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Standing Committee on Economics

Trade Practices Legislation Amendment Bill (No. 1) 2007 [Provisions]

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Chapter 1

Introduction

Background

1.1 The Trade Practices Legislation Amendment Bill (No. 1) 2007 was introduced into the Senate on 20 June 2007. The following day, the Senate Selection of Bills Committee referred the provisions of the Bill to the Standing Committee on Economics for inquiry and report by 1 August 2007.[1]

1.2 The bill amends Part IV of the *Trade Practices Act 1974* (TPA) relating to the misuse of market power and Part IVA dealing with 'unconscionable conduct'. It implements the government's response to the March 2004 Senate Economics References Committee report on 'The effectiveness of the *Trade Practices Act 1974* in protecting small business'.

1.3 The bill makes changes to section 46 of the TPA to improve and clarify the operation of the provisions of the Act relating to the misuse of market power by corporations. The amendments relate to leveraging market power, coordinating market power and predatory pricing. Additionally, it ensures that the amendments are consistent with the relevant provisions in section XIB, which relate to the telecommunications industry, as well as to applicable State and Territory legislation.

1.4 The bill also amends section 51AC of the Act to extend and clarify the operation of the unconscionable conduct provisions and ensures that the changes apply in relation to financial products and services. Further, the bill provides for the creation of a second Deputy Chairperson for the ACCC who is experienced in small business matters.

Conduct of the inquiry

1.5 The committee advertised the inquiry in the *Australian* newspaper on 27 June 2007 and invited written submissions by 9 July 2007. Details of the inquiry were placed on the committee's website. The committee also wrote to a number of organisations and stakeholder groups inviting written submissions.

1.6 The committee received 27 submissions. These are listed in Appendix 1. A public hearing was held in Melbourne on 27 July 2007. Witnesses who presented evidence at this hearing are listed in Appendix 2.

1.7 The Committee thanks those who participated in this inquiry.

Structure of the report

1.8 Chapter 2 of the report provides background to the bill, including the Senate's 2004 report, the government's response and the government's July 2004 statement *Committed to Small Business*. Chapter 3 provides a summary of the bill's three schedules. Chapter 4 presents the evidence made in submissions and at the public hearing.

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1 Selection of Bills Committee, *Report No. 10 of 2007*, dated 21 June 2007.

Chapter 2

Background to the bill

The threshold test, predatory pricing and leveraged and coordinated power

2.1 In its original form, section 46 of the *Trade Practices Act 1974* prohibited a firm that was in a position to 'control' a market from taking advantage of its market power. There was concern, however, that this provision only caught conduct by a monopolist or a monopsonist, and not corporations with a sufficient degree of market power to seriously harm competition.[1] Accordingly, a 1986 amendment established the lower threshold test of having 'a substantial degree of power in a market'. In addition, the Australian Competition and Consumer Commission (ACCC) must prove that the company has taken advantage of that power and that it did so with the 'purpose' of damaging competitors.

2.2 In February 2003, the High Court delivered its finding on the *Boral Besser Masonry v ACCC* case.[2] This was the first opportunity for the High Court to consider the issue of predatory pricing under section 46. The ACCC claimed that Boral was guilty of predatory pricing—using its market power to drop its prices below cost to protect or advance its market share. It argued that one of Boral's competitors had left the market as a result. The High Court disagreed, noting that Boral did not have the market power to recoup the losses it sustained when it dropped its prices.

2.3 In April 2003, the Review of the *Competition Provisions of the Trade Practices Act* ('the Dawson Report') inquired into, among other matters, the misuse of market power provisions in section 46 of the Act. The ACCC highlighted the difficulty of demonstrating a company's anti-competitive purpose, and proposed that the section take into account the anti-competitive effect of company behaviour.[3] However, the Dawson Report argued against amending section 46. It noted the High Court's decision in the *Boral* case and recommended that interpretation remain a

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1 Explanatory Memorandum (EM), p. 7.

2 [2003] HCA 5

3 Australian Competition and Consumer Commission, 'Dawson Report—Preliminary response: criminal sanctions major step forward for competition policy', Press Release, no. 74, 16 April 2003, http://www.accc.gov.au/content/index.phtml/itemId/347733 (accessed 10 July 2007).

matter for the High Court. The government agreed, acknowledging the 'extensive consideration' given to the section in past reviews.[4]

2.4 There have been three important court cases that have defined the interpretation of 'take advantage' in section 46. In 2001, the High Court found that Melway Publishing Ltd had not taken advantage of its market power because the conduct in question had preceded the company's acquisition of market power.[5] In 2003, the Federal Court ruled in *ACCC v Safeway Stores* that the intent of the conduct in question was important to whether it has taken advantage of its market power.[6] It found that Safeway had not intended to act to take advantage of its market power, and therefore was found to be not in breach of section 46.

2.5 In December 2003, the High Court delivered its finding on *Rural Press v ACCC*. The majority decision held that one test of whether a company had taken advantage of its market power was whether it could have acted in the way it did in the absence of market power.[7] The ACCC argued that this finding increased the section 46 threshold—if a firm *could* engage in the conduct in the absence of having market power, it will be held not to have taken advantage of its market power.[8] The case was also significant for the High Court's ruling that Rural Press was not in breach of section 46 because it relied on its 'economic and financial power', not its market power.

