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***Consumers and Small Business: At
the heart of the Trade Practices Act***

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Thirty-four years ago when the *Trade Practices Act* was but a twinkle in the parliament's eye, the then Attorney-General Senator Lionel Murphy accurately summed up the state of the marketplace in his second reading speech introducing the *Trade Practices Act*:

"Restrictive trade practices have long been rife in Australia. Most of them are undesirable and have served the interests of the parties engaged in them, irrespective of whether those interests coincide with the interests of Australians generally. These practices cause prices to be maintained at artificially high levels. They enable particular ... groups... to attain positions of economic dominance which are susceptible to abuse...[and] allow discriminatory action against small businesses."

'Protecting the interests of Australians generally' - that is the fundamental principle at the very heart of the ACCC and *Trade Practices Act*. We're here to promote the welfare of all Australian consumers, all 21 million of us in all our activities – when we buy things from a retailer, when we compete in a marketplace of goods and services, when we run a small business and deal with a myriad of suppliers.

Small business is an important and integral part of the economy. There are 2 million small firms in Australia today, and they account for nearly half of our workforce and provide about a third of our GDP. Small business is a vital part of vigorous competition and for the most part, the interests of small business are consistent with those of consumers overall.

A fair and competitive marketplace IS in all our interests – whether we are consumers or small business people – it is paramount, and to achieve this, we must protect competition, not individual competitors.

The structure of the ACCC reflects the critical importance of these two areas – with Deputy Chairs each having a specific focus – Peter Kell in Consumer Protection and Michael Schaper in Small Business.

Now I started with the history of the *Trade Practices Act* from 1974. Let me take you back now to the 1600s. In Simon Schama's *A History of Britain*, he recounts with great colour the period when James the First opened up trade between his newly united kingdoms of Scotland and England:

“Once a ferocious border policing commission was in place and had started to catch, convict and hang the gangs of rustlers and brigands who had made the Borders their choice territory, cross-frontier trade took off. Fishermen, cattle drivers and linen-makers all did well. Duty-free English beer became so popular in Scotland that the council in Edinburgh had to lower the price of the home product to make it competitive.”

Although these days we have different ways to deal with those wishing to restrict competition or inhibit trade, the benefits stemming from a highly competitive but fair marketplace are just as relevant in Australia today as they were to Scottish beer drinkers in the early 1600s.

The economic reforms of the past 25 years have seen the floating of the Australian dollar, the introduction of new players in previous monopoly industries and Australia's strong participation in the global marketplace.

As a result, the nation has become more efficient, more flexible, more productive and above all, more competitive.

And while the opening up of the Australian economy to greater competition both internally and from overseas has produced immense rewards, it also provided great benefits to consumers.

Vigorous competition provides consumers with:

- choice;
- all the information to make that choice rationally;
- convenience; and
- higher quality and lower prices for goods and services.

Business, too, is a beneficiary of competition policy. Competition – and this includes intense and, at times, incessant price competition – benefits those businesses that are able and motivated to take advantage of the powerful forces driving their particular market.

The corollary, of course, is that those businesses unable or unwilling to respond to the often daunting challenge of competition, will languish behind and may ultimately fail.

But this is the essence of an open market economy.

As the story about the Scottish beer drinkers demonstrates, free enterprise economies have operated in one form or another for hundreds of years. It is just the intensity and speed of change that is different.

I have no doubt that when that duty-free English beer first crossed the border, the local beer makers appealed for some sort of protection. But ultimately what was regarded as unfair by those who benefited from the previously closed beer market, was seen by the consumers who benefited from the end of that monopoly as vigorous and fair.

And they were right, because the purpose of competition policy must be to benefit consumers – not competitors. The question to be asked must always be what is in the long-term interest of consumers.

The principles of competition policy enshrined in both the *Trade Practices Act* and the National Competition Policy emphasise the primary purposes of a vigorous competitive economy and the protection of the interests of consumers.

