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Senate Standing Committee on Economics
PO Box 6100
Parliament House
Canberra ACT 2600

c/ Peter Hallahan
Secretary

9 July 2007

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

Here follows a submission to the Senate Economics Committee deliberations on the above mentioned Bill.

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Attached:
copy of Evan Jones, 'Small business suffers under a weak Trade Practices Act', *Canberra Times*, 12 June 2007.

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

Reference to Senate Standing Committee on Economics
June/July 2007

Evan Jones

> Small business has a fine tradition in this country, thanks in no small part to our open, competitive market that provides an opportunity for anyone to become their own boss and succeed. But in order for those businesses to be able to realise their potential, they require the same opportunities as every other competitor. In short, they deserve a fair go.
> [Graeme Samuel, 3 July 2007][1]

> Dear Mr Troiani
> Re: Wide Bay Bricks
> This office has now concluded its review of your complaint [against the National Australia Bank and others] … I regret to advise that, while I understand your concerns and acknowledge the distress that the forced sale of your business must have caused you and your family, the alleged conduct does not appear to indicate a breach of the Trade Practices Act. I suggest that you consult with your solicitor regarding other course of action that may be available.
> Yours sincerely
> John Cream, Acting Assistant Director Queensland
> Australian Competition & Consumer Commission.
> [Letter from ACCC staffer to foreclosed bank customer, 1 January2001][2]

I In general: an unsatisfactory Bill

This Bill goes a very small part of the way. The s.46 amendments desirably clarify what was implicit in the Act but which various decisions by our illustrious judiciary have rendered nugatory. The s.51AC amendment to lift the limit of coverage to $10 million is desirable. These are gains, but minor.

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[1] Graeme Samuel, 'Competition and fair trading: a fair go for small business', National Small Business Summit, Sydney, 3 July 2007.

[2] The recipient of this letter from the ACCC staffer is one Sante Troiani, quintessential bootstraps self-made migrant success story, whose business was subject to predatory foreclosure (and associated tens of millions of assets appropriated) by the National Australia Bank, under the benign watch of the Queensland judiciary, during the years 1993-99. The letter to Troiani is representative of myriad letters conveyed by the regulatory authorities to victims of bank malpractice.

In general the Bill is desultory. What it doesn't do is more important than what it contains. It should be sent back to the Treasurer with a rap over the knuckles.

The Bill skirts the margins of the failure of the Act (and of the regulatory apparatus) to accommodate the reality that the imbalance of power and the use of that imbalance of power is not incidental but structured and pervasive. This character is alluded to in my recent *Canberra Times* article,[3] but it is elaborated in my 2005 Working Paper.[4]

II. The Government's progress – a certain paucity of spirit and lack of intent?

Protocol dictates that an elected government will call the shots, and that a review body as is the Senate, not least with a Committee of which the then majority were non-Government members, should bite its lip and mind its manners. Nevertheless, the fabric of democratic legitimacy may be over-stretched at times. On this occasion one could be sympathetic with the view that the Government has insulted the Senate Economics Committee's considered efforts in its March 2004 Report, 'The effectiveness of the *Trade Practices Act 1974* in protecting small business'.

Tellingly, the Government has taken three years to respond to the Committee's recommendations. Without an election in the offing, the time delay may have been greater. It aggressively resisted forging a legislative response that considered in an integrated fashion the Dawson and Senate Committee reports. The very existence of the Senate Committee inquiry and report was a consequence of the Government choosing to privilege the corporates' agenda of overriding due process in the merger game through the establishment of an inquiry (Dawson) whose terms of reference were strategically narrow, and which now has the temerity to infer that those narrow terms of reference were somehow God-given, beyond its bailiwick.[5]

The Bill's preamble claims that its implementation represents the Government's response to the Senate report. Yet the Government's initial response to the Senate report[6] was almost universally negative – this to the Majority recommendations that were hardly revolutionary. This blanket antagonistic response was politically motivated, highlighting the Government's lack of commitment to the area. The current Bill has to be seen in the same light.

Treasurer Costello and Small Business Minister Bailey have combined to finesse parts of the small business lobby (and, it appears, the goodly Senator Ron Boswell now exhausted from years of fighting for a just cause). We have Minister Bailey claiming

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[3] Evan Jones, 'Small business suffers under a weak Trade Practices Act', *Canberra Times*, 12 June 2007.

[4] Evan Jones, 'Small Business – Corporate Business Relations: Dimensions of Structural Subordination in Australia', *Working Papers*, ECOP2005-1, School of Economics and Political Science, University of Sydney, September 2005. http://www.econ.usyd.edu.au/1164.html

[5] c/f *Trade Practices Legislation Amendment Bill (No.1) 2007, Explanatory Memorandum*, p.6

[6] http://www.aph.gov.au/Senate/committee/economics_ctte/completed_inquiries/2002-04/trade_practices_1974/index.htm

that 'There is no good reason for the Senate to hold this up', and that 'This has been consulted within an inch of its life'.[7]

Yet at the same time, COSBOA CEO Tony Steven claims, at the just concluded National Small Business Summit, that 'there is more to be done', and that 'we see this as just the start to closing the gap between what is unfair and what's currently determined as unconscionable'. At the Summit, COSBOA Chairman Bob Stanton claimed that, after the federal election, 'it will be imperative to have government committed to strengthening the trade practices act, with meaningful amendments …'.[8] Stanton also claims that price discrimination needs to be put back on the agenda.[9] A perusal of the submissions from small business organisations to the 2003 Senate inquiry would highlight that the proposed amendments fall a long way short of the hopes expressed those submissions.[10] Some consultation.

And yet COSBOA has signed on to something it doesn't like. In his Parliamentary speech praising the all round success story that is the Bill, Senator Boswell notes:[11]

> The real breakthrough came when the Fair Trading Coalition [read the MTAA?], a small business group, talked with big business—who needed measures advocated by the Dawson report, which the government was proposing to legislate.

What do we have here? Corporates setting the parameters of appropriate legislation to serve the broader public interest?

The Government, with assistance from the corporate lobby, appears to have induced, for the price of some baubles, a process of 'auto-abnegation' on the part of select small business organisations.[12]

In March 1996, immediately following the momentous electoral victory of the Coalition, the papers described the electoral campaign thus: 'John Howard won office on the back of promises to small business …'. Howard thus needed to deliver on that commitment. Subsequently, the Government delivered to small business in one

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[7] David Crowe & Patrick Durkin, 'Doubts on predatory pricing bill', *Australian Financial Review*, 21 June 2007.

[8] It is salutary that a big end of town lawyer should be less than adulatory: 'Mallesons Stephen Jaques partner Roger Featherston … said that changes amounted to tinkering. "I'd be surprised if the amendments assist small business in any significant way," he said'. Crowe & Durkin, ibid.

[9] It is instructive that one argument for the repeal of s.49 (price discrimination) was that behaviour intended to be captured under s.49 would be captured under (a presumed effective) s.46. Is legal opinion slow or merely disingenuous?

