

AUSTRALIAN GOVERNMENT RESPONSE TO THE SENATE INQUIRY INTO THE EFFECTIVENESS OF THE *TRADE PRACTICES ACT 1974* IN PROTECTING SMALL BUSINESS

INTRODUCTION

Senate Inquiry

On 25 June 2003, the Senate passed a motion requiring the Economics References Committee to inquire into and report on 'whether the *Trade Practices Act 1974* adequately protects small businesses from anti-competitive or unfair conduct'. The Senate Committee was required to have regard to the misuse of market power, unconscionable conduct in business transactions and industry code provisions of the *Trade Practices Act 1974* (the Act). The Senate Committee's report was tabled on 1 March 2004. Government Senators provided a minority report.

Dawson Review

The Review of the Competition Provisions of the Trade Practices Act (the Dawson Review) reported to Government in January 2003. At that time, the Dawson Review concluded that there was no need to amend section 46 of the Act, which prohibits the misuse of market power. The Government accepted this recommendation when it announced its response to the Dawson Review on 16 April 2003.

Recent case experience

However, several important Trade Practices Act cases have been considered since the Dawson Review provided its report to Government. The cases have raised questions about the operation of the Act.

The High Court has considered the application and interpretation of section 46 on two occasions, in *Boral Besser Masonry Ltd v. ACCC* [2003] HCA 5 (*Boral*) and in *Rural Press Ltd v. ACCC* [2003] HCA 75 (*Rural Press*).

The Full Federal Court has also considered section 46 on two occasions, in *Universal Music Australia Pty Ltd v. ACCC* [2003] FCAFC 193 and in *ACCC v. Australian Safeway Stores Pty Ltd* [2003] FCAFC 149 (*Safeway*).

Trade Practices Act 1974

The object of the *Trade Practices Act 1974* is to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection.

The competition laws, including section 46, are in Part IV of the Act. Part IVA of the Act contains laws prohibiting unconscionable conduct, including unconscionable conduct in business transactions. Part IVB of the Act contains laws

enabling the establishment of industry codes and includes, in section 51AD, a law that prohibits the contravention of any applicable industry code.

As outlined in the Government's response to the recommendations of the Dawson Review, the Government considers that the competition provisions of the Trade Practices Act are designed to protect the competitive process rather than a specific market structure or individual competitors. The competition laws should also be distinguished from industry policy and should not be seen as a means of achieving social outcomes unrelated to the encouragement of competition, or of preserving businesses that are not able to withstand competitive forces.

The Government considers it is appropriate for the Act to address issues such as unconscionable conduct in business relationships, because the promotion of fair trading enhances the welfare of Australians.

The Government also recognises the importance of small business to the vigour of the Australian economy, and the contribution that small business makes to the growth in employment and innovation.

Against this background, there are a number of measures which the Government considers should be taken in the context of recommendations made in the Senate Committee's report.

MISUSE OF MARKET POWER

Misuse of market power

Section 46 of the Act prohibits corporations with a substantial degree of market power from taking advantage of that power for a proscribed purpose, that is, the purpose of eliminating or substantially damaging a competitor, preventing the entry of a person into a market, or deterring or preventing a person from engaging in competitive conduct.

Substantial market power

Only firms with a substantial degree of market power are prohibited from taking advantage of that power for a proscribed purpose. This is because firms that lack substantial market power are rarely, if ever, able to single-handedly harm competition in an enduring way. The prohibition therefore applies only to firms that meet the threshold requirement of possessing substantial market power.

The Act was amended in 1986 to lower the threshold from a requirement that a corporation be 'in a position substantially to control a market' to a requirement that a corporation have

'a substantial degree of power in a market'. The type of power being referred to is 'market power', that is, the ability to behave persistently in a manner different from the behaviour that a competitive market would enforce on a firm. Alternatively, market power may be described as the ability of a firm to raise prices above the supply cost without rivals taking away customers in due time, supply cost being the minimum costs an efficient firm would incur in producing the product or supplying the service.