In this context, businesses that are motivated to take advantage of the competitive marketplace will thrive. And for the most part, small business is able to respond to the rigours of competition more quickly and with more flexibility than many of its larger competitors. As stated previously, the corollary is that businesses that are unable or unwilling to respond to the challenge of competition will languish and may ultimately fail.

In short, an open competitive economy is the best environment for small business to flourish.

This message has greater significance against the backdrop of the current turmoil in global financial markets, where we are seeing governments take strong and often interventionist approaches in the interests of stability. It is important to consider the impact of that priority, and how it relates to competition and policy development.

To a certain extent, government intervention into a particular industry can cushion it from some of the realities of the marketplace.

Earlier this month, for example, the Australian Government committed to invest \$6.2 billion over the next 13 years into the car industry under the *New Car Plan for a Greener Future*.

Whatever one's view as to that commitment, one cannot but agree wholeheartedly with the comments of Prime Minister Kevin Rudd and the Minister of Innovation, Infrastructure, Science and Research, Senator Kim Carr, that the future of the car industry was dependant on research, innovation and global integration rather than protection, quotas and tariffs.

If the car industry does not heed these calls, it simply won't survive.

Similarly, the ACCC has been fielding calls in recent times from sectors of small business about '*giving them a fair go*'.

However if government did intervene to shield small business from some of the competitive rigours of the marketplace, the result would not in fact be giving small business 'a fair go' - it would be artificially changing the dynamics of an open and competitive marketplace by giving one player added protection that others do not have.

As a result, consumers overall would be given an 'unfair go' as a less competitive marketplace invariably leads to higher prices and a poorer standard of goods and services, as Attorney-General Murphy pointed out back in 1974.

But such a solution also ignores the numerous and significant advantages that small business has in the marketplace. However they involve a lot of hard work, perseverance and the ability to 'think outside the square'.

Small business has the capacity to innovate – to adapt quickly to changing market needs, provide personalised service, and develop niche markets.

These qualities must be harnessed by small business to remain competitive in the marketplace and benefit all Australian consumers.

Governments and regulators have an ongoing challenge in striking a balance that promotes vigorous, lawful competitive behaviour that is likely to lead to significant and sustained benefits for consumers, while preventing unlawful anti-competitive behaviour that is likely to disadvantage us as consumers.

This is a task that needs to be undertaken independently, rigorously, transparently and objectively to ensure it remains focused on the interests of consumers. But this cannot result in the insulation of certain sectors of business from normal competitive disciplines.

Now that is theory and it has been endorsed by both the Dawson Committee Review into the Competition Provisions of the *Trade Practices Act*, and the Senate Committee considering the effectiveness of the Act in relation to small business.

The Dawson Committee Report summed up the issue as follows:

“The Committee does not favour the introduction of competition measures specifically directed to particular industries to respond to perceived shortcomings in the relevant markets. Often the complaint when analysed is not about reduced competition, but about the structure of the market which competition has produced.

Concentrated markets can be highly competitive. It may be possible to object to the structure of such markets for reasons of policy (the disappearance of the corner store, for example), but not on the grounds of lack of competitiveness.

Of course, concentrated markets should attract scrutiny to ensure that competition is maintained, but the purpose of the competition provisions of the Act is to promote and protect the competitive process rather than to protect individual competitors. The competition provisions should not be seen as a device to achieve social outcomes unrelated to the encouragement of competition. As a matter of policy those outcomes may be regarded as desirable, but the policy will not be competition policy.

Nor should the competition provisions seek the preservation of particular businesses or of a particular class of business that is unable to withstand competitive forces or may fail for other reasons.

Those are matters which may legitimately be the subject of an industry policy, but that is not a policy which is to be found in the competition provisions in Part IV of the Act.”

The Senate Committee considering the effectiveness of the *Trade Practices Act* in relation to small business noted-

“...the Committee considers that while the objects of the Act refer to enhancing competition, these objects implicitly require – or at least prefer – the existence of an effective number of competitors.