[10] http://www.aph.gov.au/Senate/committee/economics_ctte/completed_inquiries/2002-04/trade_practices_1974/index.htm

11 'Senate Speech – Introduction of Bill to amend TPA for small business, June 20th 2007. http://ronboswell.com/?p=413. Senator Boswell notes, in passing, that the recent Senate inquiry was chaired by Senator Brandis. This claim is formally incorrect but perhaps realistic in the sense that Government Senators, under the leadership of Senator Brandis, who is knowledgeable in trade practices matters, offset the generally mild Majority slate of recommendations with an incoherent, petulant, evidently politicised Minority Report.

[12] This evocative term was coined in political science to describe asymmetric international treaties. C/f Arnold Wolfers, *Discord and Collaboration*, 1965. The term is ideal for lateral application to the present context.

respect – enhancing its flexibility, but at the expense of employees (a win-win situation for an ideologically disposed government and small business). As for the broader market environment of small business, the Government has made two important advances – it has legislated a mandatory franchising code, and it has legislated s.51AC into the Trade Practices Act. But in general, the Government has preferred inaction on the profound structural concerns.[13]

Has the Coalition earned the votes that considerably assisted its ascendancy to power? At the Coalition's coming to power eleven years ago, the press reported:[14]

> Amendments to section 52, which address the impact of "economic ransom" in the franchising, petroleum and retail tenancy sectors, were set for legislation in the [Labor] Government's next term. For now, it seems the Coalition Government will refer the matter to a Senate Committee. Meanwhile the problems persist.
>
> The Small Business Group in NSW's Hunter Valley … has voiced concerns that have echoes all around Australia. The chairman of their retail committee, Mr Graham Poole, said: "We have massive problems in all shopping centres, the first is in rental differentials. Majors, such as Coles and Woolworths, may occupy 1,200 sq. m. and a small business 100 sq. m. While the majors may pay about $50-$70 sq. m. per year, a small business may be charged much more. "It is common for them to pay $1,000 per sq. m. per year!"
>
> The specialty shop can pay up or get out. Is this an example of harsh or oppressive conduct, where one party cannot leave the relationship without incurring special costs, and the stronger party knowingly exploits that advantage? Could this have been prevented if the amendments were in place, to act as a deterrent? …
>
> Mr Poole said: "the centre management [Newcastle's Charleston Square] will only deal with individuals, then swear everyone is happy, but they are not game to speak up … the ploy is divide and conquer. … [Etc., etc.]

Eleven years down the track, with another election threatening, the Government refers retail tenancies to the in-house Productivity Commission, a body whose lack of vision, lack of independence, and lack of credibility is reflected in its impoverished glowing reviews of a National Competition Policy that has polarised beneficiaries and casualties.[15]

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[13] Symptomatic of this inaction was the Government's ignoring of the bulk of recommendations from the 1999 Parliamentary inquiry into the retail sector, especially for an inclusive and mandatory retailing code of conduct. See Joint Committee on the Retailing Sector, *Fair Market or Market Failure?,* August 1999. http://www.aph.gov.au/senate/committee/retail_ctte/index.htm.

[14] Robin Robertson, ''Economic ransom' problems persist', *Australian Financial Review*, 5 March 1996.

[15] Mr Costello has conveniently forgotten that his Government's response to the Senate Committee's report included the rejection of the Committee's Recommendation 10, oriented to 'introducing measures which would prohibit retail lease provisions compelling tenants to keep their tenancy terms and conditions secret'.

Simultaneously, Graeme Samuel, ACCC Chairman, has claimed, in a speech to a small business audience, that 'Retail tenancy issues have also been somewhat of a hot issue of late'.[16] No they haven't; they've been a hot issue for decades. Mr Samuel also claims, wrongly, 'that market forces play a central role in determining prices for areas like the amount of rent a business must pay'. With these prefacing statements indicating an outlook wholly out of touch with the subject, Mr Samuel continues: 'I would suggest, however, that a closer dialogue between tenants and landlords such as shopping centre owners may address some of these [ongoing] concerns.'[17] Let small business eat cake.

This is the parlous context in which the Senate Committee should evaluate the Government's amendming Bill before it. The Bill is not built on principles; it is built on power politics, and some small business lobbies have acquiesced to this top-down opposition, declining to use to the full that modicum of power that they do possess.

III. The deeper politics of trade practices legislation

The dearth of an intellectual backdrop to the proposed amendments highlights another worrying dimension.

The Trade Practices Act, a mere 84 years after the passage of the Sherman Act, and even then courtesy of the much-denigrated Lionel Murphy, is an instrument constantly in need of attention in the face of antagonistic forces. The administration of the Act was subject to being undermined from the beginning (as had the 1965 Barwick Act), by those units of capital that had previously enjoyed an environment of open slather.[18] The Act itself was neatly knackered, via weakening of s.50, following the 1976 Swanson Committee recommendations.[19]

Simultaneously with the early concessions to the corporates, in both the wording and the administration of the Act, there was early concern for small business.

The Cooney Committee's brief account of the hand-wringing to 1991 is instructive. A prolonged quotation from the Committee's report is necessary to capture the moral, intellectual and political dynamic of the last thirty years:[20]

> The possible introduction of a general statutory prohibition on unconscionable conduct in the Act was first considered in 1976, when [even the pro corporate business] Swanson Committee recommended that the Act be amended to prohibit, as a civil remedy, 'unconscionable conduct or practices in trade or commerce.' It was suggested that such an amendment would enable the Act to

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[16] Samuel, 'Competition and fair trading: a fair go for small business', ibid.
[17] ibid.
[18] C/f V.G. Venturini, *Malpractice: The Administration of the Murphy Trade Practices Act*, Non Mollare, 1980.
[19] Establishment of the Swanson Committee was one of the first acts of the newly elected Fraser Government. By an amazing coincidence, the further weakening of the Act and its administration in the Fraser era was presided over by one John Winston Howard, in his first job as Minister for Business and Consumer Affairs (sic).
[20] Senate Standing Committee on Legal and Constitutional Affairs, *Mergers, Monopolies & Acquisitions: Adequacy of Existing Legislative Controls*, AGPS, Canberra, December 1991, p.104ff.

> better deal with the problem of the general disparity of bargaining power between sellers and buyers. The recommendation was not embraced in the 1977 amendments to the Act.
>
> In 1979, the Blunt Committee stated that it saw a law prohibiting 'unfair' business conduct as going further than, and not being compatible with, the provisions of Part IV of the Act. This was because those provisions regulate conduct according to its competitive effect and not, as a law based on 'fairness' would, on its morality. …
>
> The issue was again considered in the 1984 Green Paper, which recommended a prohibition on unconscionable conduct in relation to contracts. As a consequence of numerous submissions, principally from business organisations, expressing fears that such a provision would introduce considerable uncertainty into business dealings, the present section 52A, limited to consumer transactions, was inserted [in October 1985].
>
> In 1989, the Griffiths Committee considered a proposed extension of section 52A to commercial transactions and recommended that if the TPC wished to pursue the proposal further, it needed to develop 'persuasive arguments to counter the extensive opposition within the business community and legal profession [read not the legal profession in general but the Law Council of Australia].'
>
> In 1990, the House of Representatives Standing Committee on Industry, Science and Technology ('the Beddall Committee') presented its report Small Business in Australia: Challenges, Problems and Opportunities. That report recommended that section 52A should be extended to cover small business transactions including retail/commercial tenancy agreements, where a small business is disadvantaged in the same way as a consumer in its dealings with other parties.
>
> In 1991, the Special Caucus Committee of Inquiry into Aspects of the Australian Petroleum industry ('the Wright Report') recommended the extension of section 52A to provide protection to small business in relation to unconscionable conduct by suppliers.
>
> In July 1991, the [Trade Practices Commission] provided a detailed report on unconscionable conduct … Particular problem areas are identified as commercial tenancy arrangements, small business loans and loan guarantees, franchising, buying power activities by large retailers in dealing with small manufacturers and suppliers and by government bodies not covered by the Act, rural producers and the petroleum and building industries.

