Law Council
OF AUSTRALIA
Business Law Section

Competition Policy Review Secretariat
The Treasury
Langton Crescent
PARKES ACT 2600
Via email: contact@competitionpolicyreview.gov.au 2 July 2014

Dear Sir or Madam,

Australian Competition Policy Review

Introduction

The Law Council of Australia, is the peak national body representing the legal profession in Australia.

The Small and Medium Enterprise Committee of the Business Law Section of the Law Council of Australia (SME Committee) makes this submission in response to the Issues Paper dated 14 April 2014 released by the Competition Policy Review.

The SME Committee has as its primary focus the consideration of legal issues affecting small businesses and medium enterprises in the development of national legal policy in that domain. Its membership is comprised of legal practitioners who are extensively involved in legal issues affecting SME's.

Please also note that our submissions may differ from those made by other Committees of the Law Council, for example the Competition and Consumer Committee. This is because our SME Committee is seeking to specifically represent and reflect the interests of SME's, rather than the interests of larger businesses.

Submissions

In the following Submission, the SME Committee will be limiting its comments to those issues which it believes are relevant for SME businesses.

Are there unwarranted regulatory impediments to competition in any sector in Australia that should be removed or altered?

In the SME Committee's views, the country of origin rules contained in the Australian Consumer Law 2010 (ACL) are complicated and difficult to apply, particularly in relation to the substantial transformation test.

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Members of the SME Committee are aware of situations where small businesses who were incurring more than 95% of the cost of producing a good in Australia were unable to claim that those products were Australian Made. These difficulties arose due to the idiosyncratic interpretations taken to the substantial transformation test by both the ACCC and the Australian Made Campaign.

What made this particular situation even more frustrating was that the small businesses were proposing to export the relevant products to China. As a result, the small business was unable to continue with its proposed exports to China because it was not able to claim that the products were Australian Made.

While the SME Committee understands that country of origin laws were not specifically included in the Competition Review Panel's terms of reference, we believe that some consideration should be given to the way these laws are currently operating.

Are there any restrictions on the export of goods from Australia which should be removed or altered in order to increase competition for exporters and producers, and choice for consumers?

The ACCC has taken the view that Australian exporters of goods must comply with both Australian country of origin laws as well is country of origin laws which apply in the country where the products are to be sold. This is an unnecessary impost on Australian exporters who should only be required to comply with the country of origin laws which apply in the country where they will be selling their goods.

Another problematic area relates to the *Commerce (Trade Descriptions) Act* 1905, which is administered by the Australian Customs Service (ACS). The SME Committee is aware of a situation where an importer was importing unfinished goods, with a view to substantially transforming those goods into the finished products in Australia, and then exporting the finished products to Asia. The ACS demanded that these unfinished products be labeled with the country of origin, namely China, at considerable cost, despite the fact that these goods were not going to be sold in Australia but rather substantially transformed in Australia and then exported.

The SME Committee also notes that when applying the *Commerce (Trade Descriptions) Act* 1905, the ACS is to have regard to the country of origin laws contained in the ACL, as well as the various safe harbors created under that legislation. It is the SME Committee's experience that ACS officers do not have a good understanding of these particular sections of the ACL, or the application of the substantial transformation test.

Both country of origin and trade descriptions laws should be reviewed to ensure that they are being applied in a manner which is commercially sensible and conducive to international trade.

Are the current competition laws working effectively to promote competitive markets, given increasing globalisation, changing market and social structures, and technological change?

The SME Committee believes that in general terms competition laws in Australia are capable of working effectively to promote competitive markets. However, the SME Committee believes that

there are significant shortcomings in the way in which these laws are being investigated and litigated by the ACCC.

Are competition-related institutions functioning effectively and promoting efficient outcomes for consumers and the maximum scope for industry participation?

The SME Committee believes that the ACCC is highly resistant to any criticism of the way it runs investigations and litigation. The ACCC does not conduct internal reviews after it has been unsuccessful in major litigation. Such reviews would be beneficial in assisting the ACCC to identify any mistakes which it has made and any lessons which it can learn from these mistakes. The SME Committee believes that the ACCC should conduct regular internal reviews in relation to unsuccessful investigations and litigation to identify ways of operating more effectively in the future.

The SME Committee believes that the ACCC avoids engaging in conversations with its critics about its shortcomings. For example, in 2011 the Law Council of Australia nominated one of the members from the SME Committee for a position on the ACCC's Small Business Consultative Committee (SBCC). The ACCC rejected the Law Council's proposed nominee for a range of inconsistent reasons.

As a result and somewhat surprisingly, the ACCC's SBCC currently has no lawyer members, despite the fact that ones of its roles is to "discuss and comment on the *Competition and Consumer Act 2010* and the ACCC's role in securing industry compliance with that Act." On the other hand, the SBCC currently has two representatives from two separate accounting organizations.

Given structural changes in the economy over time, how should misuse of market power be dealt with under the CCA?

As a starting point, it is important to understand the ACCC's record in relation to s46 cases.

