Labor Senators' Minority Report

Introduction

4.1 The Government Senators' report on the *Trade Practices Legislation Amendment Bill (No. 1) 2007* recommended that the bill be passed.

4.2 Labor Senators, while not opposing the passage of this Bill, believe that the Bill is inadequate and will not strengthen the misuse of market power provisions or the unconscionable conduct provisions of the *Trade Practices Act 1974* (TPA) in any meaningful way.

4.3 The committee's evidence from many of the written submissions and the public hearing supports the Australian Labor Party's (ALP) position that the Government's Bill falls short of what is required to deal with anti-competitive and unconscionable conduct in light of recent court interpretations of the TPA, particularly in relation to section 46. The ALP believes that the Government's amendments do not discourage predatory pricing or provide small business with adequate access to remedies if they suffer from anti-competitive conduct.

4.4 The Government's amendments also fall short of what was recommended in the 2004 Senate Economics Committee's majority report on "The Effectiveness of the Trade Practices Act 1974 in Protecting Small Business".

4.5 Labor Senators also note that this Bill comes more than three years after the 2004 inquiry demonstrating a lack of Government commitment to the TPA.

4.6 Labor Senators recommend a number of amendments to strengthen the Bill to enhance competition in the Australian economy.

Section 46 and predatory pricing

The inadequacy of the Government's proposals

4.7 Section 46 as it currently stands does not provide adequate, if any, protection from anti-competitive conduct. The ACCC has not brought an action under this section since the *Boral* case in 2003. Associate Professor Frank Zumbo in his submission to the inquiry stated:

> s 46 is not operating effectively to prevent large and powerful corporations from engaging in predatory conduct or other abuses of market power. This ineffectiveness is a direct result of the High Court's decisions in Boral Besser Masonry Limited v Australian Competition and Consumer Commission [2003] HCA 5 (7 February 2003); Melway Publishing Pty Ltd v Robert Hicks Pty Ltd [2001] HCA 13 (15 March 2001); and Rural Press Limited v Australian Competition and Consumer Commission [2003] HCA 75 (11 December 2003). Collectively these decisions have narrowed the

> interpretation of two of the three elements required to be established to prove a breach of s 46. In particular, as a result of these High Court decisions the concepts of "a substantial degree of power in a market" and "take advantage" have been given a restrictive interpretation not in keeping with the parliamentary intention behind those key s 46 concepts.[1]

4.8 As evidenced by a number of submissions, the Government's amendments do not alleviate the onerous threshold test applied by the High Court in the *Boral* case, either the 'substantial market power' or the 'taking advantage' requirements. The High Court has effectively defined a substantial degree of market power as being the ability to raise prices without losing custom. The Bill, by adding factors a court may consider in determining misuse of market power and including predatory pricing within section 46 do not change the definition of substantial market power, as laid down by the High Court in *Boral.*

4.9 Dr Evan Jones in his submission states that 'The proposed amendments to section 46 do nothing to counter rural press or Boral'.[2]

4.10 Woolworths in its submission acknowledges that the Government's Bill will mean business as usual. The submission states in relation to the listing of factors and inclusion of predatory pricing within section 46 that:

> These changes clarify what Woolworths understands to be the existing court's power to take such matters into consideration.[3]

4.11 The Fair Trading Coalition (FTC) notes that the Government's section 46 amendments neglect to include important measures which would strengthen the section. FTC in its submission stated:

> The FTC does consider, however, that s46 still needs to contain some explicit description concerning the concepts of corporation's 'financial power' and more importantly 'taking advantage'.[4]

4.12 Similarly, the Shopping Centre Council of Australia stated in its submission that:

> The insertion of section 46(4), which is specifically directed to predatory pricing, reflects the current position as interpreted by the Courts and implements no change.[5]

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[1] Frank Zumbo submission p. 3.

[2] Dr Evan Jones submission, p. 15.

[3] Woolworths submission, p. 2.

