Senate Economics Committee

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

Submission
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This submission is divided into the following six parts:

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- Part 2: Why the Government's proposed amendments fail to fix the current problems with s 46;

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- Part 6: Senator Joyce's proposed amendment - A critique

Part 1: Introduction and overview of key issues involved with s 46 of the *Trade Practices Act*

There can be no doubt that an effective s 46 of the Trade Practices Act is essential to ensuring that competition is as vigorous as possible. Without an effective s 46 there will be the recurring danger that anti-competitive conduct by large and powerful corporations will distort the competitive process and drive out efficient competitors to the detriment of consumers. Within this context, it needs to be remembered that (i) the object of the Trade Practices Act is `to enhance the welfare of Australians through the promotion of competition' and (ii) that the Act does this by prohibiting conduct that recognized as being anti-competitive. Careful regard must be had to both points as, in the absence of a perfectly competitive market, effective prohibitions against anti-competitive conduct are essential to the promotion of competition. Yes, competition is a ruthless process, but that proposition is not in any way inconsistent with the proposition that there must be effective laws against anti-competitive conduct. Just like excessive regulation may stifle competition, so too may competition be stifled by ineffective prohibitions against anti-competitive conduct. Accordingly, the central question to be addressed in relation to s 46 (and indeed any section of the competition provisions of the *Trade Practices Act*) is whether the section is operating effectively to prohibit anti-competitive conduct; in this case, abuses of market power by large and powerful corporations.

Currently, however, s 46 is not operating effectively to prevent large and powerful corporations from engaging in predatory conduct or other abuses of market power. This ineffectiveness is a direct result of the High Court's decisions in *Boral Besser Masonry Limited v Australian Competition and Consumer Commission* [2003] HCA 5 (7 February 2003); *Melway Publishing*

Pty Ltd v Robert Hicks Pty Ltd [2001] HCA 13 (15 March 2001); and *Rural Press Limited v Australian Competition and Consumer Commission* [2003] HCA 75 (11 December 2003). Collectively these decisions have narrowed the interpretation of two of the three elements required to be established to prove a breach of s 46. In particular, as a result of these High Court decisions the concepts of "a substantial degree of power in a market" and "take advantage" have been given a restrictive interpretation not in keeping with the parliamentary intention behind those key s 46 concepts.[1]

[1] Zumbo, F., (2003), "The Boral case: Has the High Court done justice to s 46," *Trade Practices Law Journal*, Vol. 11, pp. 199-232. See also Zumbo, F., (2004), "The High Court's Rural Press decision: The end of s 46 as a deterrent against abuses of market power?" *Trade Practices Law Journal*, Vol. 12, pp. 126-134.

Part 2: Why the Government's proposed amendments fail to fix the current problems with s 46

The Government's proposed amendments fail to fix the current problems with s 46 because of the following reasons.

The Government's proposed amendments will not alter the test the Courts currently apply to determine whether the corporation has a substantial degree of power in a market

The test the Courts currently apply in determining whether a corporation has a substantial degree of power in a market will remain unchanged by the Government's proposed amendments. Simply stating that the a corporation can have a substantial degree of power in a market even though it does not substantially control a market or is not absolutely free from constraint adds nothing as not even the High Court in its decision in *Boral Besser Masonry Limited v Australian Competition and Consumer Commission* [2003] HCA 5 (7 February 2003) required proof of those matters when considering if the corporation had a substantial degree of power in the market. Similarly, stating that a corporation can have a substantial degree of power in a market even though it does not substantially control a market or is not absolutely free from constraint does not change the fact the Courts will continue to look at a corporation's ability to raise prices without losing business to rivals when assessing whether the corporation has a substantial degree of power in a market. In short, the proposed amendments fail to actually define what is meant by the concept of "a substantial degree of power in a market" and, therefore, the current judicial interpretation of the concept will continue to apply when deciding s 46 cases.

To understand the current problem with the judicial interpretation of the concept of "a substantial degree of power in a market" and why the proposed amendments fail to fix that current problem it is necessary to consider to the High Court's decision in *Boral Besser Masonry Limited v Australian Competition and Consumer Commission* [2003] HCA 5 (7 February 2003).

Before doing so, however, a number of preliminary points need to be emphasized. Firstly, there can be no doubt that the competition law provisions of the *Trade Practices Act* are concerned with promoting competition for the benefit of all Australians.[2] These competition law provisions are based on the premise that competition between individual competitors competing to the best of their ability and seeking to outdo each other will ensure that consumers have the benefit of competitive pricing, diversity of choice and continuing innovation in the market.