The change to the lower threshold was motivated by a concern that the previous threshold caught conduct only by a monopolist or monopsonist, and that a lower threshold was necessary to capture corporations with a sufficient degree of market power to seriously harm competition. As the Second Reading Speech noted, the threshold was thus intended to capture not only monopolists, but also major participants in oligopolistic markets and, in some cases, leading firms in less concentrated markets.

In light of the *Boral* case, some submissions to the Senate Committee claimed that the majority judgements of the High Court implied that an absolute freedom from competitive constraint was required before a corporation met the 'substantial degree of power in a market' threshold. This was said to have effectively restored the threshold to capture only monopolists or near monopolists and that this was contrary to Parliament's intention in making the 1986 amendments to lower the threshold.

Recommendation 1: The Committee recommends that the Act be amended to state that the threshold of "a substantial degree of power in a market" is lower than the former threshold of substantial control; and to include a declaratory provision outlining matters to be considered by the courts for the purposes of determining whether a company has a substantial degree of power in a market. Those matters should be based upon the suggestions outlined by the ACCC in paragraph 2.16 of this report.

The suggestions outlined in paragraph 2.16 are that:

- (1) The threshold of a "substantial degree of power in a market" is lower than the former threshold of substantial control.
- (2) The substantial market power threshold does not require a corporation to have absolute freedom from constraint – it is sufficient if the corporation is not constrained to a significant extent by competitors or

suppliers.

- (3) More than one corporation can have a substantial degree of power in a market.
- (4) Evidence of a corporation's behaviour in the market is relevant to a determination of substantial market power.

Government response The Government does not accept this recommendation. The Government does not agree that the majority judgements in *Boral* imply that a corporation must have absolute freedom from competitive constraint before it will be found to have substantial market power. Nor does it agree that the threshold has been returned to one of 'substantial control'.

Market power is a relative concept. As the majority judgements in *Boral* note, matters of degree are involved. The majority judgement in the later case of *Safeway* makes this especially clear. In that case, Safeway was found to have substantial market power, even with around 16 per cent market share. Safeway was clearly not a corporation in 'substantial control' of the market, yet it was found to have misused its market power.

The Government is also not satisfied that the proposed amendments would clarify the operation of section 46. The Government notes that the first proposal would have no legal effect and merely recites legislative history.

Far from clarifying the section, the second proposal – stating in part that 'it is sufficient if the corporation is not constrained to a significant extent' – would be likely to generate further complexity and uncertainty by adding another layer of interpretation to section 46.

The third proposal is redundant because both the courts (see, for example, the majority judgement in *Safeway*) and the explanatory material accompanying the 1986 amendments make it clear that more than one firm may have substantial market power in a given market.

The fourth proposal is also unnecessary because firm behaviour is already taken into account in assessing substantial market power. For example, in *Boral*, the High Court considered whether the firm's behaviour operated as a strategic barrier to entry, thus bolstering its market power.

Taking advantage Section 46 prohibits corporations with a substantial degree of market power from 'taking advantage' of that power for a

proscribed purpose.

Some submissions were made to the Senate Committee expressing concerns about the application of the 'take advantage' element of section 46. In particular, these submissions claimed the High Court's interpretation of 'take advantage' in *Rural Press* had narrowed the application of section 46.

Recommendation 2: The Committee recommends that the Act be amended to include a declaratory provision outlining the elements of "take advantage" for the purposes of section 46(1). This provision should be based upon the suggestions outlined in paragraph 2.28 of this report.

Paragraph 2.28 outlines a proposal to amend section 46 to clarify that, in determining whether a corporation has taken advantage of its market power, the courts should consider whether:

- (1) the conduct of the corporation is materially facilitated by its substantial degree of market power;
- (2) the corporation engages in the conduct in reliance upon its substantial degree of market power;
- (3) the corporation would be likely to engage in the conduct if it lacked a substantial degree of market power; or
- (4) the conduct of the corporation is otherwise related to its substantial degree of market power.

Government response The Government does not accept this recommendation. It is not accepted that the interpretation of 'take advantage' requires any statutory clarification.