Having stated this, the Committee recognises that there is a significant difference between protecting competitors, and protecting particular competitors. The entry and exit of competitors from the market is a normal part of vigorous competition. Market efficiency is often enhanced by driving inefficient competitors from the market

To summarise the Committee’s views on this issue, the purpose of the Act is to protect competition. This can best be achieved by maintaining a range of competitors, who should rise and fall in accordance with the results of competitive rather than anti-competitive conduct. This means that the Act should protect businesses (large or small) against anti-competitive conduct, and it should not be amended to protect competitors against competitive conduct.”

These findings are consistent with purpose of the *Trade Practices Act* as outlined in section 2:

“The object of this Act is to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection”.

But while the theory is easy to state, it is not so clear that the principles are either well understood or applied in practice. For while it is now widely accepted that the purpose of competition policy is to promote competition in the interests of consumers and not to protect competitors from the rigours of competition, in practice the distinction between these objectives is confused

and sometimes leads to conclusions that are inherently anti-competitive in nature.

Competition policy regulators are required to deal with two issues. The first is to analyse whether in the context of any particular market, there exists a course of behaviour which would have the effect or be likely to have the effect of substantially lessening competition in that market. This requires rigorous, economic analysis of the market and the likely impact of behaviour of competitors in that market. Then if that analysis reveals a likely anti-competitive consequence, competition policy requires regulators to intervene to prevent it.

It may or may not be the case that to protect and nurture competition in a market, it is necessary to take steps 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. The provisions of Part IV of the *Trade Practices Act* are designed to permit that intervention by competition regulators to take place.

What is not clear however, in the claims and counter-claims that are made by small and big business respectively in relation to these matters, is whether the primary case has been made for regulatory intervention. That is to say, it is not apparent that a course of behaviour by one or more competitors in those markets will lead to a substantially anti-competitive (and thus anti-consumer) impact.

If such an analysis leads to the conclusion that there is likely to be a substantial lessening of competition in the relevant market, then of course the competition regulator should intervene.

But if the analysis merely leads to the conclusion that some competitors in the market might suffer damage or indeed be eliminated, but that competition in the market will still be vigorous with consumer benefits, then there is a dubious case for intervention by the competition regulator.

The difficulty in this area is that so often those who seek regulatory intervention have failed to first demonstrate the case for it. Indeed, in some cases, they have been reluctant to have the relevant market, and the course of behaviour complained of, subjected to an independent rigorous analysis to determine whether there is justification for intervention.

The point is, if we intervene too soon and without transparent, open and independent analysis, we may be acting to protect competitors, at the expense of vigorous, lawful competitive behaviour, and as a consequence, disadvantage the consumer.

Having spent twelve, at times difficult, years undertaking an independent and robust process of examination and reform of anti-competitive regulations pursuant to National Competition Policy, policy makers need to be continually

on the alert that they are not drawn back by private interests to protect specific sectors of business from the competitive environment.

No better example of this can be seen in the area of petrol. You may recall the recent campaign directed towards Government by some independent small petrol retailers around Australia, calling for what they describe as a 'fair go'.

These small retailers want the same wholesale pricing as Coles and Woolworths, and want the supermarkets' shopper dockets petrol discount schemes outlawed.

Now I know that my response to this is not going to be popular with these small independent petrol retailers nor with parts of the media, but the truth is that those small independent petrol retailers will find it very difficult to respond to the price competitive pressure that Coles, Woolworths and the large independent chains such as United, Liberty, Gull and Matilda, can provide.

What is being sought is not a levelling of a playing field. It is a request for protection against the rigours of the marketplace. In fact, the ACCC petrol inquiry reported that the emergence of shopper docket schemes had not had an anti-competitive effect but had delivered discounts to consumers and promoted competition among retailers. And despite all the media hype about petrol prices, consumers are voting with their wallets in support of any discount schemes that offer cheaper petrol.

In these circumstances, the interests of small business are at odds with the interests of Australia consumers.

However rather than lessening competition, a better approach would be finding ways to make the petrol sector, at the source of supply, more competitive, which of course is also in the interests of small business.