[2] See s 2 of the Act.

Secondly, there is equally no doubt that a perception of apparently healthy competition between competitors should not be used as a cloak to hide conduct that is intentionally or strategically engaged in by a large and powerful corporation with the aim of undermining the competitive process. It is this second matter that is of particular concern within the s 46 context. Such a market situation should be carefully analyzed, with any anti-competitive conduct to the ultimate detriment of consumers being appropriately dealt with under s 46.

***Boral Besser Masonry Limited v. Australian Competition and Consumer Commission*: Does it do justice to the parliamentary intention behind the 1986 amendments?**

The High Court's decision in the Boral case was a landmark one concerning the threshold issue of whether a corporation has a substantial degree of power in a market. Unless that threshold test is satisfied, the corporation is not within s 46 and, accordingly, any conduct engaged in by that corporation, no matter how inherently anti-competitive the conduct, will escape scrutiny by the courts under s 46. With this in mind, the question of whether the High Court's Boral decision has does justice to the parliamentary intention behind the 1986 amendments to s 46 becomes a critical one. A review of the majority judgments reveals that the High Court did not do justice in its Boral decision to the parliamentary intention behind the 1986 amendments.

Gleeson CJ and Callinan J.

In their joint judgement Gleeson CJ and Callinan J found that Boral did not have a substantial degree of market power on the basis that the level of competition in the market was such that Boral did not have the ability to raise prices. Equally influential in their Honours' minds was the lack of evidence that Boral would, following the below cost pricing, be able to raise prices to recoup losses from any such pricing. According to their Honours, the ability to recoup those losses was a key issue in establishing whether or not Boral had a substantial degree of market power.

> "120. It was pointed out by this Court in *Melway Publishing Pty Ltd v Robert Hicks Pty Ltd* … that … an absence of a substantial degree of market power only requires a sufficient level of competition to deny a substantial degree of power to any competitor in the market.
> …
> 130. While the possibility of recoupment is not legally essential to a finding of pricing behaviour in contravention of s 46, it may be of factual importance. The fact, as found by Heerey J, that BBM had no expectation of being in a position to charge supra-competitive prices even if Rocla and Budget left the market, leaving it facing Pioneer and C & M, was material to an evaluation of its conduct. The inability to raise prices above competitive levels reflected a lack of market strength. A finding that BBM expected to be in a position, at the end of the price war,

> to recoup its losses by charging prices above a competitive level may have assisted a conclusion that it had a substantial degree of market power, depending on the other evidence. But no such finding was made."

In their Honours' mind there was sufficient competition in the relevant market to deny any one corporation a substantial degree of market power. Thus, it would appear that in a `competitive' market no individual corporation will have a substantial degree of market power. Indeed, on their Honours' reasoning it was possible to have markets in which no corporation had a substantial degree of market power. Such a finding has quite significant ramifications within markets where there are two or more large corporations seen to be competing against one another. Since such corporations would be considered to be sufficiently competitive with one another, their Honours would appear to have no problem finding that none of them individually had the requisite market power under s 46. On this reasoning, s 46 would have no application in any market characterized by two or more large corporations on the basis that no individual corporation in such a market would ordinarily be able to raise prices without losing business to rivals. It is essentially only monopolists or near monopolists that are able to raise prices without losing business. This runs contrary to the parliamentary intention behind the 1986 amendments on the basis that the lower threshold under s 46 was intended to cover `major participants in an oligopolistic market.' [3]

Similarly, their Honours' emphasis on the corporation's ability to subsequently recoup its losses from the below cost pricing adds a new dimension to s 46. Not only is there no evidence from the legislative history of s 46 to suggest that such a "recoupment" requirement was seen as relevant to s 46, but such a requirement would essentially require proof that the corporation has in fact succeeded in eliminating its rivals as, absent of collusion between any remaining competitors, only a monopolist or near monopolist left in the market would ordinarily be able to raise prices above a competitive level.

Any requirement that the corporation had in fact succeeded in eliminating its rival would also run contrary to the intention behind s 46. Within this context, the following comments by their Honours are somewhat troubling:

> 145. In its Statement of Claim, the ACCC identified C & M as the primary target of BBM's exclusionary purpose. Let it be assumed that BBM hoped that C & M would be eliminated as a competitor. The fact is that C & M was not eliminated. How does an unsuccessful attempt to exclude a competitor establish market power? If BBM's primary objective was as alleged by the ACCC, and the objective failed, the failure indicates an absence, rather than a presence, of market power.

