and big business.

## **6. Conclusion**

Today I have covered a number of areas where there continues to be much debate and comment. I believe that there is a need for greater clarity to assist businesses, both big and small in complying with the Act. To assist in this process the ACCC is developing clear guidelines on unconscionable conduct and the use of voluntary codes of conduct.

Ultimately our main priority will continue to be compliance with the Act –this is achieved through a variety of means; enforcement, education and developing better business practices.