The situation as it stands in Australia is that there are four major players in the petrol market, BP, Shell, Mobil and Caltex, and they are responsible for refining and importing 98% of our petrol.

This is why the ACCC's focus is on the wholesale petrol market, where we see an opportunity to expand competition.

Petrol Commissioner Joe Dimasi is working hard to see whether new players can enter the Australian wholesale market, and if this happens, the new wholesalers will need petrol outlets, which is where the independents could come into their own.

Moving onto another contentious issue, groceries.

It has long been claimed that if smaller retailers are not protected from competition from the major retailers, a market duopoly of Coles and Woolworths will result.

This necessitates, it is claimed, policy and regulatory intervention for example to retain discriminatory shop trading hours, to limit the acquisition of additional market share by the major retailers and to prevent price discrimination by suppliers to, and price discounting - claimed to be predatory pricing - by, the major retailers.

Earlier this year the ACCC conducted an inquiry into the competitiveness of retail prices for standard groceries, and overall it found supermarket retailing is 'workably competitive'.

However there were a number of factors which bear closer examination, including high barriers to entry for large-format supermarkets, a lack of incentives for Coles and Woolworths to compete strongly on price, and limited price competition from the independent sector.

It is our opinion that the appropriate response for policy makers is to lower barriers to entry and expansion, in both retailing and wholesaling to independent supermarkets and potential new entrants. As always, the ACCC will continue to examine the acquisitions of existing supermarkets as well as site acquisitions and leases for new supermarkets.

To that end we have today issued a Statement of Issues concerning a proposed lease of a new supermarket site in Wallaroo, South Australia, by Woolworths. In that Statement, the ACCC expresses its preliminary view that the proposed lease may constitute a substantial lessening of competition – on the basis that if the lease did not proceed, it is likely that another non Woolworths operator will acquire the lease to operate a supermarket in competition with an existing Woolworths supermarket in an adjacent locality. The ACCC is seeking the views of interested parties to assist it in reaching a final decision on this matter.

The lack of incentives for Coles and Woolworths to compete strongly across the board on price reflects the high level of concentration in the industry and frequent monitoring of competitors' prices.

But despite this, Aldi has had a significant impact on grocery retailing. Where Aldi stores are present in the area, Coles and Woolworths have reduced prices.

Aldi represents a new type of retailing which has overcome some of the barriers in place, and this innovative approach is what small business needs to consider.

Their strategy might well be summed up as – *“If I can't win the game under the current conditions, why not play a different type of game?”*

Aldi has shown that a new player does not have to be a full-service supermarket to generate a significant competitive reaction from Coles and Woolworths.

The entry of grocery retailers with differentiated business models poses a competitive threat to the major supermarkets and benefits Australian consumers.

Without a doubt both retail groceries and petroleum have been, and will continue to undergo rapid change. Now supermarkets are four to five times their previous size; service stations are fewer in number but significantly larger, located on major highways and directly linked with substantial convenience stores, carwashes, fast food outlets and even hotels.

These changes are driven by consumer preferences, and businesses operating in these markets will continue to undergo rapid change. But those which do adapt will survive, indeed thrive, while those unable to adapt, or rest on the belief that governments or regulators will step in to protect them, will languish and may ultimately fail.

I repeat, it is not the job of the *Trade Practices Act* or the Australian Competition and Consumer Commission to protect competitors – it is our job to protect competition and the welfare of Australian consumers.

Let us not forget however, that businesses are also consumers. Every opportunity to reduce costs and increase choice, service and availability of goods helps businesses as well, and allows them more options for innovation.

Protection of Small Business under the *Trade Practices Act*

This is not to say that small business has no protection under competition policy. For competition policy is about encouraging lawful, vigorous, competitive behaviour to benefit consumers, that is to say the public interest.

The ACCC interacts on a number of levels with small business –

- Working with them towards voluntary compliance - by far the best outcome for all parties involved;
- educating and informing them of their obligations under the *Trade Practices Act* with advice and publications;
- as well as measures to protect them from anti-competitive behaviour.

