



fair trading
coalition

Senator, the Hon Michael Ronaldson
Chair
Senate Standing Committee on Economics
The Senate
Parliament House
CANBERRA ACT 2600

Dear Senator Ronaldson

I attach for your consideration a submission from the Fair Trading Coalition in relation to your Committee's inquiry into the Provisions of the Trade Practices Legislation Amendment Bill (No 1) 2007 and the Trade Practices Amendment (Predatory Pricing Bill) 2007.

Should you have any questions in relation to this submission please do not hesitate to contact me on 02 6273 4333.

Yours sincerely

MICHAEL DELANEY
Convener
Fair Trading Coalition

13 July 2007



SUBMISSION BY THE

Fair Trading Coalition

***(A Coalition of Small Business for Trade
Practices Act Reform)***

TO THE
SENATE STANDING COMMITTEE ON ECONOMICS

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

13 July 2007

TABLE OF CONTENTS

Executive Summary and Recommendations	i
1. Introduction	1
2. Trade Practices Legislation Amendment Bill (No 1) 2007	3
2.1 <i>The Senate Economics References Committee</i>	3
2.2 <i>Section 46</i>	4
2.3 <i>Predatory Pricing</i>	4
2.4 <i>Second Deputy Chairperson of the ACCC</i>	5
2.5 <i>Section 51AC</i>	5
2.6 <i>Recommendations</i>	6
3. Trade Practices Amendment (Predatory Pricing Bill) 2007	7
3.1 <i>FTC Position on the Bill</i>	7
3.2 <i>Recommendation</i>	7
4. Other Matters	8
5. Conclusion	9
Attachments	10

Executive Summary and Recommendations

The Fair Trading Coalition (FTC) is an informal grouping of small business organisations committed to the strengthening of the *Trade Practices Act 1974*. The FTC was first established in 2002 to put forward a ‘small business’ view to the Dawson Review of the Trade Practices Act. The FTC has, since that time, continued to advocate for amendment of the Trade Practices Act. Members of the FTC are not bound by any rules or constitution and members are free to express their own views on trade practices matters. Many members of the Fair Trading Coalition, while fully supporting this submission, will also be presenting individual submissions to this Inquiry. However, all members of the Coalition remain resolute in their view, while acknowledging the Government’s introduction of a collective negotiation notification process for small business, that significant sections of the Trade Practices Act, notably sections 46 and 51AC, require urgent amendment in order to secure an environment which fosters fair competition for the benefit of Australian society.

The Fair Trading Coalition supports amendments to the Trade Practices Act which seek to strengthen and clarify the operation of sections 46 and 51AC. While strictly speaking ‘predatory pricing’ is not currently mentioned in section 46, in some circumstances such behaviour could be covered by that section. It needs to be acknowledged however, 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.

The Fair Trading Coalition supported the Majority report of that Senate Economics References Committee report of its inquiry into ‘The Effectiveness of the *Trade Practices Act 1974* in Protecting Small Business’. Importantly in the FTC’s view the Majority recommendations sought to clarify the operation of section 46 of the Trade Practices Act and to strengthen s51AC. The clarification of certain threshold matters in relation to section 46 (in particular the concepts of substantial market power and take advantage and of various other concepts including financial power and behaviour in other markets) were important issues for the FTC following a number of then relatively recent High Court decisions which, in the view of many stakeholders and commentators, had effectively made section 46 inoperative; notwithstanding the clear intention of the Parliament in 1987 that the section could apply to more than one corporation in a market.

As part of its negotiations with small business over the passage of the ‘Dawson Bill’, the Government agreed also to enter into discussions with small business representatives, including the Fair Trading Coalition, on the terms of the proposed amendments to the Trade Practices Act arising from its response to the SERC report. The outcome of that negotiation process is reflected in the Trade Practices Amendment Legislation Bill (No 1) 2007; notwithstanding that some of the issues raised by the FTC in those negotiations have not been addressed in the Bill.

