



Law Council  
OF AUSTRALIA

Via email: [economics.sen@aph.gov.au](mailto:economics.sen@aph.gov.au)

The Secretary  
Senate Economics Reference Committee  
Room SG 64  
Parliament House  
Canberra ACT 2600

Dear Mr Hallahan,

**Inquiry into the Effectiveness of the *Trade Practices Act 1974* in  
protecting small business**

I refer to my letter of 3 September 2003.

I now have pleasure in enclosing a supplementary submission which has  
been prepared by the Law Council's Trade Practices Committee of its  
Business Law Section.

Please note that the submission has been endorsed by the Business Law  
Section but has not been considered by the Council of the Law Council of  
Australia.

Yours sincerely,

Michael Lavarch  
**Secretary-General**

9 December 2003

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**Inquiry into the effectiveness of the  
*Trade Practices Act 1974*  
in protecting small business**

**Supplementary Submission by the Trade Practices  
Committee of the Business Law Section of the  
Law Council of Australia  
to the Senate Economics References Committee**

## 1. Introduction

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The Trade Practices Committee welcomes this opportunity to make a supplementary submission to the Senate Committee.

On Friday 7 November 2003 representatives of the Trade Practices Committee of the Business Law Section of the Law Council of Australia (the **Trade Practices Committee**) appeared before the Senate Economics References Committee's (the **Senate Committee**) inquiry into the effectiveness of the *Trade Practices Act 1974* (Cth) in protecting small business. The representatives who appeared before the Senate Committee were Ms Louise Castle, Chair of the Trade Practices Committee, Mr Bill Reid, Deputy Chair of the Trade Practices Committee and Dr Phillip Williams, a member of the Trade Practices Committee.

During their appearance before the Senate Committee, the representatives of the Trade Practices Committee took a number of questions on notice. The answers to these questions are provided in this submission. In addition, the representatives of the Trade Practices Committee handed up to the Committee a document outlining the factors which the courts take into account in determining whether a corporation has a substantial degree of market power. We take this opportunity to set out those factors below.

The Trade Practices Committee also wishes to strongly object to two recommendations made by the Australian Competition and Consumer Commission (**ACCC**); to insert the words "in relation to" into s46 and to remove the need to establish recoupment in predatory pricing cases.

## 2. Questions taken on notice

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During the appearance members of the Law Council took several questions on notice. The answers to these questions are provided below.

### 2.1 When was the Law Council formed?

The Law Council was established in 1933.

### 2.2 When was the Trade Practices Committee formed?

The Business Law Section of the Law Council was established in 1980. The Business Law Section has a number of committees. The Trade Practices Committee of the Business Law Section was formed in 1981. It appears that the Trade Practices Committee was initially a Standing Committee of the Law Council reporting through the Secretary General of the Law Council.

### 2.3 Did the Law Council oppose the introduction of the Trade Practices Act?

The Standing Committee of the Law Council which dealt with trade practices matters did not oppose the introduction of the Trade Practices Bill 1974 introduced by Lionel Murphy. One of the principal architects of the 1974 legislation, Richard St John (then an officer of the Attorney-General's Department), subsequently became and remains a long standing member of the Trade Practices Committee. He recalls close and constructive dialogue between interested members of the legal profession and the then government and its

advisers during the formulation and passage of the legislation. Many of those practitioners subsequently became (and some remain) members of the Trade Practices Committee and have participated actively in its work over the years.

### **2.4 Did the Law Council oppose the introduction of s51AC**

The Trade Practices Committee neither opposed nor supported the introduction of s51AC. It accepted that the government as a matter of policy had decided that small businesses were entitled to protection from unconscionable conduct and that the government felt that a specific provision was required to ensure they had this protection. The Trade Practices Committee therefore confined itself to making suggestions on the drafting of an appropriate provision. This is the Committee's usual approach.

The Trade Practices Committee did make a number of specific suggestions for the drafting of s51AC. The Trade Practices Committee noted that originally the provision did not apply to acquiring goods and services but only to supplying them. This was altered in accordance with our Committee's suggestion. Other changes which were suggested but were not made included a proposed change to the definition of "listed public company", addressing the overlap between s51AB and s51AC and specifically assisting franchises and others who present "take it or leave it" contracts.

