

## **Additional remarks from Labor Senators**

Labor Senators accept that the Petroleum Retail Marketing Sites Act and the Petroleum Retail Marketing Franchise Act 1980 and associated regulations represented an outdated model for regulation of the petrol retail sector, as they exclude major supermarket chains engaged in petroleum retailing and have been circumvented by major oil companies in some circumstances.

Labor Senators however, are of the view that the principle issue in encouraging competition in this sector, and indeed across all markets, is strengthening provisions in the Trade Practices Act against misuse of market power.

It is well known that section 46 of the Trade Practices Act has been rendered inefficient and ineffective because of a number of Federal Court and High Court cases. For example, in the Safeway case the concept of take advantage was brought into question. In the Rural Press case the concept of abusing market power in another market was brought into question. In the Boral case the very concept of market power was brought into question. The ACCC has effectively given up taking cases under section 46 of the Trade Practices Act because it knows it has now been rendered ineffective.

The Senate Inquiry into the Effectiveness of the Trade Practices Act on Small Business made a number of recommendations in strengthening the TPA, some of which the Government has committed to.

The measures in this legislation do not achieve the objective of encouraging competition in this sector in isolation from the section 46 reforms the Senate has previously called for.

Therefore, Labor Senators believe that the most efficient market outcome will not be achieved unless s46 reforms are implemented concurrently.

Labor Senators note the comments of Mr Cassidy from the ACCC:

I would say that, to the extent that there are shortcomings in the current section 46—and that is obviously well-travelled ground—we think the answer to that is to amend the section (transcript Pg E-20)

The ACCC clearly supports strengthening of s46 to support competition in this and other markets.

Ideally, the Government should commit to immediately legislating the following recommendations of the Senate Committee in relation to s46 of the TPA:

#### 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.

#### 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 s.46(1). This provision should be based upon the suggestions outlined in paragraph 2.28 of this report.

#### Recommendation 3

The Committee recommends that the Act be amended to provide that, without limiting the generality of s.46, in determining whether a corporation has breached s.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 s.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

#### Recommendation 4

The Committee recommends that s.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 s.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.

**Recommendation 5**

The Committee recommends that s.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.

**Recommendation 6**

The Committee recommends that s.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.

**Senator Ursula Stephens****Senator Ruth Webber**