The Senate Economics References Committee Report—section 46

2.6 In March 2004, the Senate Economics References Committee reported on the effectiveness of the *Trade Practices Act 1974*.[9] Many witnesses and submitters to the inquiry criticised the High Court's decision on *Boral*, deducing that a successful prosecution under section 46 would only be possible if the corporation was near dominant in the market.[10] The ACCC argued not that the Courts had got the *Boral* decision wrong, but that the Parliament's 1986 amendment of 'a substantial degree of

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4 The Hon. Peter Costello, 'Commonwealth Government response to the review of the competition provisions of the Trade Practices Act 1974', Commonwealth of Australia, http://www.treasurer.gov.au/tsr/content/publications/TPAResponse.asp (accessed 10 July 2007).

5 *Melway Publishing Ltd v Robert Hicks Pty Ltd* (2001)

6 *ACCC v Safeway Stores* (2003)

7 Senate Economics References Committee, *The effectiveness of the Trade Practices Act in protecting small business*, p. 12.

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

9 Senate Economics References Committee, *The effectiveness of the Trade Practices Act in protecting small business*, March 2004.

10 Senate Economics References Committee, *The effectiveness of the Trade Practices Act in protecting small business*, p. xi.

power' was unclear and that the original policy intent of the provision had not been realised.

2.7 The Senate committee agreed and adopted many of the recommendations suggested by the ACCC. On the question of the section 46(1) threshold test, the committee supported amendments based on the ACCC's suggestions. It proposed that in establishing whether a company has 'a substantial degree of power in the market':

- the substantial market power threshold does not require a corporation to have an absolute freedom from constraint;
- more than one corporation can have a substantial degree of power in a market; and
- evidence of a corporation's behaviour in the market is relevant to a determination of substantial market power.[11]

2.8 The Senate committee also supported the ACCC's suggestion that the Act should outline the elements of 'take advantage' for the purposes in section 46(1). Specifically, the Act should clarify whether:

- the conduct of the corporation is materially facilitated by its substantial degree of market power;
- the corporation engages in the conduct in reliance upon its substantial degree of market power;
- the corporation would be likely to engage in the conduct if it lacked a substantial degree of market power; and
- the conduct of the corporation is otherwise related to its substantial degree of market power.[12]

2.9 On the question of predatory pricing, the committee's majority report recommended that the Act be amended to state that it is not necessary to demonstrate a capacity to subsequently recoup the losses experienced as a result of a predatory pricing strategy.[13] Government Senators' disagreed. Their dissenting report stated:

> The issue of recoupment is important, in particular because it often provides the best test of whether price-cutting is a genuine exercise in competition or has a predatory intent. (A firm which is genuinely competing on price does not plan to recoup its foregone revenue from the elimination of its competitor; a firm which is engaged in a predatory pricing strategy almost

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11 Senate Economics References Committee, *The effectiveness of the Trade Practices Act in protecting small business*, p. 11.

12 Senate Economics References Committee, *The effectiveness of the Trade Practices Act in protecting small business*, p. 14.

13 Senate Economics References Committee, *The effectiveness of the Trade Practices Act 1974 in protecting small business*, pp xiii and 19.

> invariably will.) Rather, Government Senators consider that recoupment should be one of the criteria to which the court may (and ordinarily will) have regard in determining whether price-lowering behaviour is predatory.[14]

2.10 The majority report made two recommendations relating to factors that a court may have regard to in determining whether or not a corporation has a substantial degree of power in a market for the purpose of section 46(1). The first is 'the capacity of the corporation to sell a good or service below its variable cost'.[15] The second is whether the corporation has substantial 'financial' power (material and organisational assets).[16] Government Senators agreed on the matter of 'variable cost' but disagreed that the courts may have regard to 'financial power'.[17]

2.11 The committee's majority report also made two recommendations relating to the context of the threshold test. It recommended that the Act be amended to state that a corporation with a substantial degree of power in a market must not take advantage of that power in its own market, or leverage this power from one market to another.[18] The committee also recommended that a company may be considered to have obtained a substantial degree of market power by its ability to act in concert with another company.[19] This is referred to as coordinated market power.

The government's response to the Senate committee report—section 46

2.12 The government's response rejected the majority report's (and the ACCC's) recommendations to clarify the definition of 'take advantage' and insert a reference to substantial 'financial' power. On predatory pricing, the government favoured the minority report's position:

> The Government…considers that section 46 should be amended so that a court may consider whether a corporation has a reasonable prospect or

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14 Senate Economics References Committee, *The effectiveness of the Trade Practices Act 1974 in protecting small business*, p. 87.

15 Senate Economics References Committee, *The effectiveness of the Trade Practices Act 1974 in protecting small business*, p. xiii.

16 The committee recommended that '"financial power" should be defined in terms of access to financial, technical and business resources'. Recommendation 4, see page xiv.

17 Senate Economics References Committee, *The effectiveness of the Trade Practices Act 1974 in protecting small business*, p. 88.

18 These recommendations were based on the majority judgement in *Rural Press v ACCC*.

19 Senate Economics References Committee, *The effectiveness of the Trade Practices Act 1974 in protecting small business*, p. xiv.

> expectation of recoupment as a relevant factor when assessing whether a corporation has misused its market power.[20]

2.13 The government accepted the committee's recommendation that section 46 should proscribe the leveraging of substantial market power from one market into another. It also agreed that in assessing whether a corporation has 'a substantial degree of power in a market', a court may take account of any market power the corporation has that results from contracts arrangements or understandings with others.[21]

2.14 The Trade Practices Legislation Amendment Bill (No. 1) 2007 implements amendments on predatory pricing, leveraging market power and coordinating market power (see Chapter 3).