Table 1: ACCC and TPC Section 46 cases – 1974 to 2014

	Case	Year	Claims	Result
1.	CSBP & Farmers Limited	1980	ss. 45, 46	Lost
2.	Carlton United Breweries Limited	1990	s.46	Won - consent
3.	CSR Limited	1991	ss.45, 46	Won - consent
4.	Commonwealth Bureau of Meteorology	1997	s.46	Won - consent
5.	Darwin Radio Taxi Cooperative Limited	1997	s.46	Won - consent
6.	Garden City Cabs	1997	s.45, 46	Won - consent
7.	Safeway Limited	2003	ss.45, 46	Won - contested
8.	Rural Press Limited	2003	s.45, 46	Lost s.46 case but won s.45 case

9.	Boral Limited	2003	s.46	Lost - High Court
10.	Qantas Limited	2003	s.46	No result – case settled with each party bearing their own costs
11.	Universal Music and Warner Music (CD's case)	2003	s.45, 46, 47	Lost ss.45 and 46 cases but won s.47 case
12.	FILA Pty Ltd	2004	ss.46, 47	Won - uncontested
13.	Eurong Beach Resort	2005	s.45, 46, 47	Won - consent
14.	Cardiothoracic surgeons	2007	ss.45, 46	No result – s.46 claim dropped as part of the settlement
15.	Baxter Limited	2008	ss.46, 47	Won - contested
16.	Cabcharge Limited	2010	ss.46, 47	Won - consent
17.	Ticketek Pty Ltd	2011	s.46	Won – consent
18.	Cement Australia Pty Ltd	2014	ss.45, 46	Lost s.46 case, won s45 case.
19.	Visa International	2014	ss.46	Ongoing

As can be seen from the above table, the ACCC and its predecessor the TPA, have taken 19 s46 cases in 41 years, or one such case every two years.

The above table also suggests that the ACCC has been quite successful in the s.46 cases which it has pursued, winning almost 70% of the cases which have gone to a final decision.

The SME Committee submits that based on these statistics, the ACCC has not been active enough in investigating and litigating s46 cases.

In its submission to the Competition Review, the ACCC has suggested that its pursuit of s46 cases has been hampered by two deficiencies – namely:

> *first, due to its failure to capture unilateral conduct which has a deleterious effect on competition; and second, due to the way in which the 'take advantage' limb of the test is currently being applied.*

The SME Committee agrees that the absence of an effects test in s46 is a legitimate concern. It is apparent from a review of the relevant monopolization laws in the US and EC that each of these jurisdictions currently have an effects test.

In the US, monopolization is prohibited by section 2 of the Sherman Act which states:

> ***§ 2 Sherman Act, 15 U.S.C. § 2***
> *Monopolizing trade a felony; penalty*

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

As is apparent from the above, section 2 of the Sherman Act contains both a purpose and effects test – "…shall monopolise, or attempt to monopolise…"

In the European Union, monopolization is prohibited by Article 102 of the Treaty on the Functioning of the European Union:

Article 102 (ex Article 82 TEC)

Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States.

Such abuse may, in particular, consist in:

(a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
(b) limiting production, markets or technical development to the prejudice of consumers;
(c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
(d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

In practical terms, Article 102 encompassed both a purpose (or object test) and an effects test. As started in the Michelin II case:

For the purpose of applying Article 102, establishing anti-competitive object and the anti-competitive effect are one and the same thing…It if is shown that the object pursued by the conduct of an undertaking in a dominant position is to limit competition, that conduct is also liable to have such an effect.

Australian small businesses need a more effective prohibition on misuse of market power. This is because small businesses are often the victims of misuses of market power. For example, in the Ticketek case the illegal conduct was directed primarily to the activities of Lasttix, a relatively small player, which focused on providing discount tickets in competition with Ticketek.

Therefore, in the SME Committee's view it seems appropriate for the Competition Policy Review to consider the introduction of an effects test to s46 in order to make Australia's laws consistent with the approach taken in the two leading competition law jurisdictions.

Are existing unfair and unconscionable conduct provisions working effectively to support small and medium sized business participation in markets?

The Committee notes that currently unfair conduct provisions in the *Competition and Consumer Act* 2010 (CCA) are limited to the prohibition in the ACL on unfair contract terms in standard form consumer contracts.

The Committee also notes that the Commonwealth Treasury has recently issued a Consultation Paper entitled Extending Unfair Contract Terms Protections to Small Business. As the Committee is proposing to lodge a submission in response to this Consultation Paper, it will not comment on this issue further in this Submission.

Unconscionable conduct by corporations has been prohibited under the *Trade Practices Act 1974 (TPA)* since 1992, when s51AA was expressly inserted in the TPA. Section 51AC was introduced to the TPA in 1998. In 2011, s21 of the ACL replaced ss.51AB and 51AC.

In the Committee's view, the main concerns in relation to the existing unconscionable conduct provisions is that the ACCC has not been very active in its enforcement of these provisions. The following is a list of all unconscionable conduct cases pursued by the ACCC since 1992:

Table 2: ACCC unconscionable conduct cases – 1992 to 2014

	Case name	**Year**	**Result**
1.	Leelee	1999	Won
2.	Simply-No-Knead	2000	Won
3.	Berbatis	2002	Lost (on appeal)
4.	Davis	2003	Won
5.	Esanda	2003	Won
6.	Capalaba	2003	Won
7.	Keshow	2005	Won
8.	Radio Rentals	2005	Lost
9.	Allphones Retail	2009	Won
10.	Dukemaster	2009	Won
11.	Seal-A-Fridge	2010	Won
12.	E-Direct	2012	Won
13.	Excite Mobile	2013	Won
14.	Lux	2013	Won (on appeal)
15.	Coles Myer	2014	Ongoing

In the 23 years since prohibitions on commercial unconscionable conduct was introduced into the TPA/ACL, the ACCC has taken a total of 15 court cases. Interestingly, the ACCC has won 85% of the cases which it has taken under these provisions with one case currently before the courts.