While consideration of substantial market power involves a sophisticated economic analysis, the 'take advantage' requirement in section 46 simply establishes the requisite causal relationship between market power, conduct and a proscribed purpose.

As the High Court noted so concisely in *Queensland Wire Industries Pty Ltd v. Broken Hill Proprietary Co Ltd* (1989) 167 CLR 177, 'take advantage' merely means 'use' and there is no requirement to assess intent.

In *Melway Publishing Pty Ltd v. Robert Hicks Pty Ltd* (2001) 205 CLR 1, the High Court said that a corporation takes advantage of its market power if it does something that is

materially facilitated by the power, even if that behaviour is not absolutely impossible without the power. The High Court also underscored the need to accurately characterise the causal relationship by assessing whether a corporation could ordinarily engage in that conduct in the absence of market power.

In *Rural Press*, the leading judgement of the majority applied 'take advantage' by considering whether the corporation with substantial market power could engage in the same conduct in the absence of that power and by considering whether the conduct was materially facilitated by that power. This is consistent with previous cases and, therefore, there is nothing about the High Court's application of 'take advantage' in *Rural Press* that suggests a narrowing of section 46.

The Government therefore agrees with Government Senators that there is no significant ambiguity in the meaning or application of 'take advantage' and that the current interpretation does not hinder the operation of section 46.

Predatory pricing

The *Boral* case was the first opportunity for the High Court to consider the issue of predatory pricing under section 46. In light of the High Court's decision, some submissions were made to the Senate Committee expressing concern about the ability of section 46 to address predatory pricing.

Recommendation 3: The Committee recommends that the Act be amended to provide that, without limiting the generality of section 46, in determining whether a corporation has breached section 46, the courts may have regard to:

- the capacity of the corporation to sell a good or service below its variable cost.

The Committee recommends that the Act be amended to state that:

- where the form of proscribed behaviour alleged under section 46(1) is predatory pricing, it is not necessary to demonstrate a capacity to subsequently recoup the losses experienced as a result of that predatory pricing strategy.

Government response

The Government accepts this recommendation in part.

To provide further guidance to courts in the consideration of predatory pricing cases, the Government agrees that section 46 should be amended to ensure that the courts may consider below cost pricing when determining whether a corporation

has misused its market power. Costs are to be measured in a manner determined by the courts in each case and below cost pricing is not to be legally essential to a finding that a corporation has breached section 46.

However, the Government does not favour an amendment that examines a corporation's capacity to price below cost in isolation. Assessing a firm's capacity to engage in conduct is not the same as examining whether the conduct was engaged in or not. The Government also does not favour an amendment that refers to variable cost because it is not always the most appropriate cost measure and because it can be difficult to routinely quantify, potentially making compliance more expensive for corporations that wish to ensure they are not engaging in predatory pricing.

The Government also considers that section 46 should be amended so that a court may consider whether a corporation has a reasonable prospect or expectation of recoupment as a relevant factor when assessing whether a corporation has misused its market power. Although a reasonable prospect of recoupment is not to be legally essential to a finding that a corporation has breached section 46, it often provides a good test of whether price-cutting is predatory, as Government Senators noted. It is therefore appropriate that the section clearly state that a reasonable prospect of recoupment is a factor that may be taken into account.

Financial power

Some submissions were made to the Senate Committee expressing concerns about statements in *Rural Press* that distinguished between a corporation's market power and material and organisational assets, which the Senate Committee describe as 'financial power'.

Recommendation 4: The Committee recommends that section 46 of the Act be amended to state that, in determining whether or not a corporation has a substantial degree of power in a market for the purpose of section 46(1), the court may have regard to whether the corporation has substantial financial power.

'Financial power' should be defined in terms of access to financial, technical and business resources.

Government response

The Government does not accept this recommendation. As Government Senators noted, if this recommendation were to be adopted, it would considerably extend the scope of section 46 to a degree that is both uncertain and undesirable. This is because 'financial power' (that is, access to financial, technical

and business resources) is simply not the same as market power.