While the FTC supports measures to strengthen section 46 in relation to predatory pricing behaviour and thus welcomes the inclusion in the Government’s Bill of measures which go some way to doing just that, a number of Members of the FTC believe that the measures

proposed could be strengthened. The FTC believes therefore that the Government should give further consideration to the proposed s46 (4A) with a view to strengthening that provision.

The FTC has a history of declaring concern regarding predatory pricing and behaviour, particularly in sectors of concentrated markets. While it might be argued that general predatory conduct is likely caught by section 46, some more recent decisions of the High Court have introduced a degree of uncertainty. It is to be acknowledged that there are segments of small business that would be fully supportive of the Trade Practices Amendment (Predatory Pricing Bill) 2007, due to its potential to provide some clarity, within some concentrated sectors of the market, as to how a judgement of predatory pricing behaviour might be made. In many ways however, the FTC would support the wider application of such a provision.

The one perhaps important additional measure which is not addressed in either of the Bills under consideration is the issue of 'creeping acquisitions'. The FTC understands that the issue of 'creeping acquisitions' is a complex one. However, given that large sectors of the Australian economy are now highly concentrated, the FTC believes that the Parliament must now consider enacting measures which will give the ACCC greater powers to consider acquisitions on a case-by-case basis; albeit that the merger thresholds set out in section 50 of the Act may not be in question.

The FTC also recommends the clarification of the application of the Trade Practices Act to Governments generally. This was recommended by the Dawson Review and supported by the SERC. The Government accepted that this issue should be considered and agreed to raise it with the state and territory governments. However there seems to have been little progress in that regard.

The FTC is aware that the so-called Bradken principle is before the High Court in the Baxter case, but that does not address or deal with an issue of great concern to small business and that is the conduct by governments as buyers of goods and services.

Recommendations:

1. The FTC recommends the Trade Practices Amendment Legislation Bill (No 1) 2007 be passed. However the FTC strongly recommends that the following matters be given serious consideration for inclusion in the Bill:
 - that s46 be amended to clarify the concept of take advantage;
 - that a corporation's 'financial power' can contribute to its market power;
 - the Government should give further consideration to the proposed s46 (4A) with a view to strengthening that provision;
 - that the Bill be amended to recognise that the position of second Deputy Chairperson of the ACCC should attach to a person with a small business background;
 - that the coverage of section s51AC 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.
2. While the FTC would support the Bill, it is the view of the FTC that the Trade Practices Amendment (Predatory Pricing Bill) 2007 will not on its own, address small business concerns about the effectiveness of section 46 and that the measures contained in the Government’s Bill, at a minimum, also need to be included in section 46.
 3. The FTC would recommend that the Committee consider whether it would be appropriate to recommend that the Trade Practices Act be amended to address ‘creeping acquisitions’.
 4. The FTC also recommends the clarification of the application of the Trade Practices Act to Governments generally. This was recommended by the Dawson Review and supported by the SERC. The Government accepted that this issue should be considered and agreed to raise it with the state and territory governments. However there seems to have been little progress in that regard.

The FTC has in this submission raised a number of issues it believes should be given further consideration. As noted above the FTC considers the collective bargaining notification arrangement, which was and is welcomed by small business, but part of an overall package of measures that the FTC believed necessary to ensure that our markets are competitive and continue to provide choice and competitive pricing to consumers. That package included the strengthening of sections 46 and 51AC. The FTC notes that should all of the measures outlined in this submission be adopted they would go quite some way to achieving that goal.

1. Introduction

The Fair Trading Coalition (FTC) is an informal grouping of small business organisations committed to the strengthening of the *Trade Practices Act 1974*. The FTC was first established in 2002 to put forward a 'small business' view to the Dawson Review of the Trade Practices Act. The FTC has, since that time, continued to advocate for amendment of the Trade Practices Act. Members of the FTC are not bound by any rules or constitution and members are free to express their own views on trade practices matters. Many members of the Fair Trading Coalition, while fully supporting this submission, will also be presenting individual submissions to this Inquiry. However, all members of the Coalition remain resolute in their view, while acknowledging the Government's introduction of a collective negotiation notification process for small business, that significant sections of the Trade Practices Act, notably sections 46 and 51AC, require urgent amendment in order to secure an environment which fosters fair competition for the benefit of Australian society.