[4] FTC submission p. 4.

[5] Shopping Centre Council of Australia Submission, p. 2.

4.13 Associate Professor Frank Zumbo gave evidence at the hearing that unless the concepts of 'substantial market power' and 'take advantage' are adequately dealt with, the courts narrow interpretation of section 46 will be unaffected:

> the bills do not change the High Court's highly restrictive interpretation of substantial market power. The bills are silent on the issue of 'take advantage'. Unless both those issues are defined appropriately in keeping with the parliamentary intention behind those two concepts then section 46 will remain ineffective.

4.14 Addisons Commercial lawyers state in relation to the Government's amendments to add factor's the court may have regard to:

> It is submitted that these amendments do not add anything of any significant substance to section 46.[6]

4.15 When questioned in the hearing about the effect of the Government's section 46 amendments, Kathryn Edghill, competition lawyer and partner at Addisons Commercial lawyers sated that:

> From a legal perspective, there is very little change in the existing position other than to expressly clarify certain aspects which the courts have already held. The only major difference is the express reference to predatory pricing as a particular form of, if you like, the use or abuse of market power.

4.16 Further, Addisons lawyers noted in its submission that:

> in providing for the ability of the Court to consider the reasons for the pricing conduct, the amendments simply re-state the current position, which is that the Court must look at all of the factors surrounding the pricing in question in order to determine whether it is predatory, in breach of section 46.[7]

4.17 Labor Senators, therefore believe that the Government's amendments are merely cosmetic and simply add factors that the courts can already consider in considering cases of misuse of market power including predatory pricing.

4.18 The Bill also fails to implement important section 46 recommendations from the 2004 Senate Economics Committee's majority report on "The Effectiveness of the Trade Practices Act 1974 in Protecting Small Business". These include clarifying the concept of "taking advantage", clarifying the issue of recoupment and including financial power to be taken into account in determining a substantial degree of market power.

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[6] Addisons Commercial lawyers submission, p. 9.

[7] Ibid. p. 10.

Section 51AC – Unconscionable Conduct

The inadequacy of the Government's unconscionable conduct amendments

4.19 The Government makes minor amendments to section 51AC. It is difficult, in the Labor Senator's view, to see how these amendments provide any practical benefit to small business.

4.20 The amendment to add unilateral variation of contracts to the list of non-exhaustive a court may consider when determining unconscionable conduct adds nothing to the section as the courts can already take this into account. The Shopping Centre Council of Australia stated in its submission that:

> The insertion of section 51AC(3)(j) and (a)(j) serve to highlight a particular example of a matter suggestive of unconscionable conduct. Since this list of factors is non-exhaustive the Courts already could have regard to such a matter. [8]

4.21 Competition lawyer Kathryn Edghill, a partner at Addisons, stated in response to a question in the hearing about the additional of unilateral variation of contracts to the list of factors:

> I think that is a factor that is, in any event, taken into account frequently.

4.22 The Bill also fails to implement the Senate Economic Committee's 2004 majority report recommendation that the $3 million limit be abolished. The FTC in its submission notes:

> The FTC does not oppose the lifting of the threshold and indeed would wish it to be higher.[9]

4.23 Labor Senators believe that imposing a threshold is arbitrary and unconscionable conduct should be illegal regardless of the size of the transaction or the businesses involved.

4.24 The Government's Bill does not lower the extremely high threshold for small business to use the unconscionable conduct prohibition or address unfair contract terms. A number of submissions recommended that s51AC be amended to provide a definition of "unconscionable" conduct to lower the bar for access by small business. The FTC in its submission stated that:

> the FTC believes that section 51AC requires further significant strengthening and recommends to the Committee that that section be amended as follows:

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[8] Shopping Centre Council of Australia, submission, p. 2.

[9] FTC, submission, p. 5.