And as part of this process, our outreach officers get beyond metropolitan Australia to regional and rural areas to ensure small business and other operators in those areas are aware of the *Trade Practices Act*.

Let me now illustrate how the *Trade Practices Act* and the ACCC actively protect the interests of small business, while remaining consistent with the principles of promoting the interests of Australian consumers in protecting competition.

Franchising

The ACCC plays a significant role in working with small business through the Franchising Code of Conduct and the *Trade Practices Act*.

You may be surprised to learn that Australia is one of the most franchised nations in the world. We have three times as many franchises per capita as the United States, with about 1100 business format franchise systems, up from 693 in 1998, which amounts to 71 400 individual franchises.

Franchising employs an estimated 413 500 people and contributes \$130 billion to the Australian economy each year.

Both the Code and the *Trade Practices Act* provide a range of protections for franchisees and prospective franchisees in their dealings with franchisors. These include:

- ensuring prospective franchisees receive key information about a franchise before making a financial commitment and entering into a franchise system;
- ensuring that franchisees have certain rights in their ongoing franchise relationship.

When disputes occur between franchisors and franchisees, there is capacity under the Code to resolve these effectively.

The ACCC uses a variety of tools to achieve this, including direct liaison with affected parties, the Office of the Mediation Adviser, and the various legal powers of the ACCC.

Similarly in securing compliance, the ACCC considers a range of measures that involve:

- consultation and liaison with, and education for, industry participants;
- consideration of franchisee complaints;
- detailed investigation, enforcement action or litigation.

However neither the laws nor the ACCC can guarantee that all franchised businesses will thrive.

Franchised businesses can and do fail for reasons other than franchisor wrongdoing. It is a part of the ACCC's task, when assessing complaints, to determine whether the cause of concern flows from conduct contravening the law or whether the harm was the result of other factors.

The ACCC has made recommendations to the Parliamentary Inquiry into Franchising including:

- A review of mediation under the franchising code;
- A review of the requirements for disclosure under the franchising code;
- The introduction of civil pecuniary penalties for breaches of parts IVA (unconscionable conduct), IVB (breach of the code) and V (consumer protection) of the *Trade Practices Act*.

We strongly believe these changes will bolster both the Franchising Code of Conduct and the *Trade Practices Act* in providing greater clarity for franchisees and those considering entering into franchise agreements.

Small business and Section 46

Now I'd like to speak about s46 of the Act and how it can help protect small business from the misuse of market power by larger competitors.

Effective misuse of market power provisions are an important part of any competition law. They deal with situations where a firm has substantial market power and uses that power to damage competitors or to prevent new firms from competing. These provisions are an important adjunct to the other main pillars of an effective competition law – the restrictions on the accumulation of market power through mergers and acquisitions, and anti-competitive agreements between competitors.

These provisions are just as important to small business if they are targets of a misuse of market power by a larger business. In this situation the Commission will act to protect the small businesses involved.

We do this not to protect a particular business merely because it is a small business, but to protect competition where small businesses are being targeted for anti-competitive reasons by a more powerful firm.

While it is true that in the past the ACCC's ability to litigate misuse of market power allegations has been hampered by the High Court's narrow interpretation of the concept, 'take advantage' in judgments such as *Melway*, *Boral*, *Safeway*, *NT Power Generation* and *Rural Press*; this will no longer be the case.

Amendments to s46, which became law last week, clarify that if a corporation's market power drives its conduct then that is sufficient to prove it has taken advantage of its market power.

And then there is of course, s46(1AA) or the so-called Birdsville amendment, dealing with predatory pricing. Much has been claimed and counter claimed in relation to this amendment.

Only time and the courts will tell which of the claims are correct. Suffice to say, the amendment introduces some new concepts into the competition provisions of the *Trade Practices Act*, which will require interpretation by the courts before business, both big and small, can derive any certainty as to its implications.