Leveraging market power

Section 46 does not explicitly state whether the market in which substantial market power is misused must be the same as the market in which that market power is established. Some submissions to the Senate Committee raised concerns about the lack of comment by the High Court on this point in *Rural Press*. This is significant because, in that case, the Full Federal Court implied that section 46 requires the establishment of substantial market power, and its misuse, to occur in the same market.

Recommendation 5: The Committee recommends that section 46 be amended to state that a corporation which has a substantial degree of power in a market shall not take advantage of that power, in that or any other market, for any proscribed purpose in relation to that or any other market.

Government response

The Government accepts this recommendation. The Government agrees that section 46 should be amended as recommended. It is entirely appropriate for section 46 to proscribe the leveraging of substantial market power from one market into another.

Co-ordinated market power

Corporations may obtain market power in their own right or as a consequence of their interactions with other corporations in the market. Subsection 46(2) of the Act recognises, for example, that the market power of a corporation should not be assessed in isolation of any related subsidiaries or holding companies in the same corporate group.

Some submissions to the Senate Committee questioned the court's ability to take account of interactions between a corporation and other firms in a market, where those firms are not related to the corporation, that is, where they are not in the same corporate group.

Recommendation 6: The Committee recommends that section 46 be amended to clarify that a company may be considered to have obtained a substantial degree of market power by virtue of its ability to act in concert (whether as a result of a formal agreement or understanding, or otherwise) with another company.

Government response

The Government accepts this recommendation in part. The Government agrees that section 46 should be amended so that, in assessing whether a corporation has 'a substantial degree of power in a market', a court may take account of any market power the corporation has that results from contracts arrangements or understandings with others. This

amendment amounts to a statutory restatement of the principle set out by Justice Lockhart in *Dowling v. Dalgety Australia Limited and Others* (1992) 34 FCR 109.

UNCONSCIONABLE CONDUCT IN BUSINESS TRANSACTIONS

Unconscionable conduct in business transactions

Part IVA of the Act prohibits corporations from engaging in unconscionable conduct in their transactions with both consumers (section 51AB) and business consumers (section 51AC).

While the Senate Committee identified several issues in its consideration of unconscionable conduct, it concluded that section 51AC is a relatively new section that has not yet had time to develop a significant body of jurisprudence. Submissions that proposed amendment, therefore, stemmed from the premise that the current section is ineffective at protecting small business. The Senate Committee accepted that this premise has not yet been proven.

The Senate Committee did, however, accept that the case had been made for some minor changes to section 51AC.

\$3 million threshold

The protection offered to business consumers by section 51AC is subject to two limitations. Firstly, listed public companies are not protected by section 51AC. Secondly, the section does not apply where the supply or acquisition of goods is at a price greater than \$3 million, as noted in subsections 51AC(9) and 51AC(10).

Recommendation 7: The Committee recommends that subsections 51AC(9) and 51AC(10) of the Act be repealed.

Government response

The Government does not accept this recommendation. At the time of enactment, in 1998, the Government intended to limit the protection afforded by section 51AC to small businesses. This was achieved by limiting access to the protection to prices not exceeding \$3 million (originally \$1 million) for the supply or acquisition of goods. Removal of the cap would broaden the focus of the provision in a way unintended by the Government.

The Government does, however, accept that the \$3 million cap is too low for some small businesses and therefore agrees with the recommendation of Government Senators that the cap for section 51AC should be raised to \$10 million.

Unilateral variation of contracts

To identify if a corporation has engaged in unconscionable conduct in business transactions, the court can have regard to a non-exhaustive list of factors. Subsections 51AC(3) and 51AC(4) provide similar lists that are tailored for business consumers that either supply or acquire the goods or services in question.

The non-exhaustive list includes factors such as the relative strengths of the bargaining positions of each party, whether any undue influence or pressure was applied and the extent to which there was an opportunity to negotiate the terms and conditions of acquisition or supply.