Section 51AC and unconscionable conduct

2.15 The bill's other main component relates to Section 51AC of the *Trade Practices Act 1974*, which prohibits corporations from engaging in 'unconscionable conduct' in their transactions. The section was introduced as a consequence of a 1997 report by the House of Representatives Committee on Industry, Science and Technology, which noted that information asymmetries in the bargaining power of parties was a critical factor that allowed firms to engage in unfair conduct.[22]

2.16 Section 51AC was introduced in 1998 specifically to protect small business. It establishes legal remedies for smaller businesses when they are subjected to unconscionable conduct. This redress is limited by subsections 51AC(1) and 51AC(2), which excludes publicly listed companies, and subsections 51AC(9) and 51AC(10), which excludes dealings in excess of $3 million. The factors that may constitute 'unconscionable conduct' are listed under sections 51AC(3)—relating to suppliers—and 51AC(4)—relating to acquirers. These factors include any relative imbalance in bargaining power and the ability of the smaller business to understand the terms of the transaction.[23]

2.17 Since 1998, the ACCC has brought only 15 cases before the courts relating to unconscionable conduct. In a July 2007 speech, Mr Graeme Samuel, Chairman of the

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20 Australian Government response to the Senate inquiry into the effectiveness of the Trade Practices Act 1974 in protecting small business, p. 7, http://www.treasurer.gov.au/tsr/content/publications/pub_downloads/TPA_small_business.pdf (accessed 10 July 2007).

21 Australian Government response to the Senate inquiry into the effectiveness of the Trade Practices Act 1974 in protecting small business, p. 8, http://www.treasurer.gov.au/tsr/content/publications/pub_downloads/TPA_small_business.pdf (accessed 10 July 2007).

22 Explanatory Memorandum, p. 8.

23 Explanatory Memorandum, p. 8.

ACCC, noted that proving cases of unconscionable conduct was far more difficult than cases of misleading and deceptive conduct. He added:

> As a result there has been a tendency for us to say, 'let's just tackle the misleading and deceptive conduct rather than take the more difficult route of going after the unconscionable conduct elements of a case'. While this approach often works in shutting down the conduct, it is sometimes a bit too easy for our investigators to let the unconscionable behaviour slide. Well, no more. We are changing our focus to take a much more aggressive attitude to pursing unconscionable conduct, and this means pushing to get more matters before the courts. By doing so we will not only test the law, we will firm up a better definition of what constitutes unconscionable conduct, thereby providing more guidance to businesses.[24]

The Senate Economics References Committee report—section 51AC

2.18 The Senate Economics References Committee report recommended that subsections 51AC(3) and 51AC(4) be amended to include a provision where the supplier or acquirer imposes or utilises contract terms allowing the unilateral variation of a contract.[25] This followed the ACCC's evidence that 'unfettered unilateral variation clauses be added to the list of factors to which the court may have regard'. The committee acknowledged the concerns of some organisations, such as the National Farmers' Federation, which argued that a unilateral variation of standard form contracts may be competitive and necessary.[26] However, it emphasised that the recommendation serves to discourage, rather than proscribe, the unilateral variation of contracts.[27]

2.19 The Senate Committee report recommended that subsections 51AC(9) and 51AC(10) of the Act be repealed. It argued that the removal of the thresholds will not reduce the protection for small businesses, and will enhance protection for businesses involved in transactions over $3 million.[28] Several submitters, including the ACCC, had put the case that the thresholds in these subsections were inappropriate. The

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24 Mr Graeme Samuel, 'Competition and fair trading: a fair go for small business', *Speech*, National Small Business Summit, 3 July 2007, p. 3.

25 Senate Economics References Committee, *The effectiveness of the Trade Practices Act 1974 in protecting small business*, p. 40. See also Senate Standing Committee on Rural and Regional Affairs and Transport, *Operation of the wine-making industry*, October 2005, pgs. xi and 47, Recommendation 2.

26 Senate Economics References Committee, *The effectiveness of the Trade Practices Act 1974 in protecting small business*, p. 38.

27 Senate Economics References Committee, *The effectiveness of the Trade Practices Act 1974 in protecting small business*, p. 40.

28 Senate Economics References Committee, *The effectiveness of the Trade Practices Act 1974 in protecting small business*, p. 37.

ACCC argued that the $3 million transaction threshold was 'a sudden cut-off'. It added:

> …the context of the section is dealing with unconscionable conduct between larger businesses that are in a superior bargaining position compared to businesses that may be in a lesser bargaining position.[29]

The government's response to the Senate committee report—section 51AC

2.20 The government's response was that removal of the cap 'would broaden the focus of the provision in a way unintended by the government'. It did agree to extend the $3 million threshold to $10 million, as recommended by government Senators.[30] The government also accepted the majority report's recommendation on the unilateral variation of contracts (sections 51AC(3) and 51AC(4)). It noted that while this conduct may be an indication that unconscionable conduct has occurred in the bargaining process, it may also indicate healthy competition. The bill implements these amendments on unconscionable conduct (see Chapter 3).

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29 Transcript of Evidence, Mr Graeme Samuel, 7 November 2003, p. 16.

30 Government Senators' Report, *The effectiveness of the Trade Practices Act 1974 in protecting small business,* March 2004, p. 88.

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

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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

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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

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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.

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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.

Chapter 4

Issues relating to subsections 46(1), 46(3A–3C), 46(4A) & 51AC

4.1 This chapter examines the three issues on which the committee received the majority of comment in relation to the bill—the threshold test and the issue of predatory pricing in section 46, and the proposed amendments to section 51AC on 'unconscionable conduct'. The bill's section 46 amendments in particular elicited a range of support and criticism from submitters and witnesses. The committee recognises that these viewpoints are part of the wider polemic in competition law concerning the balance between promoting competition through the market and regulating anti-competitive behaviour.