Having said this, the SME Committee believes that the ACCC's successful appeal in the Lux case is likely to provide it with an impetus for taking more enforcement action in relation to unconscionable conduct. As stated in the ACCC's media release following its successful appeal in Lux:

"This is a significant decision for the ACCC as it provides important clarity regarding the scope and operation of the unconscionable conduct provisions in the Australian Consumer Law (ACL)," ACCC Chairman Rod Sims said.

"In particular, the decision has important implications for conduct which occurs in breach of consumer protection legislation, particularly where this conduct involves vulnerable consumers."

The Full Federal Court said that the consumer protection laws of the states and Commonwealth reinforce the recognised societal values and expectations that consumers will be dealt with honestly, fairly and without deception and unfair pressure.

The Court also said "(t)he norms and standards of today require businesses who wish to gain access to the homes of people for extended selling opportunities to exhibit honesty and openness in what they are doing, not to apply deceptive ruses to gain entry".

Accordingly, the Committee does not support any changes to unconscionable conduct laws at this time. Rather, the Committee believes it would be appropriate to wait and see whether the ACCC's success in the Lux case translates into greater levels of enforcement. Indeed, the ACCC's recent action against Coles Myer suggests that the ACCC is already taking a more active and robust approach to unconscionable conduct cases.

Do the provisions of the CCA on cartels, horizontal agreements and primary boycotts operate effectively and do they work to further the objectives of the CCA?

The criminal cartel provisions were introduced to the CCA in 2009. Since that time, the ACCC has not commenced any criminal cartel prosecutions.

One may argue that after six years the ACCC should have commenced at least one criminal cartel prosecution. However, the reality is that successful criminal cartel prosecutions are very rare in every jurisdiction around the world which has such laws, with the exception of the US.

For example, in the UK where criminal cartel provisions have been available since 2002, there have only been two criminal cartel prosecutions. The first case, in relation to the Marine Hoses case, arose directly out of a successful Department of Justice (DOJ) criminal prosecution and subsequent plea agreement. The second case, involved alleged price fixing allegations against British Airways. This case collapsed quite spectacularly when a vast amount of emails, some of which were exculpatory, were produced by Virgin Airways, the immunity applicant, mid-way though the trial.

The question which numerous scholars have been debating is why criminal prosecutions have been highly successful in the US, but have either failed or been non-existent in most other jurisdictions. While scholars have focused on a range of elaborate theories to explain these differences, a quite compelling but overlooked reason for this difference may be found in the unique investigatory resources available to the Antitrust Division in the US.

Federal Bureau of Investigation (FBI)

In the US, antitrust investigations are conducted jointly between the DOJ and the FBI. In reality, the FBI conducts the entire investigation. The FBI is involved in all stages of the investigation – for example they will be involved in interviewing potential defendants, interviewing leniency applicants, obtaining information from third parties, chasing up investigatory leads, managing the chain of evidence, obtaining and analysing relevant documents and giving expert evidence in court or before the grand jury. The FBI will also execute the search warrants.

A FBI agent receives 20 weeks of intensive basic training at the FBI Academy before becoming an agent. This training focuses on four-core skills area, two of which are interviewing and interrogation. FBI agents must then complete further training on a regular basis.

By contrast, in Australia, criminal cartel investigations are conducted primarily by the ACCC. The Australian Federal Police (AFP) have a limited role in assisting the ACCC in the execution of search warrants and the logistics of setting up telephone intercepts and installing listening devices. However, apart from this limited assistance it is entirely the responsibility of the ACCC to investigate criminal cartels.

Furthermore, ACCC investigators receive only one week of basic investigatory training, followed by ad-hoc on the job training.

Grand jury

Another major difference in terms of US cartel enforcement is the role of the grand jury. The function of the grand jury is to investigate possible criminal violations and return indictments against corporations and individuals.

The grand jury has been described as in *Blair v. United States*, 250 U.S. 273 (1919):

> *...a grand inquest, a body with powers of investigation and inquisition, the scope of whose inquiries is not to be limited narrowly by questions of propriety or forecasts of the probable result of the investigation, or by doubts whether any particular individual will be found properly subject to an accusation of crime.*

The grand jury has very broad powers of investigation. The grand jury has extensive powers to compel witnesses to attend the grand jury to give evidence, to issue subpoenas and to pursue other investigatory leads. The prosecutor presents a range of proposed investigatory steps to the grand jury. The grand jury then decides whether these investigatory steps should be taken. The grand jury may also decide to pursue other investigatory steps.

The grand jury is not limited to considering admissible testimony. Witnesses have no rights to object to the scope or propriety of the grand jury proceedings. Witnesses are not permitted to have Counsel present with them in the grand jury room (although the Antitrust Division will allow the witness to leave the room to consult with their Counsel).

The grand jury's deliberations are conducted in secrecy. A person is not permitted to make public comment about the existence or nature of a grand jury investigation.

It has been held in the US that the US Courts generally "cannot unduly interfere with the essential activities of the grand jury nor encroach on the grand jury's or the prosecutor's prerogatives" - *United States v. United States District Court*, 238 F.2d 713 (4th Cir.), cert. denied, 352 U.S. 981 (1957).

