



Australian
Competition &
Consumer
Commission

Speech to

**The Council of Small Business Organisations of
Australia - National Small Business Summit
Agenda**

A Small Business Friendly Trade Practices Act

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1. Introduction

Ladies and gentleman.

It is a pleasure to be here today, in what will be one of my last public addresses to small business groups as Chairman of the ACCC.

The Trade Practices Act is an important and powerful piece of legislation which provides a number of benefits and protections for small business.

The everyday application of the Act by the ACCC provides many often unseen benefits for small businesses, by activities such as:

- ? busting cartels;
- ? preventing anti-competitive mergers or acquisitions;
- ? preventing misleading or deceptive conduct by unethical businesses; and
- ? allowing small business access at a fair and reasonable price to essential services, like telecommunications or electricity and other utilities.

A strong Trade Practices Act has many advantages for small businesses – it can promote a strong and ethical industry sector; it can prevent unethical practices by competitors; and it can promote knowledge and confidence amongst consumers that they are dealing with a business or industry who abides by a high standard.

The Commission has strong reputation as a vigorous enforcer of the trade practices law. Currently we have over 60 matters in the courts. Many of you here today would be unaware that many of these cases are a direct result of complaints that the Commission has received from small businesses.

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.

During my time with the ACCC there have been a number of significant advancements in the promotion of competition and fair trading law in Australia, particularly in the area of small business. There is still a need for further improvement.

The changes to the Trade Practices Act resulting from the New Deal Fair Deal initiative provided significant steps forward in the promotion and protection of small business interests under the Act.

The appointment of a dedicated Commissioner John Martin with responsibility for small business has upgraded the Commission's handling of small business issues.

Establishing a devoted program within the Commission to assist and focus on small business concerns has enabled the Commission to react quickly to issues and to develop strategies to help small businesses with Trade Practices problems which arise. These responses have been a combination of enforcement, fostering compliance

increased dialogue in “hot spot” areas and where appropriate assisting industry driven solutions

However we can never stand still and it is clear there are a lot of questions outstanding concerning the Dawson’s committee review of the Trade Practices Act.

I would like to focus today on a few of issues:

- ? the collective negotiation provisions recommended by the Dawson Review;
- ? Misuse of Market Power; and
- ? Unconscionable conduct and other elements of the TPA affecting the competitive environment for small businesses.

2. Collective Negotiations

The Trade Practices 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.

In limited circumstances the ACCC has granted authorisations allowing the conduct to occur; examples include chicken growers, dairy farmers, sugar cane growers, lorry owner-drivers and small private hospitals.

The Dairy industry authorisation, whilst providing a significant step forward for farmers cannot be taken in isolation. Last week the ACCC also granted authorisation for concrete carriers in Queensland.

Queensland concrete carriers were granted authorisation last week by the ACCC to collectively negotiate with CSR on the carrier agreements. In granting the authorisation the Commission realised that there were a number of public benefits.

The concrete carriers application does not apply to industry wide conduct and it does not propose that carriers should refuse to deal with CSR if they are not satisfied with the progress of negotiations.

In contrast, the application by the Australian Newsagents Federation was denied. It sought to apply to both large and small publishers throughout Australia.

The ACCC recently denied applications by the Australian Hotels Association and Golden Casket but sought further information from the applicants. This information has now been received by the ACCC which is now reconsidering the applications.

The authorisation process under the Act has sometimes concerned small businesses for the length of time and cost of the process. There is, in my mind, room for improving the processes involved.

Many small business organisations have welcomed the recommendation of the Dawson Committee for the introduction of a notification system for collective negotiations. Whilst the fine details still must be worked out, the ACCC has

supported this significant step forward for small businesses in their dealings with larger businesses.

There have already been reports that some groups, like crash repairers, are considering their options under these proposed changes

It is important to note that collective negotiations will not fix all problems which might exist and are not necessarily relevant to all industries. They are a tool which can be used where appropriate.

The benefits of collective negotiations could include better opportunities to negotiate on prices and conditions. However, it should be noted that by allowing collective negotiations there must be a broader public benefit which will outweigh any detriment associated with the anti-competitive behaviour.

3. Misuse of Market Power

There are a number of provisions in the Act which are designed to stop acquisition of market power where it would be economically harmful such as mergers provisions and cartel busting provisions - but there is only one provision which addresses the misuse of market power which already exists.

Section 46, Misuse of Market power, is an essential concrete pylon shoring up the anti-competitive conduct provisions within the Trade Practices Act.

It prohibits corporations with a substantial degree of market power from taking advantage of that power for the purpose of:

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

Such conduct can include: predatory behaviour; refusal to supply in anti-competitive manner; the illegitimate leveraging of market power in one market to damage competition in another market; and some vertical practices where a larger party, who is not strictly in competition, deters or prevents competition in that particular market.

The simple fact is that there has been only one case in ten years where misuse of market power has been found to have occurred, Warner Music and Universal. Does anyone think there has been only one example of big business misusing its market power to harm competitors in the past ten years?

The ACCC has had difficulty bringing misuse of market power cases before the Courts. Not only have we had difficulty in proving a misuse of market power, but the time taken for a case to progress from start to finish is very long.