The threshold test (subsections 46(1), 46(3A), 46(3B) and 46(3C))

4.2 In its submission to the inquiry, the Law Council of Australia (LCA) supported the bill's amendment to subsection 46(1) for removing any doubt that substantial market power and the conduct which takes advantage of it need not occur in the same market.[1] The LCA also supported the amendments to sections 46(3A), (3B) and (3C), although it expressed concern that past judicial interpretation of the word 'control' may undermine new subsection 46(3C).

4.3 Boral Limited, the defendant in the 2003 High Court test case on predatory pricing, agreed with the Law Council's position on the threshold test. Its submission acknowledged that the government is not amending the basic structure of section 46 and that the bill preserves the prerequisite for a firm to have 'market power'. It argued that this threshold 'retains necessary tension between the underlying desire to promote competition and the need to regulate anti-competitive behaviour'.[2]

4.4 The National Farmers' Federation (NFF) supported the bill's measures to broaden the definition of market power. It argued that strengthening the provisions of section 46 was crucial to retaining competition and choice in fuel distribution, retailing and transport suppliers. More pointedly, the NFF's submission stated that '…it is vital that situations such as that highlighted by the Boral case are not allowed to occur into the future'.3 It noted that the High Court had found that Boral Masonry Limited did not have substantial market power in the wider market for walling and paving products, rather than the market for concrete masonry products in Melbourne.

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1 Law Council of Australia, *Submission 13*, p. 4. The submission was written by a member of the Trade Practices Committee.

2 Boral Limited, *Submission 26*, p. 1.

3 National Farmers' Federation, *Submission 8*, p. 5.

4.5 A contrary view was put by the Business Council of Australia (BCA). The BCA emphasised that 'it is not possible to enshrine every judicial decision into legislation' and argued that the bill's amendments to section 46 'are not required and would indeed be detrimental'. In particular, the BCA argued that the proposed amendment to subsection 46(3C) is overly prescriptive and that the reference to 'absolute' freedom from constraint is ambiguous and may even lower the threshold test. It also claimed that the inclusion of the specific constraints mentioned in the new subsection:

> …risks ascribing those particular factors an importance over and above other important considerations…which are relevant to the assessment of substantial market power – such as the level of imports and the height of barriers to entry.[4]

Ms Melinda Cilento, Deputy Chief Executive of the BCA, told the committee that codifying these factors creates uncertainty which may have the unintended effect of lowering the section 46 threshold. She argued that the TPA in its current form is effective.[5]

4.6 The BCA argued that in the absence of a body of case law which interprets subsection 46(3C), there is a risk that the subsection will be overly prescriptive. It requested that the government clarify in the EM that the intention of the proposed changes is not to lower the threshold of what constitutes a substantial degree of power in the market. In addition, it suggested subsection 46(3B) contain the following clarification:

> Subsections (3), (3A) **and (3C)** do not, by implication, limit the matters to which the Court may have regard in determining, for the purposes of this section, the degree of power that a body corporate or bodies corporate has or have in a market.[6]

4.7 The LCA also noted that the addition of subsections 46(3C)(b)(i) and (ii):

> …may have the limiting effect of 'elevating' those particular constraints above other factors which also form part of an assessment of substantial market power, such as the height of barriers to entry. We suggest that this deficiency be addressed.[7]

4.8 The committee notes the concerns of the BCA and the LCA. It agrees that section 46(3C) should not limit the matters to which courts may have regard in determining a corporation's market power. However, the courts currently consider other factors—such as recoupment—which are not explicitly mentioned in section 46

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4 Business Council of Australia, *Submission 11*, p. 3. See also Mr Dave Poddar, *Committee Hansard*, 27 July 2007, p. 15.

5 Ms Melinda Cilento, *Committee Hansard*, 27 July 2007, p. 16.

6 Emphasis added. Business Council of Australia, *Submission 11*, p. 4.

7 Law Council of Australia, *Submission 13*, p. 5.

of the Act. The committee suggests that the government further consider the BCA's proposed clarification to the EM regarding the intention of new subsection 46(3C).

Predatory pricing (subsection 46(4A))

4.9 The committee received several submissions commenting on new subsection 46(4A). Some supported this amendment but had concerns about the absence of a method to determine either the price or cost for the goods and services (see paragraph 3.7). Other submitters viewed the subsection as unnecessary, and even counterproductive. The underlying theme of submitters' comment—whether they favoured or opposed the subsection—was the difficulty distinguishing between predatory pricing and strong competition.[8]

4.10 Woolworths Limited, for example, supported the inclusion of subsection 46(4A) provided that key competition principles are preserved. One of these principles is the ability of some companies to capitalise on their lower net variable costs and operational efficiencies. Companies selling at prices that reflect their lower cost structure should not be subject to the predatory pricing clause. Woolworths also argued that this clause should not apply to a company that reduces its prices to match those of a competitor, or to a company that reduces its prices in some locations to meet localised competition.[9] As for the interpretation of a 'sustained period', Woolworths emphasised that the courts must allow 'normal competitive activity including discounting, clearance sales and other stock clearance activities'.[10]

4.11 The Law Council's submission broadly supported the new subsection, but criticised the vagueness of the term 'relevant cost'. It argued that this oversight 'has the potential to lead to protracted litigation and raises the prospect…that the amendments…will lead to increased regulatory costs…'[11] The Law Council did not believe that the bill—in its present form—needed to include any reference to recoupment of costs. It also stated that sustained below-cost pricing ought not to be determinative of misuse of market power, but a consideration 'in the context of all of the surrounding facts and circumstances'.[12] The Council did suggest that the new subsection 46(4A) should broaden the definition of predatory pricing conduct by inserting the words 'offering to supply'.[13]

4.12 The Fair Trading Coalition's (FTC) submission to the committee also welcomed the insertion of subsection 46(4A). It supported the exclusion of a reference

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8 See also David Liebermann and Associates, *Submission 6*.