The Members of the Fair Trading Coalition are:

- Apple and Pear Growers Association of South Australia Incorporated
- Australian Automotive Aftermarket Association
- Australian Automobile Dealers Association
- Australian Hotels Association
- Australian Motor Body Repairers Association
- Australian Newsagents' Federation
- Australian Petroleum Agents and Distributors Association
- Australian Private Hospitals Association
- Australian Service Station and Convenience Store Association
- Chamber of Women in Business
- Civil Contractors Federation
- Council of Small Business of Australia
- Drycleaning Institute of Australia
- Growcom
- The Horticulture Council
- Independent Liquor Group NSW
- Independent Liquor Stores Association
- Liquor Stores Association of Victoria
- Motor Trades Association of Australia
- The Motor Trades Association of the Australian Capital Territory
- The Motor Traders' Association of New South Wales
- The Motor Trades Association of the Northern Territory
- The Motor Trade Association of South Australia
- The Motor Trade Association of Western Australia
- National Institute of Accountants
- The Pharmacy Guild of Australia
- Service Station Association Limited
- Southern Sydney Retailers Association
- Victorian Automobile Chamber of Commerce
- Western Australian Dental Implant Society AOS (WA) Ltd

The intent of the FTC is to seek a rebalancing of the Trade Practices Act, to take account of a decade of structural change in Australia, so that it will more realistically reflect its Object: *'to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection'*.

The Members of the Coalition believe quite firmly that:

- the Trade Practices Act is about creating a society where consumers have the maximum of choice and access to services;
- there must be strong, efficient competition at both wholesale and retail. Such competition should focus on a broad range of matters including price, variety of goods, availability and after sales service;
- weaker and exploitable parties should have legislated rights and protections;
- trade practices regulation is not about ensuring unwarranted business survival; and
- the largest competitor should not have the power or right to exclude others, except by normal commercial dealings.

That means that Australia requires a Trade Practices Act that is concerned with much more than economic theory, yet which equally focuses on meeting the needs of our society. We must foster a dynamic and pluralist society with large and small businesses competing fairly side by side.

The Fair Trading Coalition supports amendments to the Trade Practices Act which seek to strengthen and clarify the operation of sections 46 and 51AC. While strictly speaking 'predatory pricing' is not currently mentioned in section 46, in some circumstances such behaviour could be covered by that section. It needs to be acknowledged however, 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.

There has been considerable debate in Australia over the past decade and in particular since 2002 (when the Dawson Review of the Trade Practices Act was finalised) about amendments to the competition provisions of the Trade Practices Act. The FTC has been principally involved in those debates and most recently has been in consultations with the Government on the amendments proposed in the Trade Practices Legislation Amendment Bill (No 1) 2007.

2. Trade Practices Legislation Amendment Bill (No 1) 2007

2.1 The Senate Economics References Committee

The amendments proposed in this Bill have as their genesis, the Government's response (announced on 23 June 2004) to the Senate Economics References Committee (SERC) inquiry into 'The Effectiveness of the *Trade Practices Act 1974* in Protecting Small Business'.

The Fair Trading Coalition supported the Majority report of that inquiry. Importantly in the FTC's view the Majority recommendations sought to clarify the operation of section 46 of the Trade Practices Act and to strengthen s51AC. The clarification of certain threshold matters in relation to section 46 (in particular the concept of substantial market power and take advantage, and of various other concepts including financial power and behaviour in other markets) were important issues for the FTC following a number of then relatively recent High Court decisions which, in the view of many stakeholders and commentators, had effectively made section 46 inoperative; notwithstanding the clear desire of the Parliament in 1987 that the section could apply to more than one corporation in a market.

The Majority Senators on the Committee also recommended the inclusion in s46 of a specific section allowing the courts to have regard to the capacity of a corporation to sell a good or service below its variable price.

The Minority Senators (the Government Senators) supported some, but by no means all of the Majority recommendations.