The existence and operation of the grand jury system in US cartel matters makes a significant difference to the way the DOJ and FBI are able conduct criminal cartel investigations. The DOJ, through the grand jury, has access to very broad investigatory powers which are largely unfettered. The grand jury does not need to have a strong basis for pursuing a particular investigatory lead. The fact that much of the grand jury work can be done in complete secrecy also permits the DOJ to maintain the covert status of its investigation for a long period.

Whilst it is not recommended that a grand jury procedure be introduced in Australia, needless to say, the fact that the ACCC does not have access to a grand jury type process in Australia makes the task of investigating criminal cartels much more difficult. The SME Committee is not advocating the introduction of a grand jury system in Australia. Rather it is seeking to highlight a possible reason why criminal cartel prosecutions have only been successful in the US.

In the SME Committee's view what is needed is intensive in-depth investigatory training which focuses on the essential skills required to investigate a criminal cartel – namely:

- the execution of search warrants;
- cautioning potential defendants prior to interviewing them;
- conducting formal interviews or Records of Interview with potential defendants rather than relying on section 155 powers;
- conducting interviews and taking statements from potential witnesses;
- ensuring appropriate engagement with immunity applicants;
- properly analysing recordings of telephone intercepts; and
- maintaining a proper chain of evidence.

One option which the ACCC may wish to explore is to work with the FBI in the development of an appropriate training program for ACCC investigators who maybe involved in investigating a criminal cartel.

Should the price signalling provisions of the CCA be retained, repealed, amended or extended to cover other sectors?

Prohibitions on price signalling exist in most leading antitrust jurisdictions.

In the EU price signalling is dealt with under the provisions of Article 101 of the Treaty of the Functioning of the European Union which prohibits agreements and concerted practices between competitors the object or effect of which is to restrict competition.

In December 2010, the EC issued a revised guidance paper on EU competition rules applicable to horizontal co-operation agreements. In this guidance paper, the EC made specific reference to price signaling behaviour:

72. *Any information exchange with the objective of restricting competition on the market will be considered as a restriction of competition by object. In assessing whether an information exchange constitutes a restriction of competition by object, the Commission will pay particular attention to the legal and economic context in which the information exchange takes place. To this end, the Commission will take into account whether the information exchange, by its very nature, may possibly lead to a restriction of competition.*

73. *Exchanging information on companies' individualised intentions concerning future conduct regarding prices or quantities is particularly likely to lead to a collusive outcome. Informing each other about such intentions may allow competitors to arrive at a common higher price level without incurring the risk of losing market share or triggering a price war during the period of adjustment to new prices….Moreover, it is less likely that information exchanges concerning future intentions are made for pro-competitive reasons than exchanges of actual data.*

As is apparent, the EC prohibition is general in its application and applies to all industries, not solely to the banking sector.

In the US, price signalling is analysed in terms of section 1 of the Sherman Act, which prohibits a "contract, combination…or conspiracy" that unreasonably restrains trade. However, as some form of agreement is required for section 1 of the Sherman Act to apply, the provision cannot be used in relation to unilateral price signalling conduct.

As a result, the US authorities seek to challenge unilateral price signalling behavior either under section 2 of the Sherman Act or alternatively under section 5 of the *Federal Trade Commission Act*.

Section 5 of the FTC Act provides:

> ***§ 45. Unfair methods of competition unlawful; prevention by Commission (Sec. 5)***
>
> *(a) Declaration of unlawfulness; power to prohibit unfair practices; inapplicability to foreign trade*
>
> *(1) Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.*

In the US, the FTC and the DOJ have also issued guidelines, entitled the 'Antitrust Guidelines for Collaborations among Competitors', which discuss the issue of price signalling. Relevantly, at paragraph 3.33(b):

Agreements that facilitate collusion sometimes involve the exchange or disclosure of information. The Agencies recognize that the sharing of information among competitors may be procompetitive and is often reasonably necessary to achieve the procompetitive benefits of certain collaborations; for example, sharing certain technology, know-how, or other intellectual property may be essential to achieve the procompetitive benefits of an R&D collaboration. Nevertheless, in some cases, the sharing of information related to a market in which the collaboration operates or in which the participants are actual or potential competitors may increase the likelihood of collusion on matters such as price, output, or other competitively sensitive variables. The competitive concern depends on the nature of the information shared. Other things being equal, the sharing of information relating to price, output, costs, or strategic planning is more likely to raise competitive concern than the sharing of information relating to less competitively sensitive variables. Similarly, other things being equal, the sharing of information on current operating and future business plans is more likely to raise concerns than the sharing of historical information. For example, where a production joint venture buys inputs from an upstream market to incorporate in products to be sold in a downstream market, both upstream and downstream markets may be "markets affected by a competitor collaboration." Participation in the collaboration may change the participants' behavior in this third category of markets, for example, by altering incentives and available information, or by providing an opportunity to form additional agreements among participants. The term "goods" also includes services.

Finally, other things being equal, the sharing of individual company data is more likely to raise (a) concern than the sharing of aggregated data that does not permit recipients to identify individual firm data.

Price signalling can result in higher prices, which may cause detriment to small businesses, as well as to consumers. Accordingly, the existing prohibitions on price signalling should be extended to other industries, in addition to banks.

Do the provisions of the CCA on secondary boycotts operate effectively, and do they work to further the objectives of the CCA?