The TPC report, however, recommended that:

> … 'maintaining the status quo under equity would appear to be a reasonable option' – the Australian courts having shown a capacity to intervene in appropriate commercial circumstances, and a willingness to expand existing doctrines and develop new doctrines when necessary.

This generalisation reflects either Herculean optimism or a decided willingness to mislead the Labor Ministers who initiated the report. . The then Chairman of the TPC was Robert Baxt, whose pronouncements then and since have evinced little sympathy for small business' adverse marketplace experience.

The TPC recommended the creation of a new Part of the Act with appropriate remedies, thus (ibid., p.113):

> … ensuring that the various broad doctrines aimed at unconscionable conduct *remain within economically justifiable areas*, increasing certainty and predictability in the law. [my italics] …
>
> [with] recognition that the objectives underlying Parts IV and V of the Act are fundamentally different from those underlying the control of unconscionable conduct, with implications for the appropriateness of remedies.

By contrast, the Attorney-General's Department considered (rightly in my opinion) that there was no natural divide between unconscionable conduct against consumers and against (small) businesses.

The Cooney Committee, unlike the Griffiths Committee, was sympathetic to advance on the unconscionable conduct front but it ultimately bowed, it appears, to the constraining influence of a TPC determined to keep the unconscionable conduct against small business genie in the bottle.

In response to this uncertainty, the Labor Government progressed marginally with legislating the mild mannered section (now) 51AA in 1992, replicating in statute the common law conventions regarding unconscionability, but enhancing only minimally small business access to unconscionability provisions.

The new Coalition Government in 1996 acceded to yet another inquiry (Reid), whose bipartisan report highlighted (perhaps better than any other report) that the 'market' environment for small business remained systemically unlevel.[21] Out of this report came the two advances under the Coalition, as noted previously – a mandatory franchising code of conduct and section 51AC.[22] These have been significant advances. However, the latter advance has been more formal than substantive, of which more below.

That there was much unfinished business would be known to anybody familiar with its multiple arenas (neatly conveyed in *Finding a Balance*) and the length of discord (stretching over decades). Hence the 2003 Senate inquiry. And hence, as night follows day, the heavy-duty backlash from the big end of town to inhibit the clearing

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[21] House of Representatives Standing Committee on Industry, Science and Technology, *Finding a balance: towards fair trading in Australia*, AGPS, May 1997.

[22] One other development followed the report – the designation of one Commissioner with small business responsibilities. The significance of this change has been negated by the impression that the incumbent has not warmed to the implications of his acquired responsibilities. In that light, the mooted establishment of another position dedicated to small business interests will herald a substantial difference only if the responsibilities of the position are taken seriously.

up of this unfinished business. A danger to 'commercial certainty' is the catchcry. The scale, dishonesty and virulence of this effort was brought to the public eye by the diligent reporting of the *Australian Financial Review*, whose editorials and columnists diligently supported such effort, in the process unfairly demonising the hapless Mark Latham as a 'populist' economic illiterate.[23]

Thus is the history of trade practices 'reform' to aid small business in its fight against predation. Two steps forward, one or two steps back. It has been an evolution in which those in Parliament and among the bureaucracy and professional classes intellectually and morally sympathetic to the small business plaint have naturally been inhibited by the conceptual and legal difficulties involved. But it has been an evolution in which small business and its supporters have also been parried, perennially overwhelmed, by inaction engendered by corporate business interests whose transparently self-interested homilies are absorbed by opinion makers and decision makers as possessing singular merit.

The current observable politicisation of the amending process turns out to be merely the latest reflection of a longstanding phenomenon whose effects are now deeply entrenched in both the wording of the Act and its administration. Worse, the imbalance of power in the marketplace that the small business lobbies and their supporters seek to offset in the Trade Practices Act is reproduced in the imbalance of power in the political sphere that shapes the Act itself. A functioning Act thus remains in the realm of the ideal. Small business (like wage labour) will never get justice through the political process as long as the imbalance of power in the economic sphere continues to be replicated in the supposedly democratic political sphere.

The current amending Bill is Exhibit A for the proof of this axiom.

IV. A conceptual backdrop both difficult and adverse

One has to acknowledge the conceptual and practical difficulties of achieving appropriate and workable wording in sections such as s.46 and s.51AC.

Nevertheless, these genuine difficulties are compounded by conceptual weaknesses and prejudices at the centre of the two significant disciplines, economics and law.

The conceptualisation of the structuring of power has long been marginalised in the economics discipline, both for analytical reasons (too difficult) and ideological reasons (too dangerous). This combination of analytical and ideological prejudices

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[23] C/f Editorial, 'Section 46 is about fair play', *AFR*, 1 August 2003; Toni O'Loughlin & Geoff Winestock, 'Lawyers [read the Australian Law Council] slam ACCC proposal', *AFR*, 10 September 2003; Editorial, 'Senate misses point on TPA', *AFR*, 3 March 2004; Hugh Morgan, 'Burdening consumers is bad business', *AFR*, 8 March 2004; Toni O'Loughlin, 'BCA dismayed over changes', *AFR*, 13 April 2004; John Durie, 'Latham wrong on TP reforms', *AFR*, 14 April 2004; Toni O'Loughlin, 'Big business slams Labor plan', *AFR*, 16 April 2004; Toni O'Loughlin, 'BCA fires broadside at small business', *AFR*, 23-26 April 2004; Toni O'Loughlin & Annabel Hepworth, 'Competition flourishing, argues BCA', *AFR*, 6 December 2004; David Crowe, 'BCA rebukes Nats senators', *AFR*, 23 September 2005. Etc.

has served to obscure a decent understanding by economists of the nature of competition itself, the supposed motor force of the market economy.

The conceptualisation of the structuring of power has also long been marginalised in commercial law, in which all players come to the contractual table with a clear mind, an iron determination, and a free will. On the margin, we have a concession to 'fiduciary duty' / 'duty of care', but the legal fraternity works overtime to consign the applicability of these admirable imperatives to the socially precarious.[24]

Another problem with the law is the inability to conceptualise under a 'contract' paradigm long term relationships with discretionary terms. Such relationships provide ideal environments for the structuring of exploitation. Legal academics have belatedly come up the opportune construct of 'incomplete contracts'.[25] The exponential growth of franchising forced this issue on otherwise recalcitrant legal minds, but the labour lawyers (not to mention the Marxists!), versed in the incomplete contract of the employer-employee relationship, could have enlightened them from the cradle.[26] In the present context, the point is that the 'incomplete contract' phenomenon is a perennial fixture of big business - small business relationships: franchisor-franchisee, landlord/manager-tenant, bank lender-borrower, retailer-supplier, processor-farmer, employer-subcontractor, etc. Lawyers keep going on about the sanctity of contract (claimed symmetrical) even though a large part of the small business arena is submerged within the arena vicariously labeled 'incomplete contract' for which other rules apply.[27]

Thus both economists and lawyers have been educated out of understanding a representative subjugation of small business by corporate business when it is staring them in the face.