Some submissions argued before the Senate Committee that the use of a unilateral variation term was unconscionable. Some companies in their contracts maintain the right to vary some aspect of the arrangement without consulting the other party to the contract. The Senate Committee accepted that there may be circumstances where a corporation's maintenance of the right to vary the terms of the contract unilaterally is efficient and in the interests of competition. They expressed reservations, therefore, about prohibiting unilateral contract terms and identified a middle ground.

Recommendation 8: The Committee recommends that subsections 51AC(3) and 51AC(4) of the Act be amended to include 'whether the supplier (in subsection 51AC(3)) or acquirer (in subsection 51AC(4)) imposed or utilised contract terms allowing the unilateral variation of any contract between the supplier and business consumer, or the small business supplier and acquirer.'

Government response

The Government accepts this recommendation. It accepts that the imposition or utilisation of a unilateral right of variation may be an indication that unconscionable conduct has occurred in the bargaining process. The Government also supports the conclusion that unilateral variation clauses do not always indicate that unconscionable conduct has occurred. In some cases these clauses may be indicative of healthy competition.

The Government therefore agrees that subsections 51AC(3) and 51AC(4) of the Act should be amended so that courts may have regard to the imposition or utilisation of contract terms that allow for the unilateral variation of any contract between the supplier and business consumer, or the small business supplier and an acquirer of goods or services, in determining if unconscionable conduct has occurred.

Application of

Recommendation 9: The Committee recommends that

Part IVA to governments

subsection 2B(1) of the Act be amended so that it is clear that Part IVA of the Act applies to the Commonwealth Government; and that the Government consult with the States and Territories with a view to amending subsection 2B(1) of the Act, so that Part IVA of the Act applies to State, Territory and local governments.

Government response

The Government accepts this recommendation in circumstances where governments are carrying on a business. This recommendation has three parts. First, that subsection 2B(1) be amended to make it clear that the Commonwealth Government is bound by Part IVA of the Act; second, that the Commonwealth Government enter into consultations with the States and Territories to amend subsection 2B(1) to ensure that States and Territories are bound by Part IVA; and third, to amend the Act to ensure that local governments are bound by Part IVA.

The Government accepts that it should be clear the Commonwealth is bound by Part IVA (the first part of recommendation 9), but notes that alteration of the Act is unnecessary. Section 2A states that the Commonwealth is bound by all provisions of the Act in circumstances where it is carrying on a business. This includes Part IVA. Amendment of the Act would, therefore, appear unnecessary.

The Government accepts the principle expressed in the second part of this recommendation. Binding States and Territories to Part IVA of the Act creates certainty for business in their dealings with that level of government. This will be progressed through negotiations between the Commonwealth and the States and Territories.

The Government accepts the principle expressed in the third part of this recommendation. Binding local governments to Part IVA of the Act creates certainty for business in their dealings with local government. The Commonwealth Government proposes to amend section 2D to remove the current exemption that local government bodies have from Part IV of the Act. The Government will give further consideration to ensuring local governments are also subject to Part IVA of the Act.

OTHER ISSUES FOR SMALL BUSINESS

Retail tenancy agreements

Some submissions to the Senate Committee argued that where a retail tenant is required, as a term of their lease, to keep their lease conditions secret, the landlord has engaged in unconscionable conduct. The Senate Committee accepted that there may be circumstances where it is in the interests of both

parties to keep the details of the lease secret, but noted that these were likely to be the exception rather than the rule. The Senate Committee noted that a tenant should be free to discuss the terms of their tenancy if they wished to do so.

Recommendation 10: The Committee recommends that the Commonwealth Government negotiate with State and Territory governments, with a view to introducing measures which would prohibit retail lease provisions compelling tenants to keep their tenancy terms and conditions secret.

Government response The Government does not accept this recommendation. It is a fundamental principle of the law of contract that parties are free to negotiate the terms of the contract, including a lease. Prohibiting secrecy clauses would violate this principle of contract law. Furthermore, if retail tenancy arrangements need regulating, it is a matter for State and Territory governments, rather than the Commonwealth Government.

