

## SENATE STANDING COMMITTEE ON ECONOMICS

### *Inquiry into the provisions of the Trade Practices Act*

## **Senator Barnaby Joyce's Dissenting Report**

### **OVERVIEW**

The current changes to the Trade Practices Act legislation, in regard to predatory pricing and unconscionable conduct, fall short of what is needed to ensure Australia has an effective *Trade Practices Act*.

This may be perceived by some as a generic statement but small business, I feel, will be unable to gather much of an advantage from where they currently are by the proposed changes. The proposed changes do not address the key problems which have been identified by small business and legal commentators in relation to the operation of s 46 and s 51AC of the *Trade Practices Act*.

Questions remain regarding the effectiveness of proposed changes regarding the concept of 'substantial market power' under s 46. In addition, the proposed changes do not clarify the s 46 concept of 'take advantage'. The proper interpretation of the concepts of 'substantial market power' and 'take advantage' are critical to the effective operation of s 46.

Currently, s 46 has fallen into disuse because of the narrow interpretation of these concepts by the High Court in the Boral and the Rural Press cases. The Australian Competition and Consumer Commission is on the public record as saying it has discontinued as number of s 46 cases as a direct result of the Boral case. Similarly, the ACCC has not taken any new cases to court since the Boral case. This lack of s 46 cases, following the Boral case, provides compelling evidence of the current ineffectiveness of s 46.

The issue of the 2003 Boral decision will still be the ultimate predeterminate of substantial market power and comments by legal commentators in the financial media seem to concur with this belief.

It is essential we maintain the liberty that is apparent for the Australian citizens ability to go into business. The litmus test of this freedom is the capacity of the individual to buy and sell product at a profit.

It has been very evident through the current media discussion that many in small business feel this liberty is being lost. In the delivery of low interest rates and low inflation, Government must also deliver the expectation that small business success is

limited only to your abilities and effort and not by the wishes of large business to put you out of business or into a continued precarious or threatened position. This aspiration must be prescribed in the legislation in a more definitive way than this current legislation envisages.

Competition in the market must be protected from large market players destroying small businesses via financial and pricing powers.

It is clearly apparent from the geographical differentiations of large business pricing policies that when competition exists, consumers benefit. But, when the bigger player manages to remove the smaller player from the an area, the consumer pays in the long run after a very short term active price discrimination to take that smaller player out of the market.

The short benefit of an intense below cost pricing strategy in a market does not justify the long term loss of competition.

## **RECOMMENDATIONS**

I endorse the amendment which I proposed as follows:

“A company that has substantial market share or substantial financial power must not supply or offer to supply goods or services for a sustained period at a price that is less than the relevant cost to the company of supplying such goods or services for the purpose of:

- (a) eliminating or substantially damaging a competitor of the company in that or any other market;
- (b) preventing the entry of a person into that or any other market;

or

- (c) deterring or preventing a person from engaging in competitive conduct in that or any other market.”

These amendments have been widely circulated throughout a number of major legal firms and the commentary I have read, except from Mr Poddar from the Business Council of Australia who, naturally enough, will reflect his peak industry body's request to protect the power of the large organisations, endorse the premise that this amendment is essential to deliver for small business.

In addition, the proposed changes did not address the following areas of concern to small business:

- (i) anti-competitive price discrimination which arises where small businesses are forced to pay either higher prices for products or higher rents to

- subsidise the lower prices or rents paid by large players to the detriment of competition and consumers;
- (ii) anti-competitive geographic price discrimination where consumers in a market with a lack of competition are charged higher prices to subsidise below cost pricing in another market to drive out competitors in that other market;
- (iii) a lack of definition for the concept of unconscionable conduct under 51AC of the *Trade Practices Act*.
- (iv) creeping acquisitions where competition is reduced over time by large players acquiring independents in a piecemeal fashion to avoid breaching s 50 of the *Trade Practices Act*.

## CONCLUSION

Until there is a general divestiture power under the *Trade Practices Act* in the same way as there is in the United States Anti-trust legislation, Australia's competition law regime will be lacking an essential element.

Obviously, to vote against the bill would be taken as an indication that one does not support the progression of small business at all.

I feel there will be nothing gained voting against the bill. However, I am disappointed it does not offer a substantial remedy to the predatory pricing and other issues discussed which are currently encountered by the small business operator in a shopping mall near you.