9 Woolworths Limited, *Submission 10*, p. 2.

10 Woolworths Limited, *Submission 10*, p. 3.

11 Law Council of Australia, *Submission 13*, pp 5–6.

12 Law Council of Australia, *Submission 13*, p. 6.

13 Law Council of Australia, *Submission 13*, p. 7.

to recoupment, which it believed would be a barrier to a successful 'misuse of market power' case.[14] However, it noted that a number of the FTC's members supported strengthening this provision. The FTC submission did not elaborate on how this subsection might be strengthened.

4.13 The committee did receive a recommendation on this issue from the Pharmacy Guild of Australia, a member of the FTC. The Guild praised the inclusion of a clause on predatory pricing, but proposed an alternative wording—'supplying goods or services for a sustained period at a price that was less than avoidable cost to the corporation of supplying such goods or services'.[15] The Guild also suggested that after subsection 46(4A), the term 'avoidable cost' is defined:

> For the purposes of Subsection 46(4A), a corporation is taken to have priced goods or services below avoidable cost if the revenues it obtains, or could reasonably expect to obtain, from the supply of those goods or services is less than the costs it could have saved, or could reasonably have expected to save, had it not supplied those goods or services.[16]

Criticism of new subsection 46(4A)

4.14 The committee received various critiques of the proposed subsection 46(4A). These ranged from claims that the section is redundant, to fears that less competition and higher prices will result, to concern over the high threshold of 'substantial market power'.

4.15 Associate Professor Frank Zumbo, appearing in a private capacity, argued that the proposed subsection 46(4A) is 'cosmetic'. He claimed that courts already have regard to the question of sustained below cost pricing and the reasons for such pricing, and the amendment therefore 'does not in any way alter the current judicial position regarding predatory pricing'.[17] Associate Professor Zumbo told the committee that the bill needed to clarify the threshold test of 'substantial market power', which at present was preventing the ACCC from bringing section 46 cases to court.[18] He believed that the Act needed greater definition to establish that a corporation may meet the threshold even though it does not have the ability to raise its prices without losing business to rivals.[19]

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14 Fair Trading Coalition, *Submission 21*, p. 4.

15 Pharmacy Guild of Australia, *Submission 20*, p. 4.

16 Pharmacy Guild of Australia, *Submission 20*, p. 4.

17 Associate Professor Frank Zumbo, *Submission 25*, p. 27. See also *Committee Hansard*, 27 July 2007.

18 *Committee Hansard*, 27 July 2007, p. 5. Associate Professor Zumbo told the committee that the fact that the ACCC had not brought a section 46 case to court since *Boral* suggested that the section was not working as it should.

19 *Committee Hansard*, 27 July 2007, p. 7. Associate Professor Zumbo noted that this amendment would be contrary to the High Court's *Boral* decision.

4.16 The law firm, Addisons, identified that the problem with predatory pricing 'lies…in determining when, in fact pricing crosses the line between legitimate, but hard or aggressive competition and becomes illegitimate and predatory conduct'.[20] It argued that with or without the new subsection, it is difficult to successfully prosecute a case of predatory pricing under the TPA. Unlike Associate Professor Zumbo, Addisons viewed the lack of successful predatory pricing cases as proof that the law was working as it should—to protect competition. This was also the judgement of Justices Gleeson and Callinan in *Boral*, which Addisons' submission cited at length.[21]

4.17 The majority judgement in *Boral* observed that the TPA in its current form does not spell out the concepts that it seeks to uphold. Ms Kathryn Edghill, a partner at Addisons, told the committee that this was one of the strengths of the section.[22] Addisons' submission argued that the bill threatened this flexibility, particularly its reference to 'relevant cost'.[23] It noted that a contradiction may arise where competition law prohibits information sharing among competitors, and yet an allegation under the proposed section 46(4A) can only be established by actual knowledge of a competitor's costs. Further, the submission argued that where the ACCC uses its powers under section 155 of the TPA to investigate a company, it is unlikely that the company will have analysed its costs on a variable basis to the extent that may be necessary to establish or defend a claim of predatory pricing. Given this difficulty, Addisons raised the possibility that a section 155 notice may become a tool for companies seeking to damage their cost-cutting competitors.[24]

4.18 The Australian National Retailers Association (ANRA) argued in its submission that new subsection 46(4) on predatory pricing is unnecessary and liable to result in increased uncertainty and more litigation. It also foreshadowed the possibility of higher prices as businesses 'become fearful of reducing prices lest they become embroiled in a predatory pricing investigation'.[25] ANRA maintained that the current Act ably protects businesses from predatory pricing conduct, and that the proposed amendments codify the courts' current interpretation. Moreover, it argued that there are many legitimate factors that impact on a company's ability to price at low levels, which should not always be visible to competitors. These are the 'operational efficiencies' referred to by Woolworths, including the cost of rent, labour and efficiencies from economies of scale.[26]

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20 Addisons, *Submission 23*, p. 6.

21 See Addisons, *Submission 23*, pp 7–8.

22 Ms Kathryn Edghill, *Committee Hansard*, 27 July 2007, p. 27.

23 Addisons, *Submission 23*, p. 9.

24 Addisons, *Submission 23*, p. 11.

25 Australian National Retailers Association, *Submission 16*, p. 18. Mrs Margy Osmond, *Committee Hansard*, 27 July 2007, p. 34.