## **3. Substantial Degree of Market Power**

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The Trade Practices Committee remains opposed to any alteration to s46. The Committee is aware that some participants in the Senate Inquiry have suggested that there is some confusion in the community about the factors which the courts consider in determining whether a corporation has a substantial degree of market power. The Trade Practices Committee does not see any basis for this confusion. A review of the high Court decisions on section 46 demonstrates that there is a clear list of factors which the Courts take into account when determining whether a corporation has a substantial degree of market power. The Trade Practices Committee representatives handed up to the Senate Committee a list of the factors which it had distilled from the case law. We have reproduced the list below.

Members of the Senate Committee also raised with us the possible introduction into s46 of a list of factors which the Court must take into account in determining whether a corporation has a substantial degree of market power. The Trade Practices Committee is of the view that considerable uncertainty would be caused by any alteration to the text of the provision, even if it sought merely to reproduce the current law. This uncertainty would require further litigation to clarify the scope of the alterations made and it is likely that the Courts would respond by interpreting the new wording and factors as a change from the settled case law.

Although the Trade Practices Committee does not believe that it is necessary for the ACCC to publish a list of the factors that the Courts consider when dealing with market power in Guidelines, the Trade Practices Committee does not oppose the publication by the ACCC of such a list and the Trade Practices Committee believes it may in fact assist with the confusion which is currently being generated by some participants in this Inquiry.

### The Trade Practices Committee's List of Factors

Market power is a dynamic concept which must be considered over time. The analysis requires an examination of the existing structure and the likely structure of the market. The Court looks to:

- market share (although this is not determinative);
- the number of competitors in the market and their strength and size;
- the number and size distribution of suppliers and/or buyers;
- structural barriers to entry (such as the presence of sunk costs, economies of scale and government regulation);
- strategic barriers to entry (such as pricing policies and capacity expansion leading to excess capacity). [In *Boral* both structural and strategic barriers to entry were considered low with no technology barriers and minimal capital outlay for a new plant (approximately \$8 million). This enabled McHugh J to conclude "*the low barriers to entry in this market by themselves were strong indicators that at no relevant time did Boral have substantial market power.*" By contrast, in *Safeway* the majority found that there were barriers to new entry in terms of size];
- pricing discretion – does the firm have the ability to raise selling prices above supply cost without rivals taking away customers or to reduce buying prices below competitive levels without rivals taking away sources of supply. [In *Boral* the Court found that Boral's customers had the power to force the price charged by masonry manufacturers "down and down";
- service discretion – does the firm have the ability to offer customers less in terms of product or service or require suppliers to offer improved terms than would be the case in a competitive market?
- the stability or volatility of demand;
- the presence of vertical integration (although this is not determinative).

## 4. Response to the ACCC's proposals

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The ACCC has made two proposals which the Trade Practices Committee wishes to address:

- (a) inserting the words "in relation to" into s46; and
- (b) removing the need for recoupment in predatory pricing cases.

### 4.2 "In relation to"

The ACCC has recommended that the concept of taking advantage in s46 be extended to include the words "in relation to". The Trade Practices Committee opposes this recommendation. The words "in relation to" have been interpreted very broadly by the courts, as the ACCC acknowledges in its submission. The consequence of this change would be to remove the need for a link between conduct and market power and would stifle much competitive activity engaged in by firms with market power which would be to the detriment of consumers. .

### 4.3 Recoupment in predatory pricing

The ACCC recommends removing the need to establish recoupment in predatory pricing cases. The Trade Practices Committee also opposes this change. Australia has one of the lowest monopolisation thresholds in the world. To go further and remove any need to establish recoupment would mean that large Australian companies could no longer engage in aggressive pricing strategies although such strategies are beneficial to consumers. Expectation of recoupment is wholly consistent with the threshold of substantial market power and is the critical factor which distinguishes between legitimate low pricing, whether above or below any measure of cost, and predatory pricing.