The Government's response (of 23 June 2004) to the SERC report could best be described as adopting a position that was 'less than the Minority'. The FTC saw that response as less than sufficient to address the concerns that its Members had about the effectiveness of both section 46 and 51AC.

As matters transpired, the introduction of legislation to give effect to the Government's response to the SERC report was delayed because of delays in the passage of the Dawson Bill (which was to give effect to the Government response to the Dawson Review of the Trade Practices Act). In an effort to resolve small business concerns about the Dawson Bill, the Government, having considered a proposal put forward by the FTC entered into discussions with small business representatives.

As part of its negotiations with small business over the passage of the 'Dawson Bill', the Government agreed also to enter into discussions with small business representatives, including the Fair Trading Coalition, on the terms of the proposed amendments to the Trade Practices Act arising from its response to the SERC report. The paper at Attachment 1 is a stock-take of the Senate Economics Reference Committee recommendations and the Government's Bill.

2.2 Section 46

At the conclusion of those negotiations the Government had agreed to modify its previous position on amendments to s46 by:

- clarifying that a corporation may still have a substantial degree of market power in a market, even where the corporation does not substantially control the market. Nor is a corporation absolutely free from constraint where another person or corporation also has a substantial degree of market power in the market;
- clarifying some aspects regarding predatory pricing and predatory behaviour by including in the Bill a provision to the effect that the Courts may have regard when determining whether a corporation has a degree of market power to any conduct, so far as is relevant, of the corporation in supplying, for a sustained period, goods or services at prices below the relevant cost to the corporation of supply of these goods or services and the reason for that conduct; and
- clarifying the Court may have regard to the behaviour in the market of the corporation and of other participants in the market, including co-ordinated behaviour arising from a contract, agreement or understanding between the corporation and other participants.

Amendments to s46 to this effect are contained in the Bill, and the FTC is very supportive of them. It is important, in the FTC's view, that if section 46 is to have any utility into the future that these threshold issues be clarified for the Courts. Any other proposed amendments to section 46 which do not also address these threshold matters will not increase the effectiveness or the utility of section 46 for small business; simply because the Courts have required that the first question which must be asked in relation to a section 46 matter is whether or not a corporation has a substantial degree of power in a market. If that test cannot be satisfied, irrespective of the purpose of any given behaviour, then a corporation will not be found to have been in breach of section 46.

The FTC does consider, however, that s46 still needs to contain some explicit description concerning the concepts of corporations' 'financial power' and more importantly 'taking advantage'. The concept of 'taking advantage', in particular, will benefit from further clarification beyond that which has been provided to date by the Courts. The FTC has previously proposed quite firmly to the Government that 'take advantage' should be clarified. The FTC also remains of the view that the concept of 'financial power' needs to be a part of any considerations and assessment of a corporation's 'substantial degree of market power'.

2.3 Predatory Pricing

In relation to the 'predatory pricing' provisions in the Bill, the FTC acknowledges that the Government has moved from its original position of proposing to include in the Bill a reference to 'recoupment'. The FTC was strongly opposed to their being any reference in section 46 to the concept of 'recoupment'. It was generally felt that the inclusion of a reference to recoupment could ultimately lead to an expectation that in predatory pricing matters recoupment would be needed to be shown; thus in the FTC's view further raising the 'barrier' to a successful misuse of market power case.

That said however, while the FTC supports measures to strengthen section 46 in relation to predatory pricing behaviour and thus welcomes the inclusion in the Government's Bill of

measures which go some way to doing just that, a number of Members of the FTC believe that the measures proposed could be strengthened.

The FTC's view is that as markets become more concentrated (as is the case in many sectors of the Australian economy) Australia needs to have strong and properly administered laws which guard against the misuse of market power and in particular, predatory behaviour by large businesses. Without significant laws against such behaviour, the FTC believes that large businesses will continue to take advantage of their market power, resulting in further concentration of markets. That concentration will eventually lead to a loss of competitors and thus competition in markets, a loss of choice for consumers and ultimately less price competition, which further disadvantages consumers.