26 Australian National Retailers Association, *Submission 16*, p. 19.

4.19 Another perspective was offered by the Southern Sydney Retailers Association. Its submission argued that section 46 in relation to predatory pricing 'is currently written back to front'. It explained:

> A successful Predatory Pricing…strategy does not require market power when the Predator ***commences*** to engage in Predatory conduct. The only thing needed by the predator ***at the start*** is deeper pockets than that of the competition they are attempting to drive to ruin and bankruptcy or the ability to leverage profits from non-competitive territory.[27]

Unconscionable conduct (section 51AC)

4.20 Several submitters supported the bill's amendments to section 51AC. The NFF, for example, welcomed the greater scrutiny of contract clauses. It argued that many contract clauses in the past have allowed buyers to 'opt out' of their contractual obligations with farmers. The NFF also supported the increase in the transaction threshold from $3 million to $10 million. It argued that many farmers have high turnovers and small margins, often with an increasingly limited number of buyers for their produce. As a consequence, many farmers have increased their exposure to the $3 million threshold.[28]

4.21 Associate Professor Zumbo observed that the test of unconscionable conduct is difficult to satisfy because it is not clear. He suggested that the current interpretation is too restrictive and could be remedied if the following non-exhaustive definition of unconscionable conduct was included under section 51AC:

> …any action in relation to a contract or to the terms of a contract that is unfair, unreasonable, harsh or oppressive, or is contrary to the concepts of fair dealing, fair-trading, fair play, good faith and good conscience.[29]

4.22 The committee does not support this proposal. It reiterates the position put in both the majority and minority March 2004 Senate reports which rejected any rewriting of definitions in section 51AC. The Government Senators' report put the argument in the following terms:

> Government Senators welcome the fact that the Majority Report makes no recommendation for the introduction of vague new statutory language into s.51AC ('harsh', 'unfair' etc.). It is our belief that the consequence of doing so would make the meaning of the section so open to a variety of different interpretations that it would be inimical to the development of a coherent and relatively clear body of law. Furthermore, the transactional uncertainty which the introduction of such language would produce would have

27 Southern Sydney Retailers Association, *Submission 15*, p. 2.

28 National Farmers' Federation, *Submission 8*, p. 7.

29 Associate Professor Frank Zumbo, *Submission 5*, pp 34–35.

> undesirable consequences for commerce, the social cost of which is difficult to assess.[30]

4.23 On the proposal to increase the threshold for unconscionable conduct, Associate Professor Zumbo argued that the monetary level is arbitrary and 'may not be enough to cover all small businesses'. His preference was that the threshold be removed altogether such that all businesses are covered by section 51AC. A second-best option was to increase the level of the threshold beyond $10 million.[31]

4.24 The committee also disagrees with Associate Professor Zumbo's proposal on the threshold. It supports the bill's amendment because it retains the protection offered by section 51AC for smaller businesses. Abolishing the threshold would allow a wider array of businesses to inappropriately use section 51AC for their strategic advantage.[32] This was not the Parliament's intention when the section was introduced in 1998.

Treasury's view of the bill

4.25 Ms H. K. Holdaway, Policy Manager of Treasury's Competition Framework Unit, told the committee that the bill represents 'very careful' consideration of the recommendations made in the March 2004 Senate Economics Committee report. She argued that the bill achieves the fine balance between protecting business from anti-competitive conduct while ensuring that consumers enjoy the benefits of competition.[33] The amendments help to clarify various issues without limiting the factors that courts can take into account in assessing whether the section 46 threshold has been met. Ms Holdaway also told the committee that the term 'relevant cost' allowed greater flexibility for the courts than terms such as 'variable cost'. Further, she noted that in the government's view, there was 'a reasonable level of understanding' as to the term 'take advantage'.[34] Accordingly, the bill proposes no amendment on this issue.

Conclusion

4.26 The committee supports the bill in its current form. Several submitters to this inquiry have noted that it provides greater clarity for the courts in relation to both the threshold test for the misuse of market power and predatory pricing in section 46. It also extends courts' capacity under the terms of section 51AC to protect a greater range of transactions entered into by small businesses. The creation of a second

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30 Senate Economics References Committee, *The effectiveness of the Trade Practices Act 1974 in protecting small business*, Government Senators' report, March 2004, p. 85.

31 Associate Professor Frank Zumbo, *Submission 5*, p. 34.

32 Explanatory Memorandum, p. 20.

33 Ms H. K. Holdaway, *Committee Hansard*, 27 July 2007, p. 39.

34 Ms H. K. Holdaway, *Committee Hansard*, 27 July 2007, p. 40.

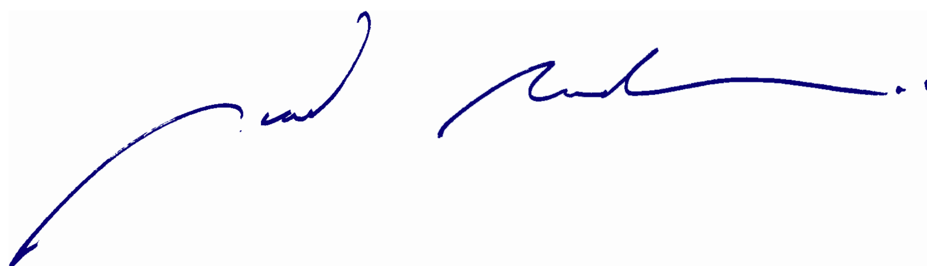
Deputy Chairperson for the ACCC is an important initiative and will elevate the status of, and attention to, small business issues within the Commission.