The analytical failing of the legal profession is enhanced by its tropist tendency to follow the money trail, which leads straight into the arms of the corporates and the attractiveness of their point of view. The insouciance with which the learned members of the bench, with duplicitous assistance from the cream of the bar, dispatch small business litigants against their bank lenders to the workhouse is a spectacle to behold.

The analytical failing of the economics profession has been enhanced by a recent tendency to expand high theoretical navel-gazing even into the 'optional' subjects of the syllabus where courses on competition law and policy had traditionally resided.

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24 C/f Wickrema Weerasooria, 'Banks owe no fiduciary or 'special duty' to customers: a reaffirmation', *Australian Banking & Finance Law Bulletin*, 15, 9, April 2000. The abdication of responsibility during the nefarious period of 'foreign currency loan' litigation against the major banks is canvassed in Evan Jones, 'The Foreign Currency Loan Experience in 1980s Australia with particular reference to the Commonwealth Bank of Australia: bank documents, bank culture, and foreign currency loan litigation', *Working Papers*, ECOP2005-3, School of Economics and Political Science, University of Sydney, December 2005. http://www.econ.usyd.edu.au/1164.html.

[25] C/f Gillian K. Hadfield, 'Problematic Relations: Franchising and the Law of Incomplete Contracts', *Stanford Law Review*, Vol.42, April 1990, pp.927-992.

[26] The blood brotherhood of the franchisor-franchisee and employer-employee relationships is reflected in the right of franchise litigation to be heard in the NSW Industrial Relations Commission

27 The American psychologist Abraham Maslow was renowned for aphorisms. The pertinent *bon mot* here is (one of various phrasings): 'He that is good with a hammer tends to think everything is a nail.'

The number of Australian economics now graduating with a modicum of exposure to the nuances of the Trade Practices Act would be not too distant from zero.

The analytical failing of the economics profession has been further enhanced by the ascendancy and concatenation of various strands of thought/ideology – the Chicago school, the 'contestability' school, and the longstanding Spencerian Social Darwinist school[28]. These strands, although not consistent, nevertheless combine to forge a tidal wave of undeniable conviction that the mega-corporate is at the same time a thing of beauty, a cornucopia of material bounty to the hitherto unfilled consumer delivered on the best possible terms, and a historical inevitability. On the latter tendency, we are all Marxists now, it appears.

Being an ex-colony that has, in many respects, remained cosily attached to genuflexion to the metropolis, these strands have filtered into the Australian bureaucracy in a rather uncritical fashion. Thus can the ACCC's Graeme Samuel declare:[29]

> Competition … benefits those businesses that are able and motivated to take advantage of the powerful forces driving their particular market. The corollary, of course, is that businesses that are unable or unwilling to respond to the, often daunting, challenge of competition, will languish and may ultimately fail. But this is the essence of an open market economy. …
>
> What is not clear however, in the claims and counter-claims that are made by small and big business respectively in relation to these matters, is whether the primary case has been made for regulatory intervention. … The difficulty in this area is that so often those who seek regulatory intervention have failed to first demonstrate the case for intervention.

Thus do we arrive at the Explanatory Memorandum of the Trade Practices Legislation Amendment Bill (No.1) 2007, and what a sorry document it is. Decades of exchange on the grand themes, even that component crudely coloured by vested interests, has been reduced to the homogenised vapidity of a 'Regulation Impact Statement and Financial Impact Statement', product of the managerialist sausage machine to which grownup, well-educated men and women have subjugated their autonomy and integrity.

There are moments of intelligence and insight in the Memorandum, available to the patient mind that hasn't been put to sleep by the inanities. But watch out for the perennial appearance of the soporific:

> Government would face transitional costs associated with amending the Act. Businesses would face transitional costs associated with understanding and applying the new law.

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[28] C/f Mark Christensen ('adviser on economic reform at the Queensland Treasury and the Productivity Commission'), 'Abuse of power is the price of a free market', *AFR*, 5 October 2005.

29 Graeme Samuel, 'Big Business V Small Business – vigorous or vicious competition?', Speech to Australian Graduate School of Management, 4 November 2004. http://www.accc.gov.au/content/index.phtml/itemId/600864

Let us sincerely hope so! One consideration of the calculus that has escaped the author(s) is the staggering sums allotted by corporates in abusing and evading the law.[30] Transitional costs be damned.

Several instances of undergraduate reasoning by the author(s) (middle level Treasury officials?) follow:

i. Predatory or merely aggressive pro-competitive pricing? (p.9)

> 'This behaviour may ultimately benefit consumers because less efficient firms are driven out of the market … Even if there is only a small number of remaining firms in the market, prices are likely to be kept at an efficient level because of rivalry between the remaining firms and the threat of firms entering the market'.

Verdict: The first sentence is pure Neoclassical/Chicago ideology. Financial power, not efficiency, is the weapon of choice in misuse of market power. Boral's aggressive price cutting in the early 1990s price war was designed to eliminate the more efficient C&M Bricks. Boral's aggressive price cutting in the late 1980s Queensland gas market, after Boral lost its monopoly franchise, was designed to cut out Elgas which provided better quality gas and at a cheaper price. Boral's serendipitous close relationship with the National Australia Bank proved to be a boon when the NAB foreclosed on one of Boral's more innovative competitors, Bundaberg-based Wide Bay Bricks.

The second sentence is pure 'contestability' ideology. Where is the evidence? Rather, the evidence points to the contrary. A mid 2003 price survey by *Choice* magazine[31] exposed that prices at Woolworths Leichhardt Market Town (suburban Sydney) after Franklins had been taken out as a competitor had increased by 23%, compared to the CPI increase for food of 13% over the same period. Another study of grocery retail prices has confirmed the inverse relationship between prices and local access to competing stores (especially those other than Coles or Woolworths).[32]

Finally, a more casual recent survey of Woolworths pricing in two adjacent Sydney suburbs adds further (striking) confirmation, as per the table below.[33] Woolworths faces competition at Liverpool but not at Moorebank.

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[30] For example, Boral is in the courts with such regularity that it is surprising that the company has time to do any business. http://www.austlii.edu.au/.

[31] Web reference no longer available.

[32] Jill Walker & Tony Webber, 'Retail Grocery Prices in Victoria: The Relevance of Local Market Conditions', *Australian Economic Review*, 37, 3, 2004. Results were generated from work originally undertaken on behalf of Metcash, but the study is the most rigorous on price competition to date.

[33] Courtesy of Craig Kelly, Southern Sydney Retailers' Association.

