

SOUTHERN SYDNEY RETAILERS ASSOCIATION

Preliminary overview of Submission

Inquiry into the Provisions of the Trade Practices Legislation Amendment Bill (No.1) 2007 & Trade Practices Amendment (Predatory Pricing) Bill 2007

Part 1 - Legislative Background

The current amendments seek to address a problem that has existed for almost three decades.

In 1980 the Trade Practices Commission commented on the ineffectiveness of s46 and stated;

“....it is clear....that monopolization in terms of the Act is going to be very difficult to establish and that cases are therefore likely to be rare”¹

This ineffectiveness led the 1986 amendments which had the parliamentary intention of strengthening the Act. The 1986 amendments deleted any reference to “market control” and substituting the threshold test, that of “a substantial degree of market power”.

In the Explanatory memorandum of the 1986 amendments it was stated;

“The government expects the section will now reach not only the market controller but also the leading firms in an oligopolistic market and the governments view is that more than one firm may have a substantial degree of degree of power in the that market.”

However two decades later, despite these 1986 amendments s46 of the TPA remains ineffective – a situation that has not changed since it was introduced in 1974.

The question for the Senate Enquiry should be - are the amendments new and meaningful that will have some effect - or are the just a statutory restatement of existing legal legislative history, and the 1986 amendments which have proved ineffective ??

Part 2 - New Information not considered by the Dawson or Senate Committee

Since the Dawson and Senate Committee hearings, substantial new information has come to light especially in relation to prices increases and lack of competition in the grocery retail sector.

The final recommendations of the these enquires was based upon the premise that, consumers were benefiting from “low prices” resulting from “vigorous competition”, however the new information reveals that these basic premises (that the Dawson and Senate Committee’s relied upon in making their final recommendations) were erroneous. Therefore, this new evidence casts a shadow over the recommendation that evolved from these committees.

Further, it is our view that both the Dawson & Senate Committees were also provided with erroneous information on the subjects of;

- a) these existence of anti-competitive Price Discrimination in the economy.
- b) the History of Price Discrimination legislation.
- c) profit margins in the grocery retail sector.

¹ Trade Practices Commission, Annual Report for the year ending 30th June 1980 para 1.7.5

It is our view that if these enquires had not be provided with this erroneous information, and instead had received the more accurate information that has since come to light, that these Committee's would have reached a completely different set of recommendations for amendments to the Trade Practices Act.

Part 3 - Analysis of the Proposed Amendments

It is our view that governments proposed amendments are meaningless.

Our view is even consistent with that of Government's, as the Governments has clearly stated that these amendments will have "no legal effect, and merely recites legislative history", and are "redundant".²

We are unsure as to how or why the Government now states these amendments are a "big win from small business", when in the past they categorically stated the virtually identical amendments will have "no legal effect, and merely recites legislative history", and are "redundant".

In relation to the "Predatory Pricing amendment" it is also our view the governments proposed amendment is meaningless, and we note our view appears to be shared by many leading Trade Practices experts including Ms. Kathryn Edghill, head of Addison's competition and trade practices division, whom is quoted in the Australian Financial Review 26th June 2007;

"The government's proposal....did not represent a significant change to the current application of the law"

It is our view that Section 46 is currently written back to front in relation to Predatory Pricing, which makes its completely ineffective.

A successful Predatory Pricing or Predatory Buying 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.

This loop-hole in s46 was commented on by Mc Hugh J in *Boral*.

*"Conduct that is predatory in economic terms and anti-competitive may **not** be captured by s46 simply because the predator does not have substantial market power **when it sets out** on its course to deter or injure competitions. That may be because **until it achieves its object it has no substantial degree of market power.....Section 46 is ill drawn to deal with claims of predatory pricing under these conditions"***

Boral case (2003) 195 ALR 609 at 665 [269]

The current proposed amendments by the Government do nothing to close this loop-hole, and in the words of McHugh J "section 46 is ill drawn to deal with claims of predatory pricing under these conditions" – and it is our view that "these conditions" referred to Mc Hugh J involve the vast majority if not all attempts at Predatory Pricing.

As the Governments proposed amendments leave this loop-hole wide open, the Government will be giving the green light to any firm with deep pockets that slides under the substantial degree of market power test to freely engage in Predatory conduct, to the detriment of competition and consumers.

² Australian Government response to the Senate Inquiry into the effectiveness of the Trade Practices Act 1974 in Protecting Small Business, available at ; http://www.apf.gov.au/senate/committee/economics_ctte/completed_inquiries/2002-04/trade_practices_1974/report/government_response.pdf

For this reason, we support the amendment proposed by the Government Senator Barnaby Joyce as it is our view the Senator Joyce's amendment effectively closes down this loop-hole, which the government amendments leave wide open.

However, the true detriment to competition and consumers especially in the retailing sector is not Predatory Pricing, but anti-competitive Price Discrimination, and unless the problems of anti-competitive Price Discrimination are addressed even an effective amendment to address Predatory Pricing, (such as Senator Joyce's amendment or Senator Fielding's amendment) will only be a small step forward, and anti-competitive Price Discrimination will still remain as the number one evil of the free, fair and open free enterprise system, that s46 is impotent to prevent.

[Part 4 - Where to from here.](#)

Although the Senator Joyce amendment, will close one loop-hole, section 46 of Trade Practices Act is clearly broken and cannot be repaired by adding a few footnotes.

With Australia's;

- * over concentrated retail markets.
- * the developed world's highest food inflation (even in non-drought years)
- * consumers having been short-changed on the benefits of tariff reductions for clothing and footwear.
- * ever increasing mountain of foreign debt, even despite the current mineral boom.
- * extremely poor productivity growth by international standards.
- * and with anti-competitive Price Discrimination rampant throughout the nation throwing up an umbrella of protection for some firms - both destroying competition, and pushing up prices for consumers.

As a nation we need a complete re-think on Competition Laws, not to protect small business – but to protect “equality of opportunity” for all business not only those existing, but those yet to be born, as it is the firms that do not even exist today, that as a nation we will rely on for our future prosperity and growth.

I ask the question to all Senator's –

what would you recommend for your children – to start their own business and risk everything, including the family home, under the current the provisions of s46 and s51ac of the Trade Practices Act, or that such a risk is too great, and it best they try and line up a job in Big Business or Big Government ?

Until every Senator can say the former without hesitation, the Trade Practices Act will not yet be repaired and as a nation, we cannot afford to dampen the entrepreneurial drive of our future generation.