From the legislative history of s 46 there is no evidence to suggest that proof of the elimination a rival is required to establish a breach of s 46.

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[3] See Australia, House of Reps, *Hansard*, 19 March 1986, p 1626.

McHugh J.

From the outset, McHugh J was clear as to the approach to be taken under the existing s 46:

> "199. In my opinion, BBM did not have a substantial degree of power in the relevant market - the sale of concrete masonry products - because it was not able to raise prices to supra-competitive levels without its rivals taking away customers. Nor was it in a position to recover the losses it made by pricing below relevant cost when and if the price-cutting finished. Accordingly, irrespective of the purpose of its pricing, it did not have a substantial degree of market power of which it could take advantage."

With this very clear statement, His Honour found the threshold test under the existing s 46 to be one of a corporation being able to raise prices without losing business. Not only was there an inability on the part of Boral to raise prices without losing custom, but there was also an inability to recoup losses from any below cost pricing once any such pricing behaviour had ended.

Overall, therefore, it is apparent that the majority of the High Court in the Boral case has equated the key threshold concept of a substantial degree of power in a market under s 46 with the ability to raise prices without losing business to rivals. In addition, the majority of the High Court also appeared to place considerable emphasis on the concept of "recoupment" as a way to assist in determining whether or not a corporation has a substantial degree of market power in situations involving allegations of predatory below cost pricing. Such a new concept is not only incapable of being justified by reference to the legislative history of, or intention behind, the s 46, but, more importantly, its adoption raises the level of proof required in s 46 cases involving predatory below cost pricing allegations. By failing to specifically state that a corporation can have a substantial degree of power in a market even though (i) it cannot raise prices without losing business to rivals; and (ii) there is no proof that the corporation has recouped losses from its predatory below cost pricing, the Government's proposed amendments fail to restore the parliamentary intention behind the 1986 amendments to s 46.

In short, the ineffectiveness of s 46 will continue despite the Government's proposed amendments. Such ineffectiveness will continue quite simply because the Government's proposed amendments will not alter the approach taken by the High Court in relation to s 46 in *Boral Besser Masonry Limited v Australian Competition and Consumer Commission* [2003] HCA 5 (7 February 2003); *Melway Publishing Pty Ltd v Robert Hicks Pty Ltd* [2001] HCA 13 (15 March 2001); and *Rural Press Limited v Australian Competition and Consumer Commission* [2003] HCA 75 (11 December 2003).

Importantly, the ineffectiveness of s 46 has continued despite the High Court's refusal to grant special leave in *Australian Competition & Consumer*

Commission v Australian Safeway Stores Pty Limited [2003] FCAFC 149 (30 June 2003).[4] With Gummow, Hayne and Callinan JJ refusing special leave on the basis that (i) `insofar as the Commission and Safeway seek to challenge conclusions of fact reached in the Full Court no question is raised suitable for the grant of special leave,' and (ii) `the events in issue having occurred so long ago and the proceedings at first instance having been protracted as they were, it would now not be in the interests of justice to extend further what may have been an unduly protracted piece of litigation.' With the Full Federal Court having divided two to one in favour of the ACCC in relation to s 46 and with the Trial Judge having found in Safeway's behalf on the s 46 issues we have four Federal Court Justices equally divided as to whether or not there have been breaches of s 46. The case has only been finally resolved by a refusal of special leave by a three member bench of the High Court, rather than through a careful assessment by all justices of the High Court of the approach taken by the Full Federal Court and by the Trial Judge in the case.

Thus, the Safeway case leaves unchanged the High Court principles as outlined in the Boral, Melway and Rural Press cases in relation to the key s 46 concepts of "a substantial degree of power in a market" and "take advantage." It is those principles that determine the scope and operation of s 46 and if they were contrary to the parliamentary intention behind those key s 46 concepts, then they remain so in the absence of reconsideration by the High Court or suitable legislative amendments. In this regard, it was disappointing that the High Court did not chose to grant special leave in the Safeway case as then we would have had the benefit of the Court's own insights as to the application of the Boral and Rural Press principles to the Safeway case. Until the all-important principles set out by the High Court in relation to "a substantial degree of power in a market" and "take advantage" are reconsidered by all Justices of the High Court or altered by Parliament, those principles will remain unchanged and s 46 will continue to be ineffective.