WOOLWORTHS GEOGRAPHICAL PRICE DISCRIMINATION						
			Liverpool	Moorebank		Price
			12.36pm 26/5/07	1.36pm 26/5/07		Difference
1	Grape Red Globe	kg	$2.98	$5.97		100%
2	Potato Sweet Gold	kg	$1.68	$3.48		107%
3	Apple Pink Lady	kg	$2.98	$4.98		67%
4	Tomato Gourmet	kg	$2.48	$4.98		101%
5	Celery Whole	each	$1.98	$2.98		51%
6	Pumpkin Butternut	kg	$0.99	$2.98		201%
7	Banana	kg	$3.48	$3.98		14%
8	Zucchini Green	kg	$0.99	$3.48		252%
9	Mandarin Imperial	kg	$1.99	$2.96		49%
10	Pear	kg	$1.98	$3.98		101%
11	Apple Cameo	kg	$3.95	$4.98		26%
12	Apple Red Delicious	kg	$2.48	$4.98		101%
13	Onion Brown	kg	$1.48	$2.83		91%
14	Tomato Cherry red	250g	$1.33	$2.98		124%
			2.11pm 28/05/07	2.58pm 28/05/07		
15	Eggplant		$2.98	$5.98		101%
16	Tomato Gourmet Md		$2.98	$4.98		67%
17	Banana		$3.48	$4.98		43%
18	Potato Sweet Gold		$2.98	$3.48		17%
19	Pear		$1.98	$2.48		25%
20	Cabbage		$2.48	$5.98		141%
	Totals		**$47.65**	**$83.42**		**75%**

ii. A successful outcome of predatory pricing? (p.10)

> 'The firm is then left with greater market power, enabling it to earn supra-competitive profits by reducing output and raising prices.'

Verdict: The 'reducing output' phenomenon is an introductory microeconomics textbook affair, generated from a static model long favoured by economists because of neat deterministic outcomes. The reasoning has no bearing on real world firms possessing quasi-monopolistic characteristics. (This is a casuistic criticism but the claim remains a tell-tale reflection of the lack of expertise of the personnel from which the Government has drawn its advice, or at least has used to crowd out more productive sources of opinion.)

iii. Business behaviour during below-cost pricing; likely response to wrongful penalisation (p.12)

> 'A simple measure of variable costs also does not take account of the transaction costs associated with ceasing a business. (A business that is not recovering its variable costs may rationally choose to continue operating for a period of time if its considers that those short term losses are going to be less than the expected costs of ceasing trading and restarting again at a later time.) … Wrongly penalising firms may lead to detrimental impacts on competition, potentially leading to reduced choice and higher prices for consumers. Wrongly penalised firms may either withdraw from the market or reduce their competitive effort.'

Verdict: This 'reasoning' is again drawn from textbook *a priorism*. There is no inkling of the mentality of a predatory firm, the last thing on the minds of its principals being the prospect of 'ceasing trading'. The prospects of a court wrongfully penalising a firm engaging in persistent sub-variable cost pricing (the emphasis here is on the word 'variable' being included in the statute) is minimal. The prospect of a court not penalising a firm engaging in predatory sub-variable cost pricing would remain substantial, even with the dangerous word 'variable' included. As for the so-called risk of diminishing 'competitive effort', it is always open to firms to direct their competitive efforts in the multiple directions that herald not a whiff of misuse of market power. (Ditto.)

The Bill's Explanatory Memorandum highlights the diminution of intelligence and the loss of collective memory regarding the longstanding debate over adequate coverage for small business under the Act. The Memorandum provides further evidence of the paucity of good intent behind the Bill.

V. Proposed section 46 amendments

Market power: The proposed amendments to s.46 (not absolute freedom of restraint; more than one corporation; in concert; in any market) are better than nothing. They restore the intentions of the section from its 1986 instigators, but which have since been eaten away by judicial decisions.

Recoupment: The proposal to not require likely recoupment as a necessary test of predatory pricing is a major step, perhaps one of the most important in the Bill. In the first instance, recoupment is presently narrowly conceived and applied, centred on the presumed power to raise prices after a cost-cutting phase. Other strategic ambitions from aggressive price cutting may be the subsequent expansion of market share, or merely 'the quiet life' with a dangerous (because more efficient or innovative?) competitor out of the way.[34]

Moreover, recoupment is essentially an 'effects' test, even though those who support it tend to be opposed to a general effects test for this section (for example, the then Minority Government Senators). The disadvantage of an effects test is not its presumed draconian character that pro-big business protagonists find distasteful, but that it is an after the events test. An after the events test is of course relevant to penalties and compensation (aka the ACCC Boral litigation years after the events). But the complementary more immediate issue in misuse of market power is, where possible, to stop it in its tracks.

Relevant cost: There has been discussion of difficulties of pinning down a cost standard that would assist in inferring predatory pricing. 'Variable' has been found wanting. 'Avoidable' hasn't been discussed. But 'relevant' has been put in the Bill with no discussion. Where did this word come from? Is it freer from misuse than 'variable'?

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[34] Boral's participation in a contemporaneous concrete cartel highlights that 'the quiet life', especially with fellow corporate Pioneer, was high on its strategic agenda. http://www.accc.gov.au/content/index.phtml/itemId/86962

<u>Financial power</u>: The absence of an amendment accommodating the Senate Committee's Recommendation #4 is a major weakness of the Bill. Some have argued that financial power was implicit in the post-1986 wording, but that, like the market power threshold, this potential reading has been neutered by judicial decisions, notably Rural Press and Boral. In my humble opinion, Melway was rightly decided, but Rural Press and Boral were incorrectly decided, to put it mildly. Financial power was fundamental to the capacity and thus the ammunition for intent of both these companies in their strategic actions.

The Government's response was as follows:

> As Government Senators noted, if this recommendation were to be adopted, it would considerably extend the scope of section 46 to a degree that is both uncertain and undesirable. This is because 'financial power' (that is, access to financial, technical and business resources) is simply not the same as market power.

This throwaway statement can only be read as innately political or jejune. It would be an embarrassment were this Government capable of embarrassment. It is not an acceptable response.

The High Court treatment of financial power in Boral is of a kind. The definitive statement by Justices Gleeson and Callinan, obliterating 'financial power' from consideration, could be labeled sophistry if it was comprehensible.[35] During the hearings, Justices McHugh and Gaudron briefly angled towards a common sense consideration of financial power before falling into line. But it was the wayward dissenting Justice Kirby who cut through the verbiage to offer some rudimentary intelligence:[36]

> Access to significant financial resources can enable a corporation to act in ways that are not dictated by short-term market considerations. The corporation can then persist with longer-term strategic objectives. Thus, if it has access to significant financial resources, the corporation may withstand pricing or output decisions that, in the short term, are not consistent with the discipline of the market or the conduct of its rivals. …
>
> It follows that access to financial power is by no means irrelevant to the possession by a corporation of a substantial degree of power in a given market. In a particular case, of which this was one, access to financial resources may be a marker for the existence of a substantial degree of power in the market as that expression is used in s46 of the Act.