It is important to have some understanding of the ACCC's record in pursuing secondary boycott cases before considering this issue.

Table 3: ACCC secondary boycott cases 1997 – 2014

Respondent/s	Year	Conduct	Sections	Result
Transport Workers Union (TWU)	1997	Secondary boycott conduct against a number of smaller companies in Qld, which had not entered into enterprise bargaining arrangements with TWU.	s.45D	Consent orders, injunctions, compliance program, and contribution to ACCC's costs.
Transport Workers Union (TWU)	1997	Secondary boycott conduct against transport companies whose drivers were not financial members of the TWU.	s.45D	Consent orders, injunctions, compliance program, and contribution to

				ACCC's costs.
Construction Forestry Mining and Energy Union	1997	Between 27 November and 2 December 1997, the CFMEU hindered or prevented operators of crane hire services supplying crane services to Western Portables to unload transportable buildings at a construction site at Collie in Western Australia.	s.45D	Injunctions, $15,000 towards ACCC's costs and Payment of $29,087.89 Western Portables by way of reimbursement of costs incurred
Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union (CEPU)	1998	Number of contraventions of secondary boycott provisions of TPA, occurring between 11/97 and 2/98 in relation to subcontracting of the fitting of sprinkler pipe to a labour hire company.	s.45D	Consent orders gained restraining union from engaging in secondary boycott to exclude contractors from fire protection industry.
Maritime Union of Australia (MUA)	1998	MUA acted in concert with International Transport Workers Federation to coordinate an international boycott of Australian vessels loaded with non-MUA labour and also organized a range of domestic secondary boycotts	s.45D, 45DB	Patrick to pay maximum of $7.5m compensation and MUA gave undertakings for 2 years.
Maritime Union of Australia (MUA)	1998	MUA boycotts in Newcastle and Adelaide of stevedores serving ships formerly contracted to Patrick Stevedores who refuse to use labour from the Patrick labour hire companies.	s.45D, 45DB	Patrick to pay maximum of $7.5m compensation and MUA gave undertakings for 2 years.
Maritime Union of Australia (MUA)	2000	MUA boycotts of Australian bulk ships in relation to hold cleaning demands	s.45DB, 60	Penalties of $150,000, permanent injunctions, costs
Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union (AMWU) Australian Workers' Union (AWU) Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia (CEPU)	2003	Secondary boycott: maintenance of a picket at the construction site of the Patricia Baleen gas plant (Victoria) obstructing construction workers and vehicles delivering materials from entering.	s. 45D	Consent orders: Declarations; Injunctions; Other orders - Each Respondent to implement compliance program and publicise the orders. Penalties $300,000 – ie $100,000 for each respondent.
Showmen's Guild of Australasia Marshall Amusements Pty Ltd Spry Amusements Pty Ltd	2004	On three occasions the Showmen's Guild, certain individual members and their affiliated corporations agreed not to supply amusement services to the independent organisers of the amusement areas of those events.	ss,45D, 45E	Declarations as to breach of section 45, injunctions for a period of 5 years, costs and court enforceable undertaking.
Communications,	2005	In August 2001, Edison Mission	ss. 45D	CEPU penalty of

Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia (CEPU) Edison Mission Operation & Maintenance Loy Yang Pty Ltd		Operation & Maintenance Loy Yang Pty Ltd allegedly entered into an agreement with the CEPU to allow only employees who are governed by the NECCIA to work at the Long Yang B Power station and are with the CEPU. Stopped acquiring services from DJN Electrical as a result.	45E	$125,000, declarations, injunctions and costs Loy Yang penalty $120,000
Construction Forestry Mining & Energy Union (CFMEU) Construction Forestry Mining and Energy Union of Workers (CFMEUW)	2005	Secondary boycott: hindering or preventing the supply of goods or services by third parties to Doric Constructions Pty Ltd at the then Holiday Inn construction site in Burswood, Western Australia	ss. 45D(1) 45E	CFMEU and CFMEUW penalty of $50 000, implement a trade practices compliance program, publish a notice to members detailing the substance of the court orders
Construction Forestry Mining & Energy Union (CFMEU) Bovis Lend Lease	2006	Alleged secondary boycott - Canberra building industry. It is alleged that in April 2003 Bovis Lend Lease wrongly terminated the supply contract between Bovis Lend Lease and Bernmar after reaching and arrangement or understanding with the CFMEU, in breach of section 45E.	ss. 45D	Bovis Lend Lease penalty $100,000 CFMEU case dismissed
John Lincoln Knight Iain Kenneth Ross	2007	Alleged secondary boycott by Adelaide cardio thoracic surgeons hindering or preventing another surgeon from providing services at a private hospital.	s.45D	Court outcome did not include findings of breach of s45D.

The above table shows, that in the period from 1997 to 2014, the ACCC commenced legal proceedings alleging a contravention of the boycott provisions in 13 cases. The ACCC was successful in every action it commenced with the exception the case it took against CFMEU in August 2006. In this case, the ACCC's claim against the CFMEU and two CFMEU officials was dismissed.

All but two actions have involved union organisations – the two exceptions are the case against The Showmen's Guild of Australasia, which was effectively a guild for independent businesses, and two cardiothoracic surgeons.

In the first few years of ACCC enforcement, it is noticeable that the ACCC did not seek pecuniary penalties against unions or their officials or members for breaches of the secondary boycott provisions. However, this changed in April 2000 when the ACCC sought its first pecuniary penalty against the MUA in relation to hold cleaning demands which the MUA was pursuing through the use of boycotts.