The Government's proposed amendments fail to provide a statutory definition of the concept of "a substantial degree of power in a market"

Given that the proposed amendments do not actually define what is meant by the concept of "a substantial degree of power in a market," it is clear that the current judicial interpretation of that concept will continue to apply. As this judicial interpretation does not do justice to the parliamentary intention behind that concept, the Committee may consider it appropriate to insert a statutory definition of the concept giving appropriate weight to such matters as substantial market share or substantial financial power. The insertion of a statutory definition of a substantial degree of power in a market would ensure that the concept is interpreted in accordance with the parliamentary intention behind the concept and ensure that s 46 covers large and powerful

[4] See ACCC v Australian Safeway Stores Pty Ltd & Anor [2004] HCATrans 344 (10 September 2004).

oligopolists which despite their inability to raise prices without losing business to rivals, can wield considerable power.

Substantial market share or substantial financial power in these circumstances become critical factors as the greater the market share or financial power, the greater the corporation's ability to engage in conduct that is by its very nature anti-competitive. It is a corporation's substantial market share or substantial financial power that gives it the ability to bring about market outcomes favourable to the corporation, but detrimental to the level of competition in that market over time. Thus, the greater the market share or financial power and the more concentrated the market, the greater the ability of the corporation to (i) force those with whom it deals to accede to demands that could not have been sustained by the corporation in the absence of its substantial market share or substantial financial power, or (ii) pursue a course of action that could not have been sustained by the corporation in the absence of its substantial market share or substantial financial power. In either case, the greater the market share or financial power, the greater the ability for the corporation to act in ways that entrench or grow its market power, but which cannot be explained merely by reference to the corporation's internal advantages (i.e. skills or efficiencies).

It is a corporation's substantial market share or substantial financial power that allows it to act in a manner that detrimental to competition if it intentionally embarks on such a course of action. In this regard, substantial market share and substantial financial power become surrogate measures of the corporation's power to act in an anti-competitive manner. Thus, the greater the corporation's market share or financial power, the greater it's market power and its ability to act to a considerable degree free from competitive constraint. At one end of the spectrum, the corporation may be a monopolist or near monopolist able to act totally or almost totally free from competitive constraint. At the other end, the corporation may have such low market share or financial power that it has no ability to act to any degree free from competitive constraint. At some point, however, a corporation will secure such a share of the market or may have such financial power that it will be able to act to a considerable degree free from competitive constraint.

When does the corporation secure sufficient market share or financial power to enable it to act to a considerable degree free from competitive constraint? The short answer, based on the consideration of the legislative history of s 46 and the intention behind the 1986 amendments to s 46, appears to be where the corporation has substantial market share or substantial financial power enabling it to act to a considerable degree free from competitive constraint. Importantly, the concepts of substantial market share or substantial financial power are ones that enable a comparison to be made of the respective market power of corporations in the market.

In relation to the question of whether the corporation has substantial market share, for example, a lot will depend on how concentrated or fragmented the market in which the corporation operates. By having regard to the market structure, a comparison can be made of the market shares of those

corporations in that market. Thus, the more concentrated the market, the larger the market share covered by the concept of substantial market share. As a relative concept only those corporations with the largest market shares will be considered to have substantial market share. Once achieved, it is this substantial market share that gives the corporation an ability to act to a considerable degree free from competitive constraint and sets it apart from a corporation that lacks such market share.

In relation to the question of whether the corporation has substantial financial power, the focus would be on the corporation's market capitalization, its access to considerable financial resources and its ability to raise capital or borrow money. Thus, the greater the corporation's market capitalization or access to financial resources, the greater the freedom of action it has, if it chose to do so, to pursue or sustain a pattern of conduct that is inherently anti-competitive. Once again, it will be the corporations with the largest market capitalization or greatest access to financial resources that will be considered to have substantial financial power.

Importantly, a reference to substantial financial power would clearly overcome a problem with the current s 46 identified by McHugh J in *Boral Besser Masonry Limited v Australian Competition and Consumer Commission* [2003] HCA 5 (7 February 2003):

> 269. As I have indicated, neither s 46 nor any other provision of the Act defines or even uses the term "predatory pricing". And the terms and structure of s 46 suggest that it is not well suited for dealing with claims of "predatory pricing". In the context of a "predatory pricing" claim, s 46 seems under- and may be over-inclusive. Conduct that is predatory in economic terms and anti-competitive may not be captured by s 46 simply because the predator does not have substantial market power when it sets out on its course to deter or injure competitors. That may be because until it achieves its object it has no substantial degree of market power. … Section 46 is ill drawn to deal with claims of predatory pricing under these conditions.