Collective bargaining for small business The Government has accepted a Dawson Review recommendation that the Act be amended to introduce a notification process for small business seeking to collectively bargain. The notification process will provide a speedier and simpler process to enable small businesses to obtain immunity under the Act for otherwise unlawful collective bargaining. It is intended that the collective bargaining be with large businesses, where the likely benefit to the public will outweigh any likely detriment from the arrangement. The notification process will be limited to small businesses by requiring the value of the transactions that each individual business is engaged in to \$3 million or less (variable by regulation). Some submissions to the Senate Committee proposed that the collective bargaining legislation allow the boycotting of the business being bargained with and not impose a \$3 million threshold.

Recommendation 11: The Committee recommends that the Government immediately bring forward legislation to introduce a collective bargaining notification scheme, including the right to boycott, and excluding the proposed \$3 million threshold for notifications.

Government response The Government accepts this recommendation in part. Legislation will shortly be introduced to the Parliament to implement a small business collective bargaining notification process. That notification process will have a threshold of \$3 million for each individual business and will allow, in the appropriate circumstance, for an ability to boycott.

Creeping The term 'creeping acquisitions' is generally used to describe

acquisitions

the acquisition of a number of individual assets or businesses over time that may have a cumulative effect upon the acquiring firm's market share. Some submissions to the Senate Committee raised concerns that the prohibition on anti-competitive mergers in section 50 of the Act may not be capable of addressing the cumulative effect of such a strategy on competition in the relevant market. This is said to be case because each individual acquisition would not substantially lessen competition in the relevant market, even though, if the acquisitions had all been made by the same firm at the one time, they may have done so.

Recommendation 12: The Committee considers that provisions should be introduced into the Act to ensure that the ACCC has powers to prevent creeping acquisitions which substantially lessen competition in a market.

Government response

The Government does not accept this recommendation. The Dawson Review considered the issue of 'creeping acquisitions' in detail and concluded that the Act, in its present form, is adequate to consider 'creeping acquisitions' in so far as they raise questions of competition. The Dawson Review noted that concentrated markets may be highly competitive and that the purpose of competition law is to promote competition rather than to protect a particular market structure or particular competitors or classes of competitor.

Further, there is considerable uncertainty as to whether 'creeping acquisitions' in general (as opposed to a specific acquisition) do substantially lessen competition and cause economic detriment.

ENFORCEMENT OF THE TRADE PRACTICES ACT

Divestiture

Divestiture involves the forced sale of some or all of the assets of a corporation. Section 81 of the Act allows a court to order divestiture of unlawfully acquired shares or other assets in the context of a merger or other acquisition that contravenes section 50 (that is, if the merger or other acquisition substantially lessens competition in a relevant market). Some submissions to the inquiry proposed that divestiture be available as a remedy in other contexts, particularly misuse of market power cases.

Recommendation 13: The Committee recommends that subsection 81(1) of the Act be amended so that section 81 can be applied where a corporation is found to have contravened section 46, section 46A , or any new section

introduced to regulate creeping acquisitions.

Government response The Government does not accept this recommendation. As the Dawson Review noted, applying divestiture to misuse of market power cases is inappropriate for conceptual and practical reasons.

Conceptually, divestiture may be an appropriate remedy in the context of a merger or other acquisition because it directly addresses the conduct (the acquisition of shares or other assets) that gives rise to a breach of the Act. In contrast, divestiture is not an appropriate remedy in misuse of market power cases because there is no clear nexus between the unlawful conduct and the assets of the corporation. In misuse of market power cases, the conduct that gives rise to a breach of the Act is the taking advantage of market power for a proscribed purpose, not the possession of shares or other assets. Therefore, attempting to identify assets to be divested so as to remedy a misuse of market power would be inappropriate.

In addition, in practical terms, courts in those jurisdictions that allow divestiture in misuse of market power type cases have noted the difficulties in ‘unscrambling’ a corporation without greatly harming the efficiency of a viable market participant.

In light of the Government’s response to recommendation 12, it is not necessary to comment on the application of a divestiture power to ‘creeping acquisitions’.

