

Chapter 3

The bill

3.1 The bill amends the *Trade Practices Act 1974* to strengthen protections for small business against anti-competitive practices. It has three Schedules.

3.2 Schedule 1 provides for the creation of a second Deputy Chairperson for the ACCC, which the government intends will be filled by a candidate who is experienced in small business matters.¹

The threshold test for the misuse of market power

3.3 Schedule 2 makes three key amendments to section 46 of the Act to clarify the courts' interpretation of misuse of market power. Recall that the current threshold test in section 46(1) is 'a corporation that has a substantial degree of power in a market'. The Schedule clarifies this test by inserting the words 'in that or any other market'. This amendment provides that a corporation must not take advantage of a substantial degree of market power, either in the market in which power is held or in any other market. The 2004 Senate report noted some uncertainty as to whether the market in which substantial power is misused must be the same as the market in which the corporation has substantial market power.²

3.4 Schedule 2 of the bill inserts subsection 46(3A) to enable courts to rule that 'a substantial degree of power in a market' exists based on any market power the corporation has that results from agreement with others.³ This was also a recommendation of the 2004 Senate report, which noted that 'the Act should be clarified to indicate that a company may obtain market power by virtue of its coordination with another company'.⁴

3.5 Schedule 2 also amends subsection 46(3C) to clarify that the threshold of 'a substantial degree of power in a market' can be satisfied even though the corporation 'does not substantially control the market', or 'does not have absolute freedom from

1 The Hon. Peter Costello MP, Treasurer of Australia, Second Reading Speech, *House of Representatives Hansard*, 20 June 2007, p. 7.

2 See Senate Economics References Committee, *The effectiveness of the Trade Practices Act 1974 in protecting small business*, pp 23–25, recommendation 5.

3 The bill also inserts section 151AH(5A) to enable courts to rule in determining the degree of power that a person has in a telecommunications market, any 'contracts, arrangements or understandings' that the person may have.

4 See Senate Economics References Committee, *The effectiveness of the Trade Practices Act 1974 in protecting small business*, p. 26, recommendation 6.

constraint' in the market.⁵ It inserts new subsection 46(3D) which states that more than one corporation may have a substantial degree of power in the market—a corporation does not need to be a monopolist for the section 46 threshold to apply.⁶ Chapter 2 noted that these changes were suggested by the ACCC in its submission to the 2004 Senate inquiry, and agreed to in the committee's report.⁷

3.6 Significantly, the bill also inserts new subsection 46(3B), which states that subsections 46(3) and 46(3A) do not limit the matters to which the Court may have regard in determining the degree of market power held by a corporation.⁸

Predatory pricing

3.7 Schedule 2 of the bill also deals with predatory pricing—where a firm deliberately sells at unsustainably low prices in an effort to cost their competitors out of the market. It inserts new subsection 46(4A) to allow the courts to take into account a 'sustained period' of selling goods or services at a price 'less than the relevant cost to the corporation of supplying such goods and services', and the corporation's reasons for engaging in this practice. However, both the Second Reading Speech and the Explanatory Memorandum emphasised that predatory pricing is neither a mandatory nor a limiting consideration for courts in considering a breach of section 46.⁹

3.8 The High Court's majority ruling in *Boral* argued that the 'relevant cost to the corporation' of the good or service in question is to be determined by the Court in each case. The EM noted that one such measure could be variable costs; selling a good or service at a price below this cost could be deemed predatory. The 2004 Senate report recommended inserting a new subsection referring to the capacity of a corporation to sell 'below its **variable** cost'.¹⁰ However, the *Boral* ruling identified various legitimate business considerations as to why a firm may sell at below variable cost. It may reflect the benefits to the firm's wider corporate group from selling the item, the firm may be willing to bear short-term losses in the hope that market conditions will improve, or it

5 The bill also inserts section 151AH(6A) to enable courts to rule that a person may have substantial power in a telecommunications market even though the person does not substantially control the market or does not have absolute freedom from constraint.

6 Commonwealth of Australia, Trade Practices Legislation Amendment Bill (2007) No. 1, <http://parlinfoweb.parl.net/parlinfo/Repository/Legis/Bills/Linked/20060701.pdf> (accessed 24 July 2007). See also Explanatory Memorandum, pp 27–28.

7 ACCC, Submission 30, p. 19. Senate Economics References Committee, *The effectiveness of the Trade Practices Act 1974 in protecting small business*, p. 11, recommendation 6.

8 Explanatory Memorandum, p. 27, paragraph 3.23.

9 The Hon. Peter Costello MP, Treasurer of Australia, Second Reading Speech, *House of Representatives Hansard*, 20 June 2007, p. 8. See also, Explanatory Memorandum, p. 28, paragraph 3.29.

10 Emphasis added. Senate Economics References Committee, *The effectiveness of the Trade Practices Act 1974 in protecting small business*, p. 19, recommendation 3.

may reflect costs that would be incurred if the firm withdrew from the market.¹¹ As a result, the bill's amendments do not specify a particular method of determining either the price or cost for the good or service.

Recoupment

3.9 One of the main findings in the *Boral* case was the High Court's judgement that the company's capacity to recoup the losses it had sustained from lowering its prices was not 'legally essential' to a finding of predatory pricing.¹² The 2004 Senate report had recommended that the TPA 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.¹³

3.10 The bill does not introduce any provisions dealing with recoupment of losses incurred as a result of pricing goods or services below cost as a result of government consultation with small business. The EM considered the options to amend the TPA so that it is not necessary to demonstrate the capacity for recoupment, and so that a Court may consider recoupment in a section 46 case.¹⁴

Unconscionable conduct

3.11 Schedule 3 of the bill amends section 51AC of Part IVA of the Act, which prohibits corporations from engaging in unconscionable conduct in transactions with consumers and business consumers. However, the protection it offers applies to transactions where the supply or acquisition of goods is \$3 million or less. The 2004 Senate report recommended that the \$3 million threshold be repealed, while the minority report recommended an increase of the price cap to \$10 million.¹⁵ Schedule 3 adopts the minority report's recommendation, amending sections 51AC(9) and 51AC(10).

3.12 Schedule 3 of the bill also amends subsections 51AC(3) and 51AC(4) of the TPA.¹⁶ These sections are a non-exhaustive list of factors that a court may have regard to when considering a breach of section 51AC. The bill inserts section 51AC(3)(j) and 51AC(4)(j) to include unilateral variation of contract as a basis for determining

11 Explanatory Memorandum, p. 28.

12 *Boral* para 130 per Gleeson CJ and Callinan J.

13 Senate Economics References Committee, *The effectiveness of the Trade Practices Act in protecting small business*, p. 19, recommendation 3.

14 Explanatory Memorandum, p. 13.

15 See Senate Economics References Committee, *The effectiveness of the Trade Practices Act in protecting small business*, p. 37, recommendation 7.

16 Section 51AC(3) relates to suppliers. Section 51AC(4) relates to acquirers.

unconscionable conduct. This occurs when a contract has been varied by one party without consultation with the other. Chapter 2 noted that the amendment was suggested by the ACCC in its submission to the 2004 Senate report, and was adopted by the committee as a recommendation.¹⁷

3.13 Finally, Schedule 3 of the bill makes consequential amendments to section 12CC of the *Australian Securities and Investments Commission Act 2001*, mirroring those made to section 51AC of the TPA.

3.14 The Act commences on the day after it receives Royal Assent.

17 ACCC, Submission 30, pp 48–49. Senate Economics References Committee, *The effectiveness of the Trade Practices Act in protecting small business*, p. 40. Recommendation 8.