The penalties which have been awarded for contraventions of the secondary boycott provisions have ranged from $50,000 up to $150,000. This is to be contrasted to the maximum penalties

which were $660,000 until 1998 and then increased to $750,000.

The ACCC has not taken any legal action against a union organisation for a secondary boycott since 2006 and no secondary boycotts actions against any party since 2007.

Therefore, in the SME Committee's view, the issue in relation to secondary boycotts is not that the provisions are difficult to enforce, but rather that they are enforced inconsistently and sporadically. The ACCC commenced 13 cases in the 10 year period from 1997, but then had not commenced any secondary boycott cases in the seven years since 2007.

As small businesses are often the victims of secondary boycott conduct, a more consistent approach needs to be taken by the ACCC in terms of the enforcement of these provisions.

Are the enforcement powers, penalties and remedies, including for private enforcement, effective in furthering the objectives of the CCA?

In the United States, divestiture has long been recognised as one of the remedies which can be ordered in relation to monopolisation cases under antitrust laws. The power of US courts to order divestiture in monopolization cases does not arise from a specific statutory provision, but rather from the court's equitable jurisdiction.

Whilst this remedy has only been sought on rare occasions in the US, there are number of notable examples.

The first divestiture in US antitrust history in relation to a monopolisation case occurred in 1911 when the US Supreme Court ordered the dissolution of the Standard Oil Trust into 34 separate companies after the company had gained almost monopoly power in the US fuel industry.

The second significant divestiture involved American Tobacco. In 1908, the DOJ commenced legal action against American Tobacco and 65 related companies and 29 individuals. The Supreme Court held that the combination which had been formed between these companies contravened section 2 of the Sherman Act. The dissolution order was made in 1911, on the same day that the dissolution order was made in the Standard Oil case.

The third case involved Grinnell Corp, a manufacturer of plumbing supplies and fire sprinkler systems, and an operator of fire and burglar alarm services from central stations. The Court concluded that the company had violated section 1 and 2 of the Sherman Act and issued orders requiring, amongst other things, that Grimmell divest a number of its affiliates.

The final significant divestiture case occurred in 1982 when AT&T consented to being broken up into seven regional service companies or "Baby bells" after becoming a virtual monopoly in the provision of telephony services.

The SME Committee does not believe that the option of introducing a divestiture remedy in relation to corporations which have breached section 46 should be dismissed out of hand. However, in the SME Committee's view a great deal more research into the effects of this remedy would need to be undertaken before it could be introduced.

The Panel is interested in whether there are other remedies or powers (for example, in overseas jurisdictions) that should be considered in the Australian context.

The Committee believes that the Review Panel should consider the introduction of a Groceries Code along the lines of the UK Groceries Supply Code of Practice. The purpose of the UK Code is to promote fair dealing between major grocery companies and smaller business suppliers by redressing imbalances in bargaining power.

The purpose of the UK Code is explained under Principle 2 which states:

> *A Retailer must at all times deal with its Suppliers fairly and lawfully. Fair and lawful dealing will be understood as requiring the Retailer to conduct its trading relationships with Suppliers in good faith, without distinction between formal or informal arrangements, without duress and in recognition of the Suppliers' need for certainty as regards the risks and costs of trading, particularly in relation to production, delivery and payment issues.*

While the UK Code is still relatively new, the Committee believes that it has been well received by small business suppliers in the UK. The Committee also understands that the UK Code has had significant positive effects in changing the way large retailers engage with small suppliers on their terms of trade.

What are the experiences of small businesses in dealing with the ACCC?

Small business usually interacts with the ACCC in one of three ways – either as:

- the subject of an ACCC investigation or litigation;
- a consequence of being subject to a mandatory industry code;
- a complainant about the conduct of another trader;
- a witness in ACCC litigation.

Small businesses as the subject of an ACCC investigation or litigation

SME Committee members of the Committee have noticed a change over the last 2 years in the way that the ACCC deals with small businesses in investigations and litigation. In our view, the ACCC's previous approach towards small businesses was often best described as aggressive and uncompromising. The ACCC would pursue small businesses with considerable vigor which often appeared disproportionate to nature of the alleged misconduct being engaged in by the small business.

In the last two years, the ACCC appears to be taking a more "commonsense" approach to dealing with small business. The ACCC is accepting more administrative settlements and issuing more warnings. However, there is still a tendency for the ACCC to be somewhat heavy handed in its dealings with small businesses.

The following are some first hand accounts from practitioners on the SME Committee of ACCC interactions with small businesses.

The ACCC received information that a small firm may be engaging in conduct which was false, misleading and deceptive. The ACCC decided to commence its investigation with the execution of two search warrants. In relation to one of the two search warrants, the ACCC sent a search warrant team of 40 staff, consisting of ACCC investigators and AFP agents, to the small business's premises. At the time, the small business had a total staff of 18 people at head office. Many of the small business staff were quite traumatized by the event. This matter was ultimately resolved by consent, with the ACCC seeking declarations and injunctions but no financial penalties or fines in relation to the small business's conduct.

In another case, a small business expressed a desire to settle allegations that it had engaged in misleading, deceptive and unconscionable conduct. However, the small business did not agree to pay the full amount of costs being sought by the ACCC. As a result, the settlement failed and the matter went to court. Just prior to trial, the ACCC dropped one of its three central allegations against the small business. While the ACCC ultimately succeeded in this case it secured a lesser outcome, in terms of number of established contraventions, than it would have achieved had it accepted the initial settlement offer from the small business.

