

## Chapter 3

### Evidence in relation to the bill

3.1 A variety of views were expressed on the Trade Practices Amendment (Predatory Pricing) Bill 2007. Some submissions broadly supported the bill. A few expressed concern that the bill would be ineffective or did not go far enough in protecting small businesses from predatory pricing.<sup>1</sup> The majority, however, opposed the bill. They did so on various grounds:

- the addition of a 'substantial financial power in a market' test;
- the phrase 'unreasonably low prices' in the definition of predatory pricing;
- the definition of 'cost' in the bill;
- the inclusion of a clause on recoupment; and
- the bill's application to three specified markets—grocery, fuel and pharmaceuticals.

#### Concerns about the proposed amendments

##### *The uncertainty of terms*

3.2 The main area of concern with the bill was the uncertainty of its terms. Several submitters argued that the courts were unfamiliar with these terms, which may adversely affect the operation of section 46 of the Trade Practices Act (TPA) and its central objective of promoting competition and the welfare of consumers.

3.3 The law firm, Addisons, strongly rejected the bill given the legal uncertainty of its terms. Ms Kathryn Edghill, a partner at Addisons, told the committee that the Senator Fielding's amendments represented 'a lawyer's heaven' with more uncertainty and confusion.<sup>2</sup> Similarly, Mr Graham Maher, also a partner at the firm, told the committee that the uncertainty of the bill's terms would result in a 'very conservative approach to competition in the market'. Both Mr Maher and Ms Edghill argued that business would face significant costs coming to terms with the amendments, which would not be in the interests of Australian consumers.<sup>3</sup>

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1 On the claim that the bill is ineffective, see the comments of Associate Professor Frank Zumbo, *Submission 25*, p. 40. The submitters broadly in support of the bill were APCO Service Stations (Submission 5), Spier Consulting on behalf of the Independent Liquor Group (Submission 19), the Fair Trading Coalition (Submission 21), the Motor Trades Association of Australia (Submission 22) and the Australian Newsagents' Federation Limited (Submission 24).

2 Ms Kathryn Edghill, *Committee Hansard*, 27 July 2007, p. 25.

3 Mr Graham Maher, *Committee Hansard*, 27 July 2007, p. 27.

3.4 Several submitters had difficulty with the bill's reference to 'financial power'. Coles' submission argued that 'financial power' is 'not a relevant concept' in Australian competition law, and that its introduction would create considerable uncertainty. It could result in an increased number of court actions and ACCC investigations, which could in turn lead to greater caution, less competition, less discounting and increased costs to customers.<sup>4</sup> Mr Dave Poddar, a partner at Mallesons Stephens Jacques, expressed concern at how the test of 'financial power' would operate in practice. For example, there is potential confusion as to whether the test would consider corporations' parent companies or their bank facilities.<sup>5</sup> Mr Poddar explained that these factors are not necessarily a good guide as to whether a corporation has 'financial power' and may unnecessarily constrain corporations' activities.

3.5 There was also confusion with the bill's reference to 'unreasonably low prices'. Woolworths noted that it is a concept that is 'undefined and unknown to the law or any regulator'. Its legal effect would be to protect inefficient companies from competition.<sup>6</sup>

### ***Recoupment***

3.6 The bill's clause on recoupment also drew criticism from submitters and witnesses. Addisons criticised the bill for its inclusion of a clause on recoupment. Ms Edghill argued that recoupment must be a factor considered by the courts in determining a transgression of section 46. The bill's clause would send a signal that recovering losses is not a necessary indicator for the courts in determining a predatory pricing case. Mr Maher told the committee that the High Court is currently aware that the issue of recoupment is a factor that the court may consider in section 46 cases.

### ***Sector specific amendments***

3.7 Several submitters criticised the bill for its explicit reference to three markets. Coles' submission disputed that there was any evidence of market failure peculiar to these markets, or that there is any need for more stringent controls on predatory pricing in these markets. Addisons' submission argued that in the absence of 'a clear case of market failure in those sectors', the bill could distort competition and harm consumers. Addisons, Associate Professor Zumbo and the Law Council of Australia (LCA) also foresaw confusion as to whether certain products were part of the identified sectors.<sup>7</sup> The LCA put the issue in the following terms:

The provisions of the *Trade Practices Act* in relation to misuse of market power should be applicable to all markets ... The 'markets' identified will

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4 Coles Group Limited, *Submission 4*, p. 3.

5 Mr Dave Poddar, *Committee Hansard*, 27 July 2007, pp 17–18 .

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

7 Addisons Commercial Lawyers, *Submission 23*, p. 18. Associate Professor Frank Zumbo, *Submission 25*, p. 40.

introduce unnecessary uncertainty, give rise to demarcation disputes (what is a 'grocery' or a 'toiletry?') and will not be adaptable readily to developments in the economy and relevant markets. There is no clear rationale for special treatment in those cases especially.<sup>8</sup>

3.8 Even submitters who broadly supported the bill were critical of its narrow scope. Spier Consulting, on behalf of the Independent Liquor Group, urged that 'the liquor industry be added to list of three industries' subject to the bill.<sup>9</sup> The Post Office Agents Association Limited, the Fair Trading Coalition and the Motor Trades Association of Australia also suggested that the bill be considered for wider application.<sup>10</sup>

### ***The wrong approach***

3.9 The committee also received evidence that the bill would not guarantee greater protection for small business. Ms Edghill told the committee that expressed concern that section 46 was 'not the vehicle' to protect small business. She contrasted the intent of this section with subsection 51AC of the TPA, which clearly was introduced to protect the concerns of small business. Moreover, in her opinion, section 46 was working well and the lack of successful prosecutions on 'misuse of market power' cases was not an indicator that the section was not working as intended.<sup>11</sup> The bill's amendments would not lead to more prosecutions on predatory pricing because they do not resolve the fine line between aggressive competition and anti-competitive conduct. On the contrary, big and small businesses alike would face significant costs in identifying competitors' variable costs and uncertainty as to the meaning of 'financial power'.<sup>12</sup>

3.10 The committee enquired as to the success of the Canada's predatory pricing legislation, which is in some ways similar to Senator Fielding's bill. Ms Edghill told the committee that this legislation did not result in more prosecutions on predatory pricing. Indeed, she identified only one finding of predatory pricing under this legislation. Ms Edghill concluded that codifying 'predatory pricing' did not provide the fix that some legislators had hoped.<sup>13</sup>

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

9 Spier Consulting, on behalf of the Independent Liquor Group, *Submission 19*, p. 2.

10 Submissions 12, 21 and 22.

11 Ms Kathryn Edghill, *Committee Hansard*, 27 July 2007, p. 26.

12 Ms Kathryn Edghill, *Committee Hansard*, 27 July 2007, p. 26.

13 Ms Kathryn Edghill, *Committee Hansard*, 27 July 2007, p. 26.

## **Conclusion**

3.11 The committee acknowledges the concerns of several submitters to this inquiry about the need to protect small business from predatory pricing and uncompetitive conduct. The overwhelming evidence, however, is that this bill is not an appropriate response to these concerns. Its terms, the clause on recoupment and its restricted scope would introduce considerable complexity and uncertainty to the Act. It is highly unlikely to protect small business, Australian consumers or Australian families from anti-competitive practices. Indeed, the committee believes that the bill would harm these groups.

## **Recommendation 1**

3.12 **The committee recommends that the bill not be passed.**

A handwritten signature in blue ink, consisting of a large, sweeping initial 'M' followed by a series of connected loops and a long horizontal stroke ending in a small dot.

Senator the Hon Michael Ronaldson  
**Chair**