The Senate Standing Committee on Economics
Report on the Trade Practices Legislation Amendment Bill (No. 1) 2007
August 2007

Additional Remarks
Senator Andrew Murray: Australian Democrats

The *Trade Practices Legislation Amendment Bill (No. 1) 2007* Bill has two weaknesses – it is long overdue, and it does not go far enough.

The Bill has three strengths – it does not weaken the *Trade Practices Act 1974* (TPA); it strengthens the TPA in a number of ways; and, a number of provisions are not supported by big business and their advisers.

Taking the last point first: competition law seeks to prevent organisations from taking full advantage of their market power, where exercising that power is regarded as contrary to the broader public and national interest. The effect is therefore to restrain large corporations from behaviour they would otherwise engage in as a natural extension of their desire to profitably dominate markets.

Securing a better deal for smaller or disadvantaged competitors is therefore not in the best interests of bigger business, and they often strongly resist such changes. I am therefore somewhat comforted by the negative reaction of those representing big business to elements of this Bill. It does mean that smaller businesses can expect to benefit from the provisions of the Bill.

There is no excuse whatsoever for the delay in bringing this Bill to the Senate. For the duration of the Howard government, small business organisations, and a number of inquiries, have pointed to considerable weaknesses in the TPA. Even although the Government only responded positively to a number of the minority Government Senators' recommendations in the Senate 2004 report[1], the Coalition government could have saved numerous businesses from anti-competitive conduct, and even from being forced out of business, by at least passing those minority recommendations earlier.

This after all is a Government that has been known to write legislation in 24 hours, or that could specially recall Parliament to change one word in one piece of legislation (from 'a' to 'the' – readers, I kid you not), so putting up amendments to the TPA quickly is not beyond them. Which brings up the question of motive – just whose

[1] Senate Economics Reference Committee, *The effectiveness of the Trade Practices Act in protecting small business,* March 2004.

interests were served by such a delay? This whole saga does not reflect well on the Government.

The Bill does not go far enough. As an interesting aside, the Bill introduces a number of amendments which closely mirror those I have introduced and lost over the years, so it does finally accept concerns I have advanced over the years. But the Bill's real weakness is that it does not contain most of the recommendations in the 2004 report made by the Majority Senators (Labor and Democrats). I am aware that members of other political parties are supportive of those recommendations too.

It seems that only a change of government might see those Majority recommendations advanced.

In the Majority 2004 report, Recommendation 10 on secret tenancy terms, Recommendation 12 concerning creeping acquisitions, Recommendation 13 concerning divestiture, are particularly worthy.

What this bill does is propose amendments which reflect the Minority Coalition Senators' recommendations, which were not always in agreement with the majority position, and were not the strongest possible amendments to the Act that could be implemented.

Although the amendments which have been proposed are welcome they do not implement Recommendation 3 and 4.

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 an capacity to subsequently recoup the losses experienced as a result of that predatory pricing strategy*

Recoupment of losses is a matter which has been used in judicial interpretation to determine whether there is predatory pricing. It is not necessarily a helpful criterion when attempting to determine predatory pricing behaviour. This was pointed out in the original report.

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.

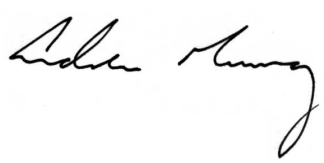
The majority of the committee saw 'substantial financial power (material and organisational assets) as being relevant but this was rejected by the Government Senators, so the amendment proposed in this bill reflects the Govt Senators minority view, not that of the majority.

The arguments for the proposed amendment are set out in the original report and remain valid to extending the interpretation.

The Committee recommended that s51AC (9) and (10) be repealed, but this legislation puts a cap on access to this provision, as recommended by the minority view. Again the argument for not limiting the threshold to $10m was stated in the original report, and supported by the majority of members.

The inclusion of the unilateral contracts amendment is welcome especially given that it is an amendment which I have proposed several times over the years.

The Australian Democrats support this Bill, but I will be moving a number of amendments in an attempt to further strengthen the TPA.



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