The misuse of market power provisions are an essential protection for small businesses directly competing with larger businesses and are facing genuinely anticompetitive behaviour that substantially lessens competition.

I note that a number of industry groups representing small businesses, including COSBOA have called for:

- ? more black letter law to provide guidance on the provision
- ? amendments to the Act to provide better protection for small businesses; and
- ? a clearer definition on what constitutes market power.

For its part, the ACCC remains active in pursuing litigation when there is a belief that a business with market power, has misused that power to cause economic harm. The Boral High Court decision has led to the ACCC ceasing some litigation. However, the ACCC will continue to pursue litigation, where we believe, that the law has been broken. This litigation, will hopefully, provide further clarification of the misuse of market power provisions.

There will be ongoing scrutiny of section 46 as parties who rely this key element of competition law consider its efficacy in the light of the relevant case law.

There have been calls by some organisations and individuals for legislative amendments to deal with concerns which have recently arisen.

4. Unconscionable Conduct and Other Elements of the TPA Affecting the Competitive Environment for Small Business

Unconscionable Conduct

The unconscionable conduct provisions contained in the Act provide protection for those small businesses who regularly deal with larger businesses. The Act has been successful in protecting retail tenants, primary producers and franchisees.

The unconscionable conduct provisions were introduced as a result of the imbalance of bargaining power which often arises between small and large business. The provisions can be used when a larger business who has market power deals with a small business in a bullish or thuggish manner.

Since the 1998 amendment to the Act the Commission has not lost a case which it has litigated under section 51AC. Whilst some decisions under the older unconscionable conduct provisions have not gone the Commission's way, the new 51AC has proved, to date, to be a strong protection for small business.

Section 51AC

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, it still remains an effective tool for small businesses. Many small businesses are not looking for people to be penalised, what they are simply looking for is an opportunity to continue running their own business in a fair and competitive environment.

Importantly, state jurisdictions now have the capacity to draw down the unconscionable conduct provisions, New South Wales, Queensland and recently

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.

Mergers & Acquisitions

The Dawson report is likely to lead to some changes to the process by which mergers and acquisition examinations are undertaken by the ACCC. Given the implementation of these proposed changes is still being worked through by Government, I do not intend to comment on them specifically.

However I am conscious of the challenges that “creeping acquisitions” continues to present in section like retail grocery industry.

A large proportion of mergers or acquisitions examined by the Commission involved the acquisition of large part or proportion of another business. The issue of creeping acquisitions arises when bit by bit a business acquires small units of business. A problem arises when no single acquisition will result in a substantial lessening of competition, particular as the acquisitions are spread out in time and space.

The issue is similar to that recently noted by a colleague who considered contribution that the loss of an individual hair makes to baldness. Clearly no single hair can be sufficient to make the difference between being bald and not being bald; but if so, and hairs can be removed individually, then baldness is impossible.

The issue of creeping acquisition raises a problem for the ACCC. At what point can or should the ACCC view such a small and often insignificant event in its wider context. What hair's removal will result in baldness?

This said, we are spending a significant amount of time on the assessment of these smaller acquisitions when they occur. However, it is a difficult and complex problem which we do need to properly weigh up.

As I said earlier this year, one of our top priorities will be the scrutinising of big retail groups where they buy independent supermarket operators and liquor retailers to increase their market share.

The recent problems surrounding the acquisition of Franklins, highlights this problem. The ACCC accepted that the Franklins business was in rapid decline, and that the withdrawal of key stakeholder support was imminent.

The ACCC was concerned that an uncontrolled collapse of the chain would see many more stores go to the major supermarket chains, with fewer stores available for independents and new entrants than is the case under the current proposal.

In the event, the package agreed to by the ACCC involved the offer of 200 stores representing around two thirds of the total sales value of Franklins Stores to the independent sector.

Codes

Voluntary codes of conduct can play an important role in ensuring that there are good practices and dispute resolution arrangements agreed to in place in industry sectors where large and small business industry encounter pressures. The Franchising Code of Conduct is unique in that it is the only mandatory code prescribed under the TPA. It has been effective in improving disclosure and other behaviour in the franchising sector.

The ACCC has in the past assisted industry sectors develop their own voluntary codes to overcome disputation and ensure fair competitive practices are applied. I am advised by my Small Business Commissioner John Martin that efforts in two “hot spot” areas of disputation are smash repair and retail tenancy, have failed so far to produce any agreement on national codes of conduct. Our experience has been that they are a preferable alternative to additional black letter law and regulation which is often triggered at State and Territory levels with consequences for national consistency.

5. Conclusion

There can be no question that the ACCC has a central role in small business interests in the market place. We have been innovative in our small business program in finding there are different ways to achieve positive outcomes.

Strong enforcement through litigation remains the ACCC’s strongest weapon.

The question I want to leave with you is does the Commission have all the tools to be effective in its small business role?

For views on this, I think it is appropriate to turn the discussion over to my fellow panel members.

Thank you for your time today and importantly thank you to many of you here today for your support during my time with the Commission.