4.27 The committee emphasises that the bill implements many of the recommendations of a thorough and considered inquiry process into the *Trade Practices Act 1974*. This process revealed public dissatisfaction with the courts' interpretation of the 'misuse of market power' provisions. The bill's amendments on the threshold test were recommended by the 2004 Senate Economics Committee's majority and minority reports, and endorsed by the ACCC. The ACCC remains strongly supportive of these amendments.[35] On predatory pricing, the bill followed the Senate report's recommendation to include reference to a company's capacity to sell below cost. On the issue of unconscionable conduct, the bill implements the Senate report's recommendation on the unilateral variation of contracts and Government Senators' recommendation to increase the monetary threshold to $10 million.

4.28 The committee believes the bill's amendments are important to state expressly the legal principles that have been established by the courts. It is immaterial that some of the amendments permit courts to consider factors they already have the power to consider. The committee also rejects claims that the bill's amendments will create uncertainty as to the operation of the Act. On the contrary, sections 46(3A), 46(4A) and 51AC(3)(j) and 51AC(4)(j) will draw courts' attention to potential areas of contravention. The bill makes clear that the amendments are not included to elevate the importance of these factors over others. Rather, they are included to clarify and to guide, and the courts will continue to rule according the facts and circumstances of the individual case in question.

Recommendation 1

4.29 The committee recommends that the bill be passed.



Senator the Hon Michael Ronaldson
Chair

35 See Graeme Samuel, 'Competition and fair trading: a fair go for small business', National Small Business Summit, 3 July 2007, http://www.accc.gov.au/content/item.phtml?itemId=791291&nodeId=e13ac2c93b89ec9869b59f8d26e4b475&fn=20070703_Small%20Business%20Summit.pdf (accessed 23 July 2007).

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

• that s51AC be amended to proscribe the following conduct:

• unilateral variation of contract or associated documents;

• 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);

• 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

• 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

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.

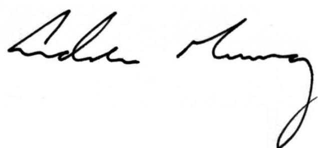
The majority of the committee saw 'substantial financial power (material and organisational assets) as being relevant but this was rejected by the Government Senators, so the amendment proposed in this bill reflects the Govt Senators minority view, not that of the majority.

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.



Senator Andrew Murray

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.

FAMILY FIRST
Additional Comments

Provisions of the Trade Practices Legislation Amendment Bill (No.1) 2007

FAMILY FIRST is convinced that the *Trade Practices Act* needs to be strengthened to restore fair trading and competition to Australian markets. There is a question as to whether the Government's proposed changes are adequate.

FAMILY FIRST introduced its *Trade Practices Amendment (Predatory Pricing) Bill 2007* because of a concern that anti-competitive conduct like predatory pricing can drive small businesses out of the market and that small businesses are particularly vulnerable because of their limited resources.

Fair competition will help to ensure the lowest prices for families.

Small business has been waiting for the Government's *Trade Practices Legislation Amendment Bill (No.1) 2007* for more than three years since the Senate Economics References Committee recommended action.

The Government's *Trade Practices Legislation Amendment Bill (No.1) 2007* has support from many, but not all small businesses. There is also concern and reluctant support from many groups representing big businesses and those involved in trade practices law.

The Fair Trading Coalition representing 30 small business member groups states that, while some of its members want section 46 strengthened further, it:

> … supports amendments to the *Trade Practices Act* which seek to strengthen and clarify the operation of sections 46 and 51AC [and that] … predatory behaviour by large businesses is a matter of significant concern to the Members of the Fair Trading Coalition and the FTC supports the introduction of specific measures into the *Trade Practices Act* to address predatory, and in particular predatory pricing, behaviour.[2]

In addition, the Coalition suggested that an important issue that must be addressed is "creeping acquisitions", where markets become highly concentrated not by one-off large purchases, but by small purchases shop by shop that do not attract the attention of government regulators.[3]

2 Submission 21 (Fair Trading Coalition), page i.

3 Submission 21 (Fair Trading Coalition), page ii, iii.

A number of significant small business groups such as the Council of Small Business of Australia (COSBOA) and the National Association of Retail Grocers of Australia (NARGA) did not make submissions to the inquiry, but COSBOA and NARGA have stated their support for the Government's bill in media releases.[4]

COSBOA and NARGA have also indicated they want the Government to go further with reforms than the current bill.[5]

Not all groups or individuals representing small businesses support the Government's bill. The Southern Sydney Retailers Association declared the amendments "meaningless"[6] while University of New South Wales Associate Professor Frank Zumbo stated that he did not see any merit in the Government's bill.[7]

Professor Zumbo argued the *Trade Practices Act* needed to be amended because it does not include definitions of 'substantial market power', nor of 'take advantage', but the Government's bill does not do this:

> Section 46 is intended to stop firms with substantial market power from taking advantage of that power for an anticompetitive purpose. In order for there to be a breach of section 46, the firm must have substantial market power as defined by the courts or the legislation, if that is appropriate.
>
> As a result of a series of High Court decisions a firm will not have substantial market power unless it has the power to raise prices without losing business to rivals. This test—the ability to raise prices without losing business to rivals—has become the key test for substantial market power. It is highly restrictive, as few, if any, firms would have the ability to raise prices without losing business to rivals … This means that section 46 is currently not operating as intended by parliament … So, unless the concept of substantial market power is appropriately defined, section 46 will remain ineffective …
>
> There is a second threshold issue of whether the firm has taken advantage of its substantial market power. Once again as a result of a series of High Court decisions, that test of 'take advantage' is also an onerous and restrictive test which basically comes down to the proposition that if a firm could engage in the same conduct with or

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4 NARGA Urges Swift Passage of Trade Practices Reforms, NARGA Media Release, 20 June 2007; Win for Small Business in the Trade Practices Act, COSBOA Media Release, 19 June 2007.