The ACCC is closely examining the recent amendments to the *Trade Practices Act* with respect to predatory pricing. We will be reviewing the operation of this section in light of our own determinations, any litigation (whether instituted by the ACCC or private litigants) and senior legal advice.

The ACCC plans to issue general guidance about the likely interpretation of the terms in s46(1AA) but this guidance will be qualified, as the ultimate interpretation will be up to the courts, and will take place on a case by case basis.

Nevertheless, we will enforce s46 and its components with the utmost vigour, wherever our legal advice tells us we have reasonable grounds to do so. However, a word of caution - small business should not place undue reliance on the misuse of market power provisions.

It needs to be understood that these provisions require both conduct which is damaging, or potentially so, to competitors, and for this conduct to be intended to, or to have the purpose of, damaging specific competitors.

It is not enough to point to the fact that competitors, even small competitors, are being damaged by the actions of a larger, more powerful business. Normal, even aggressive competition is not on its own a misuse of market power. The conduct of the larger business needs to be targeted or intended to damage particular competitors.

The misuse of market power provisions are not a panacea for the concerns of business, and to achieve any outcomes the Commission will require the assistance of business.

The Commission will investigate properly alleged instances of abuse of market power and use its statutory powers to do so.

Unconscionable conduct

Many of the complaints received at the ACCC from small businesses do not relate to concerns about direct competition with large businesses - the majority are about their commercial relationships with large businesses.

In these situations the more relevant provisions that apply are the unconscionable conduct laws, particularly the statutory unconscionability provision, Section 51AC.

One business cannot use its power or influence over another for unconscionable purposes. A business in a position of power threatening to withhold the supply of products, especially where those products cannot be sourced elsewhere, in order to impose harsh and oppressive conditions will likely breach the unconscionable conduct provisions of the Act.

In the *Simply No Knead* case, the ACCC under s51AC made it clear to franchisors that they cannot hold their franchisees to ransom with unreasonable terms and conditions.

The franchisor in this case withheld essential supplies unless the franchisees bowed to a range of unreasonable conditions, including making them pay for

advertising that did not even include their stores details, and forcing them to buy many years worth of product at a time.

At one point, the franchisor demanded the surrender of diaries containing details of current customers, while setting up his own businesses which competed directly with his franchisees.

The franchisor demanded unreasonable conditions, such as refusing to consider meetings unless the request was received by mail, and refusing joint meetings, when the franchisees tried to discuss their concerns with him.

The court declared that the conduct of the franchisor was unconscionable, in breach of the Act, and that the managing director of the franchise was involved in the contraventions.

The conduct of this franchisor beggared belief and the franchisees in this case had no way forward in running their businesses.

The unconscionable conduct provisions seek to protect parties from unfair dealing such as this, particularly where one of the parties is especially vulnerable. Businesses should not take unfair advantage of a person in a vulnerable position by entering into commercial arrangements without ensuring that the person has full knowledge of its terms and effects.

The cases that the ACCC has pursued with regard to unconscionable conduct all have an unscrupulous factor. It is more than tough negotiating. For a matter to be regarded as unconscionable by the courts a business must have crossed the line and engaged in conduct that is not tolerated in a normal commercial relationship.

It is important to reiterate that the law does not exist to inhibit businesses from advancing their own legitimate commercial interests. The law will not apply to situations where a business has merely driven a hard bargain, nor does it require one business to put the interests of another party ahead of its own.

However, the ACCC has long recognised that when it comes to negotiating with big business the playing field is far from level for small business in some contexts.

Collective Bargaining

Which leads me to the area where significant changes have been made to assist small business - that of collective bargaining.

Normally, where groups of competing businesses come together to collectively negotiate terms and conditions and, in particular prices, this is likely to raise concerns under the *Trade Practices Act*.

The ACCC and the Act however explicitly acknowledge that it is sometimes fairer to enable a relative mismatch in bargaining power to be evened up, by

enabling small business to come together to bargain collectively. This is legitimised under the authorisation process.

Through authorisation, the ACCC has the power to authorise protection from court action for otherwise anti-competitive conduct where those proposing to engage in that conduct can demonstrate that there is a net public benefit.