The FTC believes therefore that the Government should give further consideration to the proposed s46 (4A) with a view to strengthening that provision.

2.4 Second Deputy Chairperson of the ACCC

The Trade Practices Legislation Amendment Bill (No 1) 2007 also proposes amendments to give effect to some other aspects of the SERC report. This includes provision for the appointment of a second Deputy Chairperson of the ACCC. This proposal is supported by the FTC on the basis that the person occupying that position would have a background in small business. The FTC notes that the Bill does not specifically address that matter.

The FTC notes that in announcing the appointment of a second Deputy Chairperson, the Prime Minister said in a speech on 6 July 2004 to the Council of Small Business Organisations of Australia, that *'the Government has decided to create a new position within the ACCC and that is a new position of deputy chairman with particular responsibility in relation to small business'*. The FTC is concerned that the emphasis on small business proposed by the Prime Minister is not reflected in the Bill. Section 7 of the Trade Practices Act provides that one Commissioner has to have a consumer background. The Act should also provide that one Deputy Chair should have a small business background.

2.5 Section 51AC

The Bill also gives effect to the amendments to section 51AC foreshadowed in the Government's response to the SERC report. Those amendments include the raising of the threshold for section 51AC from \$3 million to \$10 million (and it should be noted here that the calculation of the thresholds as between section 51AC and the new collective bargaining notification arrangements differs and thus the proposed change to the section 51AC threshold should not be considered to be an aligning of thresholds). In section 51AC the threshold refers to the value of an invoice for goods/services provided by one party to another. The majority of the SERC recommended the removal of the threshold altogether from s51AC and the FTC obviously supported that recommendation. The Government has however indicated that it wishes to retain a threshold, but has agreed that it should be lifted to \$10 million. The FTC does not oppose the lifting of that threshold and indeed would wish it to be higher.

The Bill also provides for a further amendment to section 51AC to add to the list of matters that the Courts may have regard to in determining whether conduct has been unconscionable,

‘whether the supplier (acquirer) has a contractual right to vary unilaterally a term or condition of a contract between the supplier (acquirer) and the business consumer for the supply (acquisition) of goods or services’. Again this amendment is supported by the FTC. However, the FTC believes that section 51AC requires further significant strengthening and recommends to the Committee that that section be amended as follows:

- 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.

It should be noted that while (as outlined above) the Government’s Bill proposes to list the issue of unilateral variation of contracts in the list of factors in section 51AC which the Courts may consider, the Bill does not go as far in relation to that matter as is recommended by the FTC; the FTC position is that such behaviour (along with the other matters listed above) should be proscribed.

2.6 Recommendations

In light of the discussion above, the FTC recommends the Trade Practices Amendment Legislation Bill (No 1) 2007 be passed. However the FTC strongly recommends that the following matters be given serious consideration for inclusion in the Bill:

- that s46 be amended to clarify the concept of take advantage;
- that a corporation’s ‘financial power’ can contribute to its market power;
- the Government should give further consideration to the proposed s46 (4A) with a view to strengthening that provision;
- that the Bill be amended to recognise that the position of second Deputy Chairperson of the ACCC be a person with a small business background;
- that the coverage of section s51AC 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.

3. Trade Practices Amendment (Predatory Pricing Bill) 2007

3.1 *FTC Position on the Bill*

The FTC has a history of concern regarding predatory pricing and behaviour, particularly in sectors of concentrated markets. While it might be argued that general predatory conduct is likely caught by section 46, some more recent decisions of the High Court have introduced a degree of uncertainty. It is to be acknowledged that there are segments of small business that would be fully supportive of this Bill, due to its potential to provide some clarity, within some concentrated sectors of the market, as to how a judgement of predatory pricing behaviour might be made.

The Bill proposes to introduce a new section 46AA into the Trade Practices Act to proscribe predatory pricing in three specific markets. Those markets are the grocery market, the fuel market and (broadly) the pharmaceutical market. The FTC has generally regarded those market as being highly concentrated markets. Because of its concerns about the possible impacts on competition and consumers of markets being highly concentrated, the Fair Trading Coalition is not opposed to behaviour in those markets being subject to particular scrutiny under the Trade Practices Act. In many ways however, the FTC would support the wider application of such a provision.