5 Crowe, D, Look what I do for you, PM tells small business. *Australian Financial Review*, 3 July 2007, page 4; Trade Practices Act Just the Beginning! COSBOA Media Release, 3 July 2007.

6 Submission 15 (Southern Sydney Retailers Association), page 2.

7 Associate Professor Frank Zumbo, Committee Hansard, 27 July 2007, page 11.

> without market power then engaging in that conduct is a 'taking advantage' for the purposes of section 46.[8]

There is a notable divide in evidence given between those who are concerned about the effect of the High Court's recent decisions on making the legislation ineffective and those who support the current situation.

For example, the Business Council of Australia stated that "… it is not clear that the High Court's position on section 46 is incorrect and our preference would be that no additional regulation be imposed through changes to the *Trade Practices Act* … we believe that the current legislation is effective."[9]

One submission suggested the High Court's decision on the Boral case was correct and that action other than changes to the *Trade Practices Act* might be of more help to small businesses, such as "training subsidies, research grants, town planning."[10]

Groups representing big businesses gave grudging support to the Government's bill.

The Business Council of Australia "… believes that amendments to section 46 are not required and indeed would be detrimental … [but] with a view to limiting any adverse consequences flowing from amendments, the BCA is prepared to accept changes that seek to clarify and codify the existing legislation, noting the risks …".[11]
The Australian National Retailers Association declared a similar reluctance for change[12] as did Coles[13]. Woolworths declared "no major objections" to the Government's bill, apart from concerns about the predatory pricing provision.[14]

A number of submissions argued that the Government's bill meant little practical change to the *Trade Practices Act*. For example, Addisons Lawyers said section 46 does not need change and that "many of the amendments to section 46 proposed in the Government's *Trade Practices Legislation Amendment Bill (No. 1) 2007*, whilst not objectionable, are simply a re-statement of the current law and add little, if anything to the state of jurisprudence on the issue."[15]

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8 Associate Professor Frank Zumbo, Committee Hansard, 27 July 2007, page 5.

9 Ms Cilento, Business Council of Australia, Committee Hansard, 27 July 2007, pages 14, 17.

10 Submission 6 (David Lieberman and Associates), page 2.

11 Submission 11 (Business Council of Australia), page 2.

12 Submission 16 (Australian National Retailers Association), page 4-5.

13 Submission 4 (Coles Group), page 1.

14 Submission 10 (Woolworths Limited), page 1, 2.

15 Submission 23 (Addisons Lawyers), page 3.

The Law Council of Australia also argued there should be no change to section 46, but recognising there is political will for change, generally supports the Government's changes.[16]

FAMILY FIRST believes the *Trade Practices Act* must be strengthened to protect small business by ensuring fair competition. Small businesses are vital for competition, which ensures the lowest prices for families.

FAMILY FIRST introduced the *Trade Practices Amendment (Predatory Pricing) Bill 2007* to give small businesses much needed protection from predatory pricing, by ensuring competition and fair trading. Fair competition will help to ensure the lowest prices for families.

FAMILY FIRST acknowledges that there are significant issues yet to be addressed to ensure fair competition, including creeping acquisitions, defining substantial market power, defining take advantage, unilateral variation of contracts and 'take it or leave it' contracts.

Senator Steve Fielding
FAMILY FIRST Leader
FAMILY FIRST Senator for Victoria

16 Submission 13 (Law Council of Australia), page 3.

APPENDIX 1
Submissions Received

Submission Number	Submitter
1	Alan Edward Barnard
2	Shopping Centre Council of Australia (SCCA)
3	Meridian Connections Pty Ltd.
4	Coles Group Limited
5	APCO Service Stations Pty Ltd
6	David Lieberman and Associates (Lawyers and Mediators)
7	TC Boxall
8	National Farmers' Federation
9	Queensland Lease Consultants
10	Woolworths Limited
11	Business Council of Australia
12	Post Office Agents Association Limited (POAAL)
13	Law Council of Australia
14	Assocaition of Consulting Engineers Australia (ACEA)
15	Southern Sydney Retailers Association
16	Australian National Retailers Association (ANRA)
17	Evan Jones
18	National Federation of Independent Business (NFIB)
19	Spier Consulting
20	The Pharmacy Guild of Australia
21	Fair Trading Coalition (FTC)
22	Motor Trades Association of Australia (MTAA)
23	Addisons Commercial Lawyers
24	Australian Newsagents' Federation Ltd
25	Associate Professor Frank Zumbo
26	Boral Limited
27	Queensland Newsagents Federation

APPENDIX 2

Public Hearing and Witnesses

Friday, 27 July 2007 – Melbourne

CILENTO, Ms Melinda, Deputy Chief Executive
Business Council of Australia

EDGEHILL, Ms Kathryn, Partner
Addisons

HOLDAWAY, Ms H K, Policy Manager, Competition Framework Unit
Department of the Treasury

MAHER, Mr Graham, Partner
Addisons

OSMOND, Ms Margy, Chief Executive Officer
Australian National Retailers Association

PODDAR, Mr Dave, Partner
Mallesons Stephen Jacques

ROGERS, Mr Scott, Senior Advisor, Competition Framework Unit
Department of the Treasury

SCOTT, Mr Bill, Branch Committee Member
Pharmacy Guild of Australia

SHEEHAN, Mr Maurice, Branch Director, Victoria
Pharmacy Guild of Australia

ZUMBO, Associate Professor Frank