The Government is pleased to hide behind a crude and archaic concept of market power – a goodly percentage of the relevant market. Back in the real world, if Rural Press and Boral had conceived of their market power in this form, neither would have engaged in the activities that led to the litigation.

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[35] Boral Besser Masonry v ACCC [2003] HCA 5, 7 February, pars.137-139.
[36] ibid., pars.363-364.

The Senate's 'financial power' recommendation was the litmus test of the Government's commitment to a meaningful section 46. The Government has failed that test.

Boral: Beyond the refusal to consider 'financial power' is the inability to confront the implications of the judgments that cemented the impasse. The proposed amendments to section 46 do nothing to counter Rural Press or Boral.

The high-end legal eagles have given the time-starved some useful cameos of the High Court's Boral decision[37]. But to my mind the experts have missed the point. There is a perennial claim that the High Court decision pivoted on finding that Boral did not possess 'substantial market power'. This reading is simplistic. A more plausible reading of the Boral decision is as a fishing exercise. Boral was going to win the day, and a reason or reasons had to be found to find in favour. Multiple reasons were found, rather than one. The decision was 'over-determined'.

The High Court judged Boral to have 'legitimate business reasons' for its conduct (consonant with the Trial Court Judge Heerey's 'commercial judgment'). Competitive pricing is *by definition* meant to attack and eliminate competitors. Boral's actions (there was a smoking gun) came within a 'proscribed purpose' but this appellation was irrelevant because Boral's action were legitimate *per se*. Etc.

The essence of the High Court Boral decision is that section 46 has no place in the Trade Practices Act. 'Misuse of market power' is a *non sequitur*. Competition is a dog eat dog process; get used to it. The little guys are grist for the mill. Indeed, why not repeal the bothersome Act in its entirety? Let 'er rip! The doughty Allens Arthur Robinson got it right (without articulating for the unwashed the implications):[38]

> This decision follows the *Melway* case in reversing the disturbing trend in Federal Court decisions [what trend?] in which judges have jumped from finding a 'purpose of eliminating or damaging a competitor' (ie through 'smoking gun' memos) to readily inferring that the firm involved must have 'taken advantage' of its market power. Such decisions have made it difficult for large firms to continue to pursue competitive strategies that have helped them to achieve that market position, free from the concern that they can be challenged for anti-competitive behaviour. The decision will be welcomed by firms that have a significant market position or are financially well resourced [!], as further clarifying where the line should be drawn.

This Social Darwinism ('survival of the biggest' version rather than 'survival of the fittest') was foretold by a consistent inability of the bench since Queensland Wire to capture the differential essence of s.46 (my italics):

> (1) A corporation that has a substantial degree of power in a market shall not take advantage of that power for the purpose of:

[37] Freehill's July 2003 account is a cut above the rest. http://www.findlaw.com.au/article/9338.htm.
38 AAR, 'Boral High Court Decision, 7 February 2003.
http://www.aar.com.au/med/pressreleases/pr7feb03.htm

> (a) *eliminating or substantially damaging a competitor* of the corporation or of a body corporate that is related to the corporation 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.

Some phrases in s.46 have evidently needed clarification, but the meaning of the phrases in s.46(1) ought to be transparent. The Government must confront the reluctance of the judiciary to administer the law.

Given the gale emanating from Rural Press and Boral, the Government's proposed amendments to s.46 are but a farting in the wind.

VI. Proposed section 51AC amendments

Turnover limit: The Government has thrown a sop to small business in proposing a raised turnover limit from $3 million to $10 million (the Minority Senator's recommendation). The raising of the limit is a major advance. That the limit was originally set at $3 million highlights how reluctant have been the authorities and the legal profession to confront the very idea of business to business unconscionable conduct (as opposed to against consumers). But the existence of a limit remains arbitrary, not consistent with conventions on unconscionability in the rest of the law. A transparent asymmetry of bargaining position is the crucial basis for the operability of the section.

Unilateral variation of contracts: The conundrum about the conditions under which unilateral variation of contracts is understandable. However, the precise wording of the proposed amendment after s.51AC (3)(j) and (4)(j) (and ASIC Act equivalents) has a bad smell about it. The draftsperson appears to be either not paying attention or else there is a fifth column in our midst. The proposed wording appears to give the powerful party a powerful incentive to write into the contract the right to unilateral variation. In a twinkling, unilateral variation of contracts becomes the legitimised norm.

We already have a problem with contracts, about which the authorities' heads remain steadfastly in the sand. Contracts, especially in the finance sector, already entrench unequal bargaining power. Unilateral contract variation is a superficial reflection of a more fundamental problem.

Consider the National Australia Bank overdraft contract. Section 5 reads:

> Despite 6 below [regarding review of the customer's operation of the facility], the Bank may cancel the facility at any time whether or not you are in breach of this agreement. Where the facility is cancelled:
> (a) the Bank will give you notice of the cancellation as soon as practical.

The Commonwealth Bank has a similar inclusion; in all probability, so do the other banks. This section provides a license for unconscionable conduct – it has so been used. The contract itself is unconscionable. What are the authorities doing about it?

Where is the recognition of the entrenchment of unconscionability in contract terms in this Bill?

The hurdle of unconscionability: The Bill, in raising the turnover limit, gives more businesses access to s51AC. But the Government has shamefully ignored the functionality of the section itself? Business as usual. Legal culture has long relegated 'unconscionability' to the margins of commercial activity, as noted above. It has been reluctant to confront the centrality of unconscionability to commercial activity.

The Bill's Explanatory Memorandum reminds us that the Act has as its motif 'to enhance the promotion of competition *and fair trading* …'. State government Fair Trading bureaus have a better idea of the substantive meaning of 'fairness'. The Fair Trading Coalition has pushed a more penetrating wording for some time. The Government, alas, has declined an opportunity to give s51AC more clout.

What has happened to s51AC since its inception in 1998? Alas, no public document details its history. Personal correspondence to me from the ACCC has outlined the s51AC cases that the ACCC has initiated (the underlying presumption being that everything is in perfect working order).[39] I admit to being pleasantly surprised at the number of cases noted. Nevertheless, the bulk of the cases initiated are against smallish businesses.[40] Of the 15 cases initiated, only 3 have been against large businesses. Two of the cases, Daewoo Australia and BIS Cleanaway, were *lay down misere*. The third large company case, against Westfield, and thus the most significant to date, allowed Westfield off the hook with acceptance of guilt on a narrow issue and allowance of a confidential settlement (the 'penalty' of choice of guilty parties). The ACCC under its present Chairman has initiated only one case against a corporate (BIS Cleanaway). The too-hard basket rules.

The finance sector in particular: The elephant in the room of unconscionable conduct is the finance sector – the major banks, those pillars of Australian business, in particular. There is effectively no regulation of bank malpractice. This parlous situation has long reached the realm of the scandalous.

The Treasurer's office currently has on file two extended documents from me on this matter.[41] No response has been forthcoming. The Treasurer has been woken from his slumber by being confronted personally with a case study in 'alleged' bank unconscionable conduct by a petitioner from his own electorate.[42] Even upmarket Higgins, it appears, is not immune to bank depredations.