The ACCC took legal action against a number of related small businesses for alleged misleading and deceptive conduct. When commencing legal proceedings, the ACCC issued a new release which omitted the word "alleged" in the title. The ACCC compounded this problem by including other sub-judice statements in the news release and in news grabs which commented negatively on the small business's alleged conduct. As a result, of the ACCC's actions subsequent third party news articles reported that the small businesses had been found to have engaged in misleading and deceptive conduct, instead of reporting the ACCC had simply made allegations which still had to be proved in court.

A consequence of being subject to a mandatory industry code

Many small businesses operate under licences, distribution agreements or franchise agreements and in some cases may be subject to a mandatory industry code prescribed by the Commonwealth. In many cases small business participants in licensing and distribution (if they are not franchise agreements) have no additional protections afforded to them despite the fact that:

(a) they may have to pay significant amounts to acquire the licence or distribution rights;

(b) they have no certainty of contractual tenure despite being required to expend large sums to establish and fit out their businesses to meet a minimum agreed standard;

(c) when the offending organization is pointed out to the ACCC , our experiences have indicated that the ACCC will often not act or take steps to investigate and seek compliance with an industry code unless and until someone makes a formal written complaint . Even then the time taken by the ACCC in reviewing and acting is in the SME Committee's opinion too long. Many small businesses are reluctant to go on the record and make a formal written complaint because they fear their identity will be discovered and they fear retribution including the loss of the right to continue to conduct the business that they have invested so heavily in. This is most prevalent in the motor dealer sector where the threat of loss of the dealership is often their primary concern. This

concern will continue unless and until some form of genuine "whistleblower" protection is afforded to those making legitimate complaints; and

(d) in respect to a mandatory industry code it is not the franchisee, licensee or distributors obligation to force compliance with the code - that ultimately rests with the ACCC as the regulator and enforcement entity whilst contractual relief can be sought by complainants through appropriate forums.

A large percentage of complaints to the ACCC relate to conduct occurring which is often bundled into the category of franchising. Significant reforms to the Code are pending and due to commence on 1 January 2015.

Participants in the sector regularly complain that they are suffering from reform fatigue as the sector has been targeted by many State and Commonwealth reviews and inquiries over many years. The last review commenced in January 2013 and will not conclude until 1 January 2015. Reviews are often subject to unreasonably short public and sector consultation periods.

At the same time in recent years there has been significant legislation that directly affects small business including the Personal Property Securities Act, the Business Names Registration Act and changes to Privacy Act. In addition there are now proposals to change dispute resolution facilitation services offered to small business (through the Small Business and Family Enterprise Ombudsman), greater roles for various State and Commonwealth Small Business Commissioners, prospective unfair contract protection extension to business to business contracts and ultimately changes to the ACL and CCA coming out of this branch and root review. The immense amount of legislative change results in small business incurring costs in seeking advice on these reforms and changing contracts and practices. These additional costs are difficult to absorb in small business. The franchise sector wants and deserves a degree of legislative certainty and stability to absorb the enormous changes that have affected small business over recent years.

The reviews of the Franchising Code of Conduct have outpaced similar changes and reviews to Oilcode (which was based substantially on the original franchising code). As a consequence, many of their terms are quite inconsistent with Oilcode yet to be brought into line with similar changes made in 2008 and 2010 to the Franchising Code of Conduct.

Coupled with the impending changes to the Code there is also:

(a) the threat of extension of unfair contract term protections to franchise agreements if the ACL unfair contract term protections are extended to business to business standard form contracts;

(b) legislation in NSW that has introduced 'unfair contract terms" and "unfair conduct" protections for new vehicle motor dealers that borrow extensively from the provisions of the ACL unfair contract term protection, and the likely extension of this initiative to other States and Territories – this overlaps with the proposed changes as dealer agreements are deemed to be franchise agreements;

(c) the proposals currently considered as part of the branch and root review including a suggestion that Government may remove the logical and beneficial related body corporate exclusion that was added to third line forcing provisions.

The Code has been in operation since 1998 yet there are still many business opportunities marketed as licences or distribution agreements which on inspection fall within the definition of a franchise agreement. These small businesses are particularly vulnerable to unscrupulous operators who choose to not comply with the law.

Unfortunately the ACCC appears to have been focused more on using their random audit power and focus enforcement action against those that do try to comply with the Code rather than on those who deliberately seek to avoid its application. In one notable example, a manufacturer of well-known boats was subjected to investigation in relation to claims it engaged in resale price maintenance. Those claims were made by its dealer network. Despite the investigation, the ACCC failed to detect that it was in fact offering franchise agreements to its dealer network and not complying with the Code. That manufacturer had deliberately failed to comply with its obligations to its dealer network under the Franchising Code of Conduct until it subsequently was forced to comply in 2010, as a consequence of increasing pressure from its dealer network.

It took some 12 years after the Code commenced for this compliance to occur during which time members of the dealer network were disadvantaged through no protection. A motor vehicle dealership agreement is deemed to be a franchise agreement but there has been little pro-activity from the ACCC in this area to compel greater compliance particularly in the marine sector.