These comments refer to the possibility that a corporation with substantial financial power could enter a market and engage in sustained predatory below cost pricing with the intention of destroying competition, but not be covered by s 46 because when it sets out on the predatory conduct it may not have a substantial degree of power in a market.

In summary, having secured substantial market share or having substantial financial power and with it the ability to act to a considerable degree free from competitive constraint, the corporation is in a position where it can more readily act in a manner detrimental to competition. It is not simply the attaining of that position that is of concern for the purposes of s 46, but rather having attained that position or having that position the corporation is placed on notice that it is not to engage in conduct that is inherently anti-competitive. While of course the corporation can continue to exploit its internal advantages (i.e. skills and efficiencies) without fear of s 46, it cannot now intentionally

engage in predatory conduct which, when considered objectively, undermines the competitive process.

The Government's proposed amendments fail to address the urgent need to restore the parliamentary intention behind the equally critical s 46 concept of "take advantage"

The proposed amendments fail to include any legislative clarification regarding the concept of `take advantage.' This is a significant omission as it means that the test currently applied by the Courts in relation to the concept of "take advantage" will continue to apply. Under that test if a corporation with a substantial degree of power in a market engages in conduct that the corporation *could* have also engaged in the absence of a substantial degree of power in a market, then the corporation is not taking advantage of that market power for the purposes of s 46 where it engages in that conduct. As "taking advantage" needs to be established in *addition* to a substantial degree of power in a market in order to prove a breach of s 46, a failure to clarify the concept of "taking advantage" means that s 46 will remain ineffective.

Indeed, in order for s 46 to be effective, there is an urgent need to restore the parliamentary intention behind **both** the concept of "a substantial degree of power in a market" and the concept of "take advantage." The amendments not only fail to restore the parliamentary intention behind "a substantial degree of power in a market," but make no attempt to restore the parliamentary intention behind the concept of "take advantage."

A clear legislative statement as to the meaning of "take advantage" is necessary given the restrictive and onerous interpretation given to that concept by the High Court. To fully appreciate this restrictive and onerous interpretation it is necessary to consider the high Court's decisions in *Melway Publishing Pty Ltd v Robert Hicks Pty Ltd* [2001] HCA 13 (15 March 2001).

Melway Publishing Pty Ltd v Robert Hicks Pty Ltd: The issue of taking advantage

While the High Court has in the Boral case arguably raised the threshold regarding the critical concept of `a substantial degree of power in a market,' it is important to note that the High Court had in its earlier decision in *Melway Publishing Pty Ltd v Robert Hicks Pty Ltd*[5] also arguably imposed a very onerous test regarding whether or not the corporation has `taken advantage' of its market power. When taken together, the High Court's decisions in the Boral and Melway cases have effectively made breaches of s 46 extremely difficult to establish and have, as a result, considerably reduced the scope of s 46. Such a state of affairs is contrary to the intention behind the existing s 46.

[5] [2001] HCA 13 (15 March 2001)

Of particular concern with the High Court's Melway decision is the apparent reworking of concept of `taking advantage' in that case. While it was believed that following the earlier High Court decision in *Queensland Wire Industries Pty Ltd v Broken Hill Proprietary Co Ltd*[6] the concept of `take advantage' meant simply to *use* one's power, the High Court has in the Melway case (and now confirmed in the Boral case) taken a different view of the concept. The clearest evidence signaling a change in the High Court's interpretation of the concept of `taking advantage' is found in the following comment by McHugh J in the Boral case:

> "…despite what was said in Queensland Wire, I am not convinced that the term "uses" captures the full meaning of "take advantage of that power."[7]

Turning to the Melway case, it is apparent that the High Court took the view that a corporation was not to be seen as having taken advantage of its market power if the corporation could have engaged in the same conduct in the absence of market power. This new approach to the concept of `take advantage' is outlined in the following comments by the majority in the Melway case:

> "Bearing in mind that the refusal to supply the respondent was only a manifestation of Melway's distributorship system, the real question was whether, without its market power, Melway could have maintained its distributorship system, or at least that part of it that gave distributors exclusive rights in relation to specified segments of the retail market."[8]

With evidence showing that the distributorship system had been in place since before the appellant had acquired a substantial degree of power in a market, the majority in the case found that the appellant had not `necessarily' taken advantage of that power:

> "The creation and maintenance of the appellant's distribution system, at a time when it did not have a substantial degree of market power, shows that its maintenance, when the appellant had market power, was not necessarily an exercise of that power."[9]

While it is clear that the *distributorship system* was in place since the beginning, the question at the heart of the case was whether or not the appellant could have engaged in the conduct - in this case, a refusal to supply 30,000-50,000 directories - in the absence of market power. According to majority of the High Court, the answer was yes in view of appellant's support for the distributorship system at a time when it had no market power. The appellant's support for the distributorship system was seen by the High Court

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[6] (1989) 167 CLR 177.