The FTC would, therefore, support the Bill, but would also suggest to the Committee that the Bill will not – on its own – clarify the manner in which s46 effectively operates, or how it might thus be interpreted by the Courts in matters that might stand outside the market sectors explicitly mentioned.

3.2 *Recommendation*

While supportive of the Bill, it is the view of the FTC therefore, that the Trade Practices Amendment (Predatory Pricing Bill) 2007 will not on its own, address small business concerns about the effectiveness of section 46 and that the measures contained in the Government's Bill, at a minimum, also need to be included in section 46.

4. Other Matters

As mentioned above, while the FTC notes and welcomes the reference by the Government of retail tenancy matters to the Productivity Commission for inquiry and report, the FTC notes that not all unconscionable conduct matters relate to retail tenancy issues and therefore proposes that the matters outlined above in relation to a strengthening of s51AC should be given serious consideration.

The FTC notes also that while the collective bargaining notification arrangements were and are welcomed by small business (albeit that at the time of writing have yet to be 'tested') those arrangements were but part of an overall package of measures that the FTC believed necessary to ensure that our markets are competitive and continue to provide choice and competitive pricing to consumers. That package included the strengthening of sections 46 and 51AC. The FTC notes that should all of the measures outlined in this submission be adopted they would go quite some way to achieving that goal. The one perhaps important additional measure which is not addressed in either of the Bills under consideration is the issue of 'creeping acquisitions'. The FTC understands that the issue of 'creeping acquisitions' is a complex one. However, given that large sectors of the Australian economy are now highly concentrated, the FTC believes that the Parliament must now consider enacting measures which will give the ACCC greater powers to consider acquisitions on a case-by-case basis; albeit that the merger thresholds set out in section 50 of the Act may not be in question.

The FTC would recommend that the Committee therefore consider whether it would be appropriate to recommend that the Trade Practices Act be amended to address 'creeping acquisitions'.

The FTC also recommends the clarification of the application of the Trade Practices Act to Governments generally. This was recommended by the Dawson Review and supported by the SERC. The Government accepted that this issue should be considered and raised with the state and territory governments. However there seems to have been little progress in that regard.

The FTC is aware that aspects of this matter (and in particular, issues relating to 'derived immunity') are before the High Court in the Baxter case, but that does not address or deal with an issue of great concern to small business and that is the conduct by governments as buyers of goods and services.

5. Conclusion

The Fair Trading Coalition supports amendments to the Trade Practices Act which seek to strengthen and clarify the operation of sections 46 and 51AC. While strictly speaking 'predatory pricing' is not currently mentioned in section 46, in some circumstances such behaviour could be covered by that section. It needs to be acknowledged however, 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.

There has been considerable debate in Australia over the past decade and in particular since 2002 (when the Dawson Review of the Trade Practices Act was finalised) about amendments to the competition provisions of the Trade Practices Act. The FTC has been principally involved in those debates and most recently has been in consultations with the Government on the amendments proposed in the Trade Practices Legislation Amendment Bill (No 1) 2007.

Amendments to clarify the operation of s46 are contained in the Trade Practices Amendment Legislation Bill (No 1) 2007, and the FTC is very supportive of them. It is important, in the FTC's view, that if section 46 is to have any utility into the future that these threshold issues be clarified for the Courts. Any other proposed amendments to section 46 which do not also address these threshold matters will not increase the effectiveness or the utility of section 46 for small business; simply because the Courts have required that the first question which must be asked in relation to a section 46 matter is whether or not a corporation has a substantial degree of power in a market.

While the FTC is also supportive of the Trade Practices Amendment (Predatory Pricing Bill) 2007 and the measures proposed in that Bill to address predatory behaviour, the comments above about clarification of some of the threshold aspects of section 46 should also be taken into consideration.