Small business as a complainant about the conduct of another trader

Small businesses often complain to the ACCC about what they believe is unfair competition from their competitors. While many of these complaints are about large businesses, often small businesses complain about their small business competitors.

The first issue to note in relation to small business complaints is that the ACCC does not advise the small business whether the ACCC has decided to investigate their complaint. The ACCC appears to have adopted a policy of not advising the complainant whether they have decided to investigate the small business complaint or not.

Previously, it was the ACCC's practice to write to all complainants to advise them whether or not the complaint was being actioned. It was also standard practice for the ACCC to provide reasons why it had decided not to pursue a complaint.

While the SME Committee understands that the ACCC may have adopted its current particular policy in relation to complaints in order to save time and money, it does not represent good public administration. Statutory bodies have to be held accountable for their decisions - this cannot occur if the ACCC does not provide complainants with any reasons why it had decided not to pursue their complaint.

In one comical incident, a small business wrote to the ACCC about a complaint which it had made to the ACCC about a large competitor. The small business stated that it had lodged a complaint with the ACCC 10 months earlier but had heard nothing more from the ACCC. The small business

asked the ACCC why it had not investigated and taken action in relation to its complaint. The ACCC responded to this complaint by stating that it was not its policy to advise complainants whether it was pursuing a particular complaint. The ACCC then defended its apparent inaction by advising the small business that it could not accuse the ACCC of not actioning its complaint because, due to the ACCC's policy of non-disclosure, the small business could never know for certain whether the ACCC had in fact actioned its complaint or not.

The situation should be contrasted to the situation in the EU. Not only does the EC have to provide complainants with detailed reasons why it has decided not to pursue a particular competition complaint, but furthermore complainants can pursue court action to challenge the EC's decision not to pursue a particular competition complaint.

In the SME Committee's view, the ACCC needs to be held accountable for its decisions not to pursue particular complaints. The ACCC needs to amend its practice of not writing to complainants to explain its reasons for not pursuing a particular complaint.

Small business as witnesses in ACCC litigation

Often the ACCC will be unable to win its cases without the assistance of small businesses as witnesses in their cases. However, deciding to agree to be a witness in an ACCC case is a major decision for most small businesses, for the following reasons:

- it is stressful experience being a witness in ACCC litigation, particularly if the respondent is a large company. Apart from being anxious about the court process, many small businesses are concerned about the possibility of commercial retaliation by the large business after the case has been concluded;

- small business are often surprised at how much time they will have to spend providing the ACCC with a witness statement and relevant documents, attending conferences with counsel and being available to give evidence during the trial; and

- the small business may incur significant expenses when being a witness for the ACCC, particularly if they have to be away from their business for lengthy periods of time.

It is the experience of members of the SME Committee that the ACCC often does not treat its small business witnesses in ways which encourage their ongoing and future cooperation. For example:

- ACCC officers will often allow the ACCC's external lawyers to be the small business witness primary point of contact. However, most small business witnesses would prefer to dealing with an ACCC officer in the first instance;

- the ACCC often expects small businesses to be able to drop everything they are doing in order to provide assistance for the case. The ACCC does not understand that the small business person needs to be able to continue running their business, whilst trying to juggle the ACCC's demands in relation to the litigation;

- on occasion, the ACCC does not take appropriate steps to protect the confidential information provided by small businesses in relation to their cases. In one case, the ACCC contacted a witness in a major case and asked it whether it agreed to a number of section 50 non-publications orders being made in relation to particular documents. What the ACCC did not explain to the witnesses was that the consequence of them agreeing to these limited non-publication orders was that every other document provided by the witness to the ACCC as part of the litigation and put into evidence would be made public; and

- it is very difficult for small business witnesses to recover the expenses associated with being a witness for the ACCC.

The SME Committee believes that the ACCC must improve the way it interacts with small business witnesses. If the ACCC do not take positive steps in relation to this issue, small businesses will be even more reluctant to assist the ACCC in its cases. Accordingly, the SME Committee believes that the ACCC should consider providing its staff with specific training on witness management.

Another concern is that the ACCC has little power to protect small businesses from future commercial retaliation if they do agree to give evidence. The only avenue which the ACCC has in this regard is section 162A of the CCA which states:

> *A person who:*
>
> *(a) threatens, intimidates or coerces another person; or*
> *(b) causes or procures damage, loss or disadvantage to another person;*
>
> *for or on account of that other person proposing to furnish or having furnished information, or proposing to produce or having produced documents, to the Commission…is guilty of an offence punishable on conviction by a fine not exceeding 20 penalty units or imprisonment for 12 months.*

As far as the SME Committee is aware, no cases have ever been taken by the ACCC for a contravention of s162A. A likely reason for non-enforcement is that s162A creates a criminal offence which has to be proved beyond reasonable doubt.

Accordingly, it may be appropriate to introduce a civil prohibition to the CCA which is in similar terms to s.162A, and to include large civil pecuniary penalties. For example, the maximum civil pecuniary penalty for a contravention of the new civil provision could be $200,000 for a corporation and $50,000 for an individual. In the SME Committee's view, a prohibition aimed at protecting small business witnesses which is subject to a lower onus of proof is more likely to be effectively enforced by the ACCC than is the case with the current s162.

Further discussion
The SME Committee would be happy to discuss any aspect of this submission.

Please contact Coralie Kenny, the Chair of the SME Committee, on 0409 919 082 if you would like to do so.

Yours faithfully

John Keeves
Chairman, Business Law Section