[7] *Boral Besser Masonry Limited (now Boral Masonry Ltd) v Australian Competition and Consumer Commission* [2003] HCA 5 (7 February 2003) at para. 321.

[8] *Melway Publishing Pty Ltd v Robert Hicks Pty Ltd* [2001] HCA 13 (15 March 2001) at para. 61.

[9] Ibid, at para. 68.

as demonstrating that a refusal to supply 30,000-50,000 directories could have also occurred in the absence of market power.

In theory, an appellant wishing to support a distributorship system could refuse to supply 30,000-50,000 directories. Of course, a publisher would not want to undermine a system that serves the commercial interests of both itself and its distributors. In reality, however, the question arises as to how long a refusal to supply 30,000-50,000 directories would have been maintained in a market where the publisher lacked market power. Indeed, would a publisher sit by for too long and watch a substantial share of the market go to a competitor? Would the publisher maintain its refusal in the face of a very real risk of losing a substantial share of the market? After all, in a market where a corporation lacks market power there would, by necessity, be substitute products offered by other competitors, each of which would also lack market power, but wishing to take market share wherever they can find it.

In short, while a corporation having a substantial degree of market power may have acted in the same way in the absence of market power such an analysis should really focus on how long the behaviour would have continued in the absence of market power. Thus, although the conduct may have been theoretically possible at a time when the corporation lacked market power, sight should not be lost of the commercial reality in which the conduct may not have been maintained for too long in the absence of market power for fear of risking the corporation's business profitability or survival.

In contrast to the possibly short lived occurrence of the conduct in the absence of market power, the conduct in question may persist for an indefinite time where the corporation has a substantial degree of market power. Indeed, the substantial degree of market power may be used to sustain the conduct with little or no risk to the corporation's business profitability or survival. Unlike the case where the absence of market power would put the corporation's very business profitability or survival at risk, the engaging in conduct where the corporation has a substantial degree of market power may work to entrench or enhance that market power.

Overall, therefore, there is a danger in making a comparison of conduct with and without market power. Clearly, companies behave differently depending on the circumstances and, in particular, whether or not they can sustain the conduct without risk of losing substantial market share or risk to their business profitability. In short, the issue comes down to whether or not the corporation can engage in the conduct without losing substantial market share or risking their business profitability.

Indeed, a corporation without market power cannot sustain a refusal to supply for too long for it risks denying itself a business opportunity to build market share or losing customers that may not come back to the corporation. A corporation without market power cannot sustain below cost selling for too long for it risks its business profitability or even risks going out of business. A corporation without market power cannot price discriminate for too long for it risks losing business from those it is discriminating against on price. Those

price discriminated customers can simply go to another entity, which also lacking market power would be happy to build market share. Conversely, customers lacking market power could not go to a supplier and demand a more favourable price to those received by rivals for the simple reason that the supplier would not want to lose business from those disadvantaged rivals.

Clearly, the existence of a substantial degree of power in a market (as the concept was intended to be defined by 1986 amendments) is what allows a corporation to engage in conduct that would have been short lived in the absence of the market power or conduct that may even have been a threat to the corporation's business profitability in the absence of the market power. Rather than make a difficult and ultimately theoretical assessment of how an corporation would behave with or without market power, the question for s 46 should be whether or not the corporation with a substantial degree of market has engaged in recognized forms of anti-competitive conduct for an anti-competitive purpose listed in paragraphs (a),(b) or (c) of s 46(1), an approach in keeping with the legislative history of the concept.

The focus of the inquiry under s 46 should be how the corporation with a substantial degree of market power has in fact behaved rather than how it could have behaved in the absence of that market power. In accordance with the parliamentary intention behind the 1986 amendments, s 46 is concerned to prohibit anti-competitive conduct - in whatever form it may take - by corporations that have a substantial degree of market power and who engage in that anti-competitive conduct for a prohibited purpose as listed in s46(1). By focusing on the conduct and the purpose behind the conduct, any speculation as to how the entity could behave with or without market power is removed and the spotlight placed squarely on the conduct engaged in by those having a substantial degree of market power and the purpose behind that conduct.