The FTC has in this submission raised a number of issues it believes should be given further consideration. As noted above the FTC considers the collective bargaining notification arrangement, which was and is welcomed by small business, but part of an overall package of measures that the FTC believed necessary to ensure that our markets are competitive and continue to provide choice and competitive pricing to consumers. That package included the strengthening of sections 46 and 51AC. The FTC notes that should all of the measures outlined in this submission be adopted they would go quite some way to achieving that goal.

MTAA
National Secretariat
Canberra

Convener of the Fair Trading Coalition

13 July 2007

Attachment

STOCKTAKE OF SENATE ECONOMIC REFERENCES COMMITTEE RECOMMENDATIONS

RECOMMENDATIONS	GOVERNMENT ACTION as of June 2007.	COMMENTS
<p><u>Recommendation 1</u></p> <p>Substantial market power.</p> <p>R 1.1 - Current threshold of substantial degree of market power is lower than previous one.</p> <p>R 1.2 - No requirement to have an absolute freedom of constraint.</p> <p>R 1.3 - More than one corporation can have substantial market power.</p> <p>R 1.4 - Behaviour is a relevant factor in proving substantial market power.</p>	<p>Accepted. In Bill.</p> <p>Accepted. In Bill.</p> <p>Accepted. In Bill.</p> <p>Not accepted.</p>	
<p><u>Recommendation 2</u></p> <p>Taking Advantage</p> <p>R 2.1- 2.4 - descriptions of what may amount to taking advantage</p>	<p>Not accepted.</p>	<p>FTC sees this as an important issue and should have been accepted by the Government.</p>
<p><u>Recommendation 3</u></p> <p>Predatory Pricing</p> <p>R 3.1 - Court may consider capacity to sell below variable cost.</p> <p>R 3.2 - Not necessary to show recoupment.</p>	<p>Accepted. In Bill, but as below cost, not below variable cost.</p> <p>Bill does not mention recoupment.</p>	<p>Predatory pricing not a specific offence but an issue for the next round.</p> <p>FTC does not want recoupment to be a legislative factor.</p>

RECOMMENDATIONS	GOVERNMENT ACTION as of June 2007.	COMMENTS
<u>Recommendation 4</u> Financial power to be part of substantial degree of market power.	Not accepted.	
<u>Recommendation 5</u> Misuse of market power in a second market to be covered.	Accepted. In Bill.	
<u>Recommendation 6</u> Co-ordinated market conduct to be covered.	Accepted. In Bill.	
<u>Recommendation 7</u> Unconscionable conduct – repeal threshold.	Threshold limit increased to \$ 10 mill. In Bill.	
<u>Recommendation 8</u> Unconscionable conduct-unilateral variation of contracts to be a factor.	Accepted. In Bill.	
<u>Recommendation 9</u> Application of TPA to Governments.	Government agreed to consult with states on the issue.	This is a potentially important issue and appears to be in limbo. Some aspects in High Court but not the underlying issue.
<u>Recommendation 10</u> Retail Tenancies	Government has announced reference to PC.	
<u>Recommendation 11</u> Collective bargaining/boycott notification, no threshold	Government has introduced collective bargaining with a variety of thresholds.	Collective bargaining notifications now law. Needs to be fine tuned.

RECOMMENDATIONS	GOVERNMENT ACTION as of June 2007.	COMMENTS
<u>Recommendation 12</u> Creeping acquisitions	Not accepted.	Very much an issue for ACCC to test and may be tested in Coles break up.
<u>Recommendation 13</u> Divestiture for breaches of section 46	Not accepted.	
<u>Recommendation 14</u> 'Cease and Desist' power for ACCC	Not accepted.	ACCC does not support.
<u>Recommendation 15</u> Changes to section 155 - statutory demands for information,	Not accepted.	
<u>Recommendation 16</u> More resources for ACCC	ACCC now better resourced.	
<u>Recommendation 17</u> Federal Magistrates Court to deal with section 46 and 51AC issues	Accepted but only for Section 51AC, not section 46.	
THE ABOVE IS THE SITUATION AS OF 26 JUNE 2007		

HANK SPIER

July 2007