The petitioner, Melbourne businesswoman Lana McLean, will experience a by now routine process. Letters will be delivered to the authorities, with copious documentation attached. Petitioners will attempt to find the ear and hopefully

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[39] Nigel Ridgway, General Manager, Compliance Strategies Branch, ACCC, to Jones, 31 May 2007. 5p.

[40] The previous Chairman, Alan Fels, sold the s51AC victory (justifiable because rapacious) against the minnow Simply No Knead (Franchising) as a tour de force.

[41] Jones to Nigel Ridgway, ACCC, 28 February 2007, 16pp.; Jones, 'The National Australia Bank v Walter/Palatinat: A Case Study in the Adverse Small Business Environment in Australia', April 2007, 38pp.

[42] Richard Gluyas, 'Costello letter forces CBA case review', *The Australian*, 9-10 June 2007.

sympathy of Members of Parliament, and through them a responsible regulator. There then will follow an elaborate round of denial and buck-passing by various authorities (not our responsibility, but perhaps talk to such and such) – witness the ACCC letter to Mr Troiani that prefaced this document. Bank public relations departments issue ritual statements of incomprehension at the fuss. The complaint, indeed the petitioners themselves, will then disappear into a well-oiled vortex which has claimed all the previous petitioners. And that will be the experience and the end of Ms McLean, residence in Mr Costello's electorate notwithstanding.

The hardy, or rather the foolhardy, imagine that they will take their case to the courts in pursuit of the justice that the courts have been established to provide. There they will experience the hubris, as noted above, with which our best legal minds consign their case to the rubbish bin (with some, albeit rare, happy exceptions). Pursuit by the bank to bankruptcy then looms, consignment to dependence on the public pension, and Mr Samuel's 'open competitive economy' is converted from a life's dream and achievement to a nightmare.

Several years ago, I compiled a document of case studies of 'alleged' victimisation by one bank, as a vehicle to drag individual case out of their isolation and to consider elements in common.[43] In a belated response to receipt of this odorous package, the ACCC replied that the cases were either: out of date; potentially fraudulent (i.e. not our jurisdiction); or not evidence of unconscionable conduct.[44] And there the issue reposes, in the vortex.

The whirlpool has experienced an increase in velocity with the handing over of responsibility for unconscionable conduct in financial services to ASIC – first for consumers (in 1998?) and then for small business (2001?). This move was a masterstroke for cementing inactivity. Before the move, the ACCC had initiated no s51AC cases against the banks; since the move, the ASIC has bubbled along, now with concern, now with resignation. As I noted in my 28 February 2007 ACCC letter, 'Whoever is responsible for the conception and execution of this handover should be taken out the back and shot.'[45]

Six years down the track, the press reports that:[46]

> ASIC is likely to contest a parliamentary request[47] to investigate a possible systemic problem in the banking system, saying it has no jurisdiction over matters involving simple bank credit. …
>
> ASIC deputy chairman Jeremy Cooper said yesterday [without consulting relevant staff] that the watchdog was clarifying with the committee the extent

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[43] Evan Jones, 'The Banks and Small Business Borrowers: case studies of adversity', *Working Papers*, ECOP2004-3, School of Economics and Political Science, University of Sydney, April 2004.
[44] Nigel Ridgway to Jones, 8 April 2005, 6p.
[45] The move appears to have been conceived with either one of two mentalities – a bureaucrat's pursuit of clean lines following the imagined elegance of the post-Wallis regulatory restructuring, or our svengali at work again, extinguishing the flickering flame of due process available to aggrieved bank clients.
[46] Richard Gluyas, 'ASIC baulks at pollies' call for banking probe', *The Australian*, 30 June 2007.
[47] The text refers to interest in the issue from the Joint Standing Committee on Corporations and Financial Services, chaired by Senator Bruce Chapman.

> of its authority over problems relating to bank credit. “We are not a core regulator of loans, so the ordinary failure to provide bank statements is outside our jurisdiction, unless there’s misleading or unconscionable conduct”, he said.

What a shmozzle. For a start, what is unconscionable conduct? The Deputy Chairman appears to have no idea. Is not the non-issuance of bank statements unconscionable? Is not the utilisation of so-called ‘shadow ledger’ bank statements, of which non-issuance is an issue, unconscionable? Is not the process of customer default itself that gave rise to the creation of an internal dual ledger system unconscionable? There are symptoms and there are deeper issues.

Mr Cooper displays more buck-passing from an institution that now does a flourishing side business in public relations expertise. But the deputy chairman has a point. There is no core regulator of loans. There is ACCC, APRA, ASIC, the RBA, the BFSO – a cacophony of acronyms. And after all this paper-shuffling, as noted, there is effectively no regulation of bank malpractice.

In the meantime, bank malpractice corrupts not merely bank culture. Bank malpractice potentially corrupts bank staff, the legal system, the judiciary, the magistrature[48], receiver/managers, valuers, real estate agents, the Insolvency Trustee, the Tax Office, the various police forces. Members of Parliament and governments?[49]

It is conceivable that I, being partisan on this issue, have over-estimated the extent of the problem. But that there is a problem is undeniable. Except to our basket of acronymed regulators. And where is this problem acknowledged in this Bill? In the Bill, ASIC remains as the guardian of unconscionable conduct in financial services at the very time that that body is steadfastly denying its responsibility. The vortex beckons.

VII. Collective bargaining

Creation of a notification process for collective bargaining (by contrast to the existing authorisation system) was to be the leverage by which the Government bought allegiance from the small business lobbies for the October 2006 Dawson amending Bill. Six months down the track (after the new system’s inauguration on 1 January) there have been no takers.[50] The big zero. Mr Samuel has admonished small business for its lack of gratitude.[51] It turns out that the notification process has not provided a ‘speedier and simpler process’ as promised. Neither the Government nor the ACCC

[48] There is a recent case in which an aggrieved bank customer took a major bank to the Small Claims court in his state. The presiding magistrate decided in the customer’s favour. But then the case was surprisingly re-opened. The customer inferred that the magistrate had been lent on by someone up the hierarchy (under pressure from?), with the customer being forced to a behind-the-scenes settlement whose details conveniently remain private. All this for several thousand dollars.
[49] Which bank bankrolled the electoral victory of the Liberal Party in 1996?
50 The Government has received not bouquets but ridicule from the punters who have naturally observed the stark hypocrisy of collective bargaining being denied wage workers while being advertised to harried small businesses as their economic salvation.
[51] Samuel, ‘Competition and fair trading: a fair go for small business’, ibid.

has inquired as to why small business is not clambering onboard the collective bargaining notification express.

The Senate Committee recommended that the Government bring forward a collective bargaining notification scheme (Recommendation #11). The Government, in its Explanatory Memorandum to the Bill, claims that the 'change to legislation has been addressed previously' (p.5), and so the issue does not appear in the Memorandum's 'Regulation Impact Statement'.

However, one dimension has been elided. The Senate Committee's recommendation includes the sub-clause 'including the right to boycott'. The Government has not addressed this issue. What is the point of arranging a collectivity if the power that derives from collective action is denied? The ACCC has its head in the sand.