The Government's proposed amendments fail to state that proof of "recoupment" is not required in allegations of predatory below cost pricing

In relation to allegations of predatory below cost pricing, the failure of the proposed amendments to include a legislative statement to the effect that recoupment of losses is not necessary means that the Courts will, in accordance with the majority judgements in the High Court's Boral decision, continue to consider whether the corporation has recouped its losses from the predatory below cost pricing.

Given that s 46 does not mention "recoupment," the High Court's preoccupation with "recoupment" is of concern as it introduces by judicial means a concept not in s 46 itself. Within this context, it is important to not to lose focus of the potential threat to the competition posed by predatory below cost pricing. Indeed, although below cost pricing by large and powerful corporations may benefit consumers in the short-term it will ultimately be to their detriment if engaged in by a large and powerful corporation intentionally to undermine the competitive process. Sight must not be lost of why the large

and powerful corporation may engage in the predatory below cost pricing. Thus, if engaged in to match its competitors that would be justifiable, while if engaged in a pre-emptive manner in full knowledge that the corporation's substantial resources would allow it to below cost price in a sustained manner, then serious questions arise as to whether the so-called price competition is a cover for more sinister anti-competitive conduct. Similarly, a large and powerful corporation significantly expanding capacity or production in a market characterized by oversupply would also raise serious questions as to the corporation's true intentions, particularly as such conduct may be engaged in by the corporation concurrently with predatory below cost pricing.

Importantly, an express legislative statement that proof of "recoupment" is not necessary was supported in Recommendation 3 of the majority report from the Senate Inquiry into the Effectiveness of the *Trade Practices act 1974* in Protecting Small Business.[10]

[10] See p. 19 of the Report.

Part 3: Significant omissions from the Government's proposed amendments

The Government proposed amendments do not deal with a number of areas that would facilitate access to justice by small businesses or would deal effectively with anti-competitive conduct.

Failure to provide access to the Federal Magistrates Court to recover damages for breaches of the competition provisions of the Trade Practices Act

The failure to make changes to the *Trade Practices Act* to allow small businesses to apply to the Federal Magistrates Court to recover damages suffered as a result of anti-competitive conduct by large businesses is an important omission from the proposed Government amendments. Small businesses should be allowed to apply to the Federal Magistrates Court to recover damages in circumstances where the ACCC has successfully prosecuted the large business under the competition provisions of the *Trade Practices Act* and has obtained a finding of fact under s 83 of the *Trade Practices Act* in relation to the breach. The use of s 83 findings of fact to recover damages in the Federal Magistrate Court formed part of Recommendation 17 of the majority report from the Senate Inquiry into the Effectiveness of the *Trade Practices Act 1974* in Protecting Small Business.[11] Indeed, the majority report found that access to the Federal Magistrates Court in s 46 cases following a s 83 finding of fact would allow small businesses to "piggyback" off successful ACCC cases in order to recover any losses in a timely and low cost fashion rather than having to go to the Federal Court as is currently the case.[12]

Failure to deal with creeping acquisitions

The failure to make changes to the *Trade Practices Act* to deal effectively with creeping acquisition is another important omission from the proposed Government amendments. The amendment of the *Trade Practices Act* to deal effectively with creeping acquisitions was supported in Recommendation 12 of the majority report from the Senate Inquiry into the Effectiveness of the *Trade Practices act 1974* in Protecting Small Business.[13] Creeping acquisitions remain a problem as individually small scale acquisitions may not substantially lessen competition in breach of s 50 of the *Trade Practices Act*, but collectively they may substantially lessen competition over time and lead to high levels of market concentration to the detriment of competition and the consumer.

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[11] See p. 79 of the Report.
[12] See paragraphs 5.44 and 5.45 at p. 78 of the Report.
[13] See p. 64 of the Report.

Failure to include a general divestiture power in the Trade Practices Act to deal with serious or repeated breaches of s 46

Unlike the United States, Australia does not have a general divestiture power to deal with the most serious breaches of s 46 of the *Trade Practices Act*. While there is a limited divestiture power to deal with mergers that have occurred in contravention of s 50 or s 50A of the *Trade Practices Act*, this divestiture power does not extend to other breaches of the competition provisions of the *Trade Practices Act*. The insertion of a general divestiture power in the *Trade Practices Act* in relation to serious or repeated breaches of s 46 of the *Trade Practices Act* was supported in Recommendation 13 of the majority report from the Senate Inquiry into the Effectiveness of the *Trade Practices act 1974* in Protecting Small Business.[14] While a divestiture remedy would be one of last resort, it would provide a strong deterrent against serious or repeated breaches of s 46 of the *Trade Practices Act* by sending a clear signal that such serious or repeated breaches are unacceptable from a competition and consumer point of view and could lead to a Court imposed break-up of the offending corporation.