Last year, changes were made to the process for small business seeking collective bargaining authorisations. These changes were designed to make it easier for businesses to access these authorisations through a new notification process.

While having many of the same characteristics as authorisation, the notification process provides automatic immunity within 28 days from the date of notification unless the ACCC is satisfied that the proposed collective bargaining arrangements are not in the public interest.

A notification also provides a three-year immunity period from the date the notification is lodged.

Another benefit of this process is the low cost in submitting an application, which is currently \$1000.

While we have encouraged, indeed exhorted small business operators to contemplate collective bargaining, and to contact the ACCC for guidance and assistance on this matter, it is a constant source of frustration to us at the ACCC, that many small businesses which might benefit significantly from a collective bargaining arrangement, have shown a reluctance to proceed down that path.

National consumer law

Thus far I have focussed my comments on the protections afforded by the *Trade Practices Act* for small business. But as has been emphasised by successive reviews of the Act, its primary intent is to enhance the welfare of all Australian consumers.

So while the small business sector will concentrate on its status under the Act, 21 million consumers will be keenly observing what can best be described as a revolution that will bring Australia's consumer laws into the 21st century. I am talking about the adoption of a national consumer law, from which all Australians will benefit.

Agreed to by the Ministerial Council on Consumer Affairs in August, the new national consumer law will operate in all states and territories.

This will provide consistency and certainty as consumers will no longer have to consider whether federal or state law is relevant to their issue. It will also mean if consumers move interstate, they will be covered by the same law, which will no doubt boost confidence in the national consumer law system.

Compliance costs should also reduce substantially for business as the national consumer law will replace consumer laws across nine jurisdictions.

In fact, the Productivity Commission estimated a national consumer law could save consumers and businesses up to \$4.5 billion each year.

It is pleasing that the national consumer law will be based on the consumer protection provisions of the *Trade Practices Act* as well as incorporating amendments reflecting best practice in state and territory legislation.

There will also be a provision dealing with unfair contract terms.

The Commonwealth will be the lead legislator, through an application legislation scheme and enforcement of the national consumer law will be shared jointly with the ACCC and state and territory fair trading offices.

This is an important achievement in harmonisation, which is very clearly in the public interest. We eagerly await formalisation of the national consumer law in an Inter-Governmental Agreement, and anticipate that the national consumer law will be fully implemented by 2011.

Summary

As I have described, it is not the role of competition policy, the *Trade Practices Act* or the ACCC to favour one sector over another. Our role is to promote the welfare of Australian consumers through a fair and competitive marketplace - we're not here to protect competitors, we protect competition.

The benchmark test for competition regulators is whether a course of conduct is likely to lead to a substantial lessening of competition in a specific market for goods or services.

One of the difficulties is that there is not a wide understanding of the difference between protecting competitors and promotion of competition.

And while small business will seek the focus of competition policy to tend towards greater protection of competitors, ostensibly in the interests of competition, the voice of the consumer will be constant in urging that the focus remain on the promotion of competition for the benefit of consumers.

The interests of consumers rest with consumer groups, governments and regulators like the ACCC to ensure that competition is muscular and lawful, even if this implies that it be aggressive and potentially damaging to some players in the market. For this is the way consumers derive the advantages of choice, quality and price to which they are entitled and we ensure that our economy is best able to adapt to maximise productivity and growth, especially in challenging economic times.

The Commission cannot interpret its responsibility to promote competition to mean the protection of individual companies and the outlawing of vigorous,

legitimate competition – even where that competition causes difficulties for individual firms.

As I stated earlier tonight, an open competitive economy is the best environment within which small business can flourish.

Vigorous competition is not market failure and it is not the job of the ACCC to preserve competitors or protect any sectors of the economy from competition.

The role of the ACCC and the *Trade Practices Act* is fundamentally to enhance the interests of Australian consumers by promoting fair, vigorous and lawful competition, whether it be between businesses big, medium and/or small.