The ACCC treated with derision the Western Australian dairy farmers' claim that they needed rights to collective boycott to escape subjugation by the increasingly ravenous dairy processors. But the *piece de resistance* of the collective bargaining conundrum is to be found in Victoria amongst the chicken growers (indeed everywhere amongst the chicken growers, but the Victorian documentation is compelling).

A chicken grower is a latter day feudal serf. The conditions under which chicken growers scratch out a living are appalling, but nobody in authority is listening. Feudal serfdom is the product of the wave of deregulation ushered in by National Competition Policy, product of ill-informed ideologues and well-informed vested interests. Since deregulation in 2001, Victorian chicken growers have been trying to get a livable contract out of the handful of chicken processing overlords without success.[52]

A tentative and constrained collective bargaining authorisation had been granted by the ACCC to the chicken growers[53], but the processors appealed to the Australian Competition Tribunal. The ACT, after an inexcusable delay of 5 months between hearing and judgment, decided for the processors[54]. In a masterly display of two-faced cowardice and obfuscation, the ACT agreed that the chicken growers' description of the appalling conditions under which they operated constituted an accurate description of the industry, but it still denied authorisation of a collective bargaining structure containing a boycott component. There was no precedent said the Tribunal, so we don't know how it would operate, and we aren't going to hazard an experiment. Besides, said the Tribunal, a collective boycott would harm the growers themselves! We have your best interests at heart.

On collective bargaining, the ball is in the Government's and the ACCC's court. Don't hold one's breath for the game to be re-started. This Bill, as is becoming customary, sweeps the problem under the mat.

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[52] Victorian Farmers' Federation, 'History of "negotiations" between chicken processors and growers', *Briefing Notes*, November 2006.
[53] ACCC, 27 April 2006. http://www.accc.gov.au/content/index.phtml/itemId/732943. This ACCC note claims that 'the ACCC understands that many growers have successfully negotiated contracts with their respective processor'. This claim is inaccurate, and it is representative of a tendency within the ACCC to substitute wishful thinking for reality.
[54] http://www.austlii.edu.au/au/cases/cth/ACompT/2006/2.html.

VIII. Creeping acquisitions

The Senate Committee's recommendations regarding creeping acquisitions (#12 & #13) are missing from the Bill. The Government had this to say in response:

> The Dawson Review considered the issue of 'creeping acquisitions' in detail and concluded that the Act, in its present form, is adequate to consider 'creeping acquisitions' in so far as they raise questions of competition. The Dawson Review noted that concentrated markets may be highly competitive and that the purpose of competition law is to promote competition rather than to project a particular market structure of particular competitors or classes of competitor. Further, there is considerable uncertainty as to whether 'creeping acquisitions' in general (as opposed to a specific acquisition) do substantially lessen competition and cause economic detriment.

As with the Government's response to the Senate's 'financial power' recommendation (#4), this response is a disgrace. It couldn't be written better to serve Woolworths' interests than if it had been written by Woolworths itself. The response exposes an abject kowtowing to corporate interest behind Chicago/Contestability ideology. The Act in its present form is transparently not adequate to consider creeping acquisitions, and reference to Dawson Review legitimation only serves to highlight how politicised in essence was that Review.

The ACCC works with a merger criterion for administration of section 50 that has evolved pragmatically; the criterion has no scientific standing. As civilised beings it is our right and our responsibility to examine our own inherited artifacts for their continued functionality.

The creeping acquisitions issue has arisen because it has only recently arrived on centre stage as the marauding giants Woolworths and Coles gobble up independents operating in the spheres that they intend to dominate. A simple typing in of 'Woolworths' into the search category of the ACCC website will provide the reader with the latest offerings on the insatiable Woolworths' dinner plate.

The whole point of Woolworths' creeping acquisitions program is to *lessen* competition. Woolworths dislikes competition. Woolworths has no respect for the law. Why the Government and the regulator should have respect for Woolworths is unclear.[55]

On competition, Woolworths seeks market dominance to screw down suppliers, to levels beyond efficient and equitable pricing.[56] Supplier price repression goes beyond

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[55] Woolworths' previous CEO Roger Corbett steadfastly refused to acknowledge culpability (unlike sister conspirator Coles) in the Federal Court prosecution of section 45 harassment of independent liquor retailers. What is a person with these values doing on the Reserve Bank Board and now the Prime Minister's Aboriginal Task Force?

[56] C/f 'Woolworths has cited enhanced scale & leverage with suppliers as a benefit of the ALH bid' (Stephen Bartholomeusz , *Sydney Morning Herald*, 17.7.04); 'Foodland has squeezed suppliers to its

what can be absorbed through enhanced supplier efficiencies and thus is dutifully passed on in higher wholesale prices to small business independent retailers which sell into the same market as the giant retailers. In packaged liquor, an internal mid-2005 estimate at Fosters had Fosters' liquor revenue as being derived in the proportion 70% from independents and 30% from the two giants, whereas the latter's market share of package liquor sales was at the time about 45%. Large-scale suppliers thus act to provide the large-scale retailers with an additional cost differential by which the latter 'out-compete' their smaller competitors. Ditto with the rampant cross-subsidisation of rentals in shopping centres. The giant retailers' 'competitive advantage' in shopping centres is enhanced by the denial of tenancies to a range of retailers that compete with the giant retailers' products (liquor, fruit and vegetables, etc.). Market distortions everywhere that lessen competition are deemed by our beady-eyed regulators to be a harbinger of competition.

On the consumer side, the prices are low as long as other stores remain nearby; when the other outlets are bought up or beaten out, the prices escalate, as noted above in section IV.

On the law, Woolworths was found guilty in the Safeway bread price-fixing and misuse of market power case.[57] It was found guilty in the independent liquor stores harassment case.[58] Woolworths cynically broke the law in holding a surfeit of liquor licenses through illegal means during the transition period of liquor license deregulation in Victoria. Woolworths bends the law by converting shopfront liquor licenses into Dan Murphy liquorbarns, and the relevant regulators don't turn a hair.

These benefits and more are being currently brought to you courtesy of a phalanx of creeping acquisitions, which the Government and the regulator treats as not merely benign but as a blessing. Bah humbug.

* * *

Senator Boswell has worked hard for meat for the small business table, and sees this Bill as 'historic legislation'[59]. I don't think so.

The existing sections 46 and 51AC (and 51AA), with assistance from the courts, have never managed to dent a culture in which corporates treat the exploitation of their commercial relations with small business as a right. This Bill is intended to maintain the status quo. The main thrust of this Bill appears to be to get the small business lobbies to shut up, and for their members to continue to vote for the Coalition.

NZ business by $NZ50-60m p.a. and Woolworths will be able to squeeze trans-Tasman suppliers more because it is much bigger …' (Pam Graham, *AFR*, 26.5.05).

[57] ACCC v Safeway [2003] FCAFC 149, 30 June 2003. http://www.austlii.edu.au//cgi-bin/disp.pl/au/cases/cth/FCAFC/2003/149.html?query=safeway.

58 ACCC v Liquorland (Australia) [2006] FCA 826, 30 June 2006. http://www.austlii.edu.au//cgi-bin/disp.pl/au/cases/cth/federal_ct/2006/826.html?query=woolworths.

59 http://ronboswell.com/?p=413