> • that the coverage of the section be extended to address conduct that is 'harsh, unfair or unconscionable; and
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> • that s51AC be amended to proscribe the following conduct:
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> • unilateral variation of contract or associated documents;
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> • the termination of contract by one party without just cause or due process (though it is not intended that the rights of parties to repudiate a contract be removed);
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> • the bringing into existence of documents or policies after the signing of the contract which are then binding and which can also be used to vary the original agreement or contract; and
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> • the presentation of 'take it or leave it' contracts or agreements.[10]

4.25 Labor Senators, therefore, believe that the Governments amendments to section 51AC are inadequate and offer little additional protection from unconscionable conduct to small businesses dealing with large business.

The Government's Bill neglects to address other urgent problems with the Trade Practices Act

4.26 A number of urgent and necessary reforms to the TPA are not included in this Bill. Many of the required reforms were identified and recommended in the 2004 Senate inquiry, however, the Government has chosen not to act on them, but rather present this inadequate Bill which represents a bare minimum of what is required to strengthen the TPA.

Creeping Acquisitions

4.27 S50 of the Act gives the ACCC power to disallow mergers or acquisitions if they will lead to an unacceptable degree of control of the market. The ACCC is currently not able to consider the impact of 'creeping acquisitions' on the national market when considering mergers.

4.28 Mr Hank Spier in his submission on behalf of the Independent Liquor Group notes that:

> There are other recommendations that the ILG would like to see become law and in particular some controls on "creeping acquisitions".[11]

4.29 Associate Professor Frank Zumbo noted in his submission that:

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[10] FTC submission pp6.

[11] Spier Consulting submission, pp1.

> Creeping acquisitions remain a problem as individually small scale acquisitions may not substantially lessen competition in breach of s 50 of the Trade Practices Act, but collectively they may substantially lessen competition over time and lead to high levels of market concentration to the detriment of competition and the consumer.[12]

4.30 Labor Senators believe that 'creeping acquisitions' should be acted on as a matter of urgency.

Difficulties for small business to obtain damages for anti-competitive conduct

4.31 The Federal Magistrates Court can hear certain matters under the TPA, most notably S51 cases. The Magistrate's Court cannot hear S46 matters, however. This means that small businesses wishing to bring an action under S46 must commence it in the much more expensive and cumbersome Federal Court.

4.32 Mr Hank Spier in his submission on behalf of the Independent Liquor Group notes that:

> ILG would like to see the TPA amended to make it much easier for victims of conduct in breach of the TPA be able to obtain compensation following successful ACCC action.[13]

4.33 Labor Senators agree that small business should be able to commence cases in the Federal Magistrates Court.

Criminal penalties for cartel conduct

4.34 The Dawson Committee of 2003 recommend the imposition of prison terms for individuals found to have engaged in serious cartel conduct. The Government announced in February 2005 that it would legislate for prison penalties. However, over two years later the Government has not legislated for prison terms and it is not included in this Bill.

4.35 The submission by David Lieberman and Associates Lawyers' and Mediators notes that:

> Rather than seek to amend s46 more would be done to improve competition and allow for fair trading by improving the law in relating to cartels (as has been proposed by the Treasurer).[14]

4.36 While Labor Senators do not agree that amending s46 would not improve the law, Labor Senators do agree that criminal penalties should be imposed for serious cartel conduct and calls on the Government to implement its February 2005 promise.

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[12] Associate Professor Frank Zumbo submission, p. 16.

[13] ILG submission, p. 1.

[14] David Lieberman and Associates submission, p. 2.

Conclusion

4.37 Labor Senators, while not opposing the Bill, do not support the Committee's recommendation that it be passed unamended. Labor Senators do not believe that the Government's Bill address problems with the competition provisions of the TPA. Labor Senators recommend that amendments to strengthen 46 and 51AC be made and that additional amendments to the TPA to introduce criminal penalties for serious cartel conduct.

Senator Ursula Stephens
ALP, New South Wales

Senator Ruth Webber
ALP, Western Australia

Senator Annette Hurley
ALP, South Australia