Cease and desist orders

Some submissions to the Senate Committee proposed that the ACCC be provided with the power to issue cease and desist orders, modelled on similar powers provided to the Commerce Commission in New Zealand. It is said that these orders would compel a corporation to cease and desist from engaging in anti-competitive conduct.

Recommendation 14: The Committee recommends that the Act be amended to provide for cease and desist orders, modelled on the orders provided for in sections 74A to 74D of the Commerce Act 1986 (NZ), appropriately modified to conform with Australian constitutional law.

Government response The Government does not accept this recommendation. The Dawson Review examined the need for a power to make cease and desist orders, and found that there was no justification for its introduction.

Specifically, it was not clear to the Dawson Review why the existing process of obtaining an interim injunction was

inadequate. Further, the Dawson Review noted that even if a constitutionally valid power were able to be granted to the ACCC to issue cease and desist orders, it was not clear that such orders would be any speedier or more efficient than an interim injunction.

Investigative powers

Section 155 empowers the ACCC to compel parties to provide documents and other evidence relevant to investigations into possible contraventions of the Act. The Federal Court has ruled that these powers are to cease once legal proceedings have commenced. The ACCC contended to the Senate Committee that its investigations of alleged anti-competitive conduct are hindered following its application to the court for an interim injunction to stop the conduct. Specifically, there is said to be a trade-off between being able to obtain an injunction quickly to prevent further anti-competitive conduct and the inability of the ACCC to compel responses from some witnesses after injunctive proceedings commence, with the potential weakening of the ACCC's case due to the unavailability or destruction of evidence. The ACCC proposed that it be given the ability to use its section 155 powers after the grant of an interim injunction, but prior to the commencement of substantive proceedings.

Recommendation 15: The Committee recommends that section 155 of the Act should be amended to enable the ACCC to seek the permission of the court (whether as part of a warrant application or otherwise) for the continued use of its powers under section 155 after the commencement of injunctive proceedings. The use of section 155 powers should cease prior to the commencement of substantive proceedings.

Government response

The Government does not accept this recommendation. The court has very extensive powers to compel the exchange of information in preparation for trial. It is not accepted that these powers are inadequate.

The Government notes that the Dawson Review came to the same conclusion when it considered a similar proposal.

The power of courts to compel the exchange of information in Trade Practices Act cases was strengthened significantly in *Trade Practices Commission v. Abbco Ice Works Pty Ltd* (1994) 123 ALR 503. As a result of this case, corporations were denied the right to claim the privilege against self-exposure to a penalty during pre-trial court processes. Therefore, corporations are already able to be forced to answer questions or hand over documentary evidence to the ACCC, even if it will result in the corporation being found in breach of the Act and liable to

very substantial financial penalties and other orders.

ACCC budget

Recommendation 16: The Committee recommends that the ACCC should be adequately funded to undertake its role as the principal litigant in section 46 and section 51AC cases.

Government response

The Government accepts the recommendation but does not accept the suggestion that the ACCC is inadequately funded. In the 2004-05 Budget, the Government has provided the ACCC with an additional \$46.7 million over four years and a \$22.0 million equity injection in 2004-05, to enable the ACCC to effectively deal with an increased number of matters and to maintain its level of service delivery.

Federal Magistrates Court jurisdiction

The Federal Magistrates Court currently has jurisdiction to hear consumer protection and product safety and product information cases under the Act. Submissions to the Senate Committee noted that the jurisdiction of the Federal Magistrates Court could be extended, noting that this forum may provide for speedier and cheaper resolution of disputes.

Recommendation 17: The Committee recommends that the jurisdiction of the Federal Magistrates Court be extended to enable it to deal with Misuse of Market Power (sections 46 and 46A, where cases rely upon section 83), Contravention of Industry Codes (section 51AD) and Unconscionable Conduct (Part IVA).

Government response

The Government agrees that legislation should be amended to enable the Federal Magistrates Court to consider proceedings relating to Part IVA and Part IVB. However, the Government considers that section 46 and section 46A cases are likely to raise issues that are complex and that are more appropriately considered by the Federal Court.