Failure to deal with anti-competitive price discrimination

While anti-competitive price discrimination is a form of anti-competitive conduct intended to be covered by s 46 of the *Trade Practices Act*, it remains a problem area given the current ineffectiveness of s 46. In view of the continued ineffectiveness of s 46 it may be appropriate to deal specifically with anti-competitive price discrimination. A number of international precedents are available including the United States *Robinson-Patman Act of 1936* and s 50(1)(a) of the Canadian *Competition Act*:

> **50.** (1) Every one engaged in a business who
>
> (*a*) is a party or privy to, or assists in, any sale that discriminates to his knowledge, directly or indirectly, against competitors of a purchaser of articles from him in that any discount, rebate, allowance, price concession or other advantage is granted to the purchaser over and above any discount, rebate, allowance, price concession or other advantage that, at the time the articles are sold to the purchaser, is available to the competitors in respect of a sale of articles of like quality and quantity, …
>
> is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.

As well as s 18 of the United Kingdom *Competition Act 1998*:

[14] See p. 66 of the Report.

> **18.** - (1) Subject to section 19, any conduct on the part of one or more undertakings which amounts to the abuse of a dominant position in a market is prohibited if it may affect trade within the United Kingdom.
>
> (2) Conduct may, in particular, constitute such an abuse if it consists in-
>
> (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
>
> …
>
> (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; …

Failure to deal with anti-competitive geographic price discrimination or "price flexing"

In view of the continued ineffectiveness of s 46 it may also be appropriate to deal specifically with anti-competitive geographic price discrimination or "price flexing." This arises where, for reasons unrelated to any difference in costs of supplying the different locations, a corporation charges a different price in different locations depending on the level of competition in those different locations. Thus, in highly concentrated markets or low competition areas consumers may face higher prices while consumers in more competitive areas face lower prices. While clearly these price discrepancies provide valuable evidence of the benefit of having more competitive markets in preference to more concentrated markets, it is equally clear that anti-competitive geographic price discrimination or "price flexing" may be detrimental to competition and ultimately consumers where higher prices in concentrated markets unrelated to differences in supply costs are used to subsidize predatory below cost pricing in competitive markets with the intention of driving out competition in those competitive markets. This practice is prohibited in s 50(1)(b) of the Canadian *Competition Act*:

> **50.** (1) Every one engaged in a business who
>
> …
>
> (*b*) engages in a policy of selling products in any area of Canada at prices lower than those exacted by him elsewhere in Canada, having the effect or tendency of substantially lessening competition or eliminating a competitor in that part of Canada, or designed to have that effect, …
>
> is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.

Part 4: *Trade Practices Legislation Amendment Bill (No.1) 2007* (The Government's proposed amendments) – A critique

In this part of the submission each Schedule of the Bill will be considered in assessing whether the Bill delivers meaningful changes and is in keeping with the stated objective of the particular amendment.

Schedule 1—Deputy Chairpersons

Schedule 1 of the Bill amends the relevant sections of the *Trade Practices Act* to provide for the appointment of a second Deputy Chairperson for the ACCC. In relation to this amendment the Treasurer's media release: Government Amendments to the Trade Practices Act 1974 [19/06/2007] states that the Bill will:

> "…establish a second Deputy Chairperson position for the ACCC, with the position to be filled by a candidate who is experienced in small business matters."

Despite these comments the Government's proposed amendment does not expressly require that the additional Chairperson position be in fact filled by a candidate who is experienced in small business. While this Government may have an initial intention to appointment such a candidate, there is no ongoing requirement or guarantee that a Deputy Chairperson position will always be filled by a candidate who is experienced in small business matters. The issue can easily be put to rest by including an additional amendment stating that one of the Deputy Chairperson positions must be filled by a candidate who is experienced in small business.

Schedule 2—Misuse of market power

Schedule 2 provides for a number of amendments to s 46 of the *Trade Practices Act*. Each proposed amendment to s 46 will be considered individually.

(i) Inserting Subsection 46(1) - `taking advantage of power *in that or any other market*

This amendment proposes to insert the words “in that or any other market” after the words “of that power” in s 46(1). Were this amendment to be enacted, s 46(1) would read as follows (with the new words in bold print):

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

This amendment is cosmetic as the courts are not saying that a corporation can’t take advantage of power from one market in another market, but rather what the Courts are saying is that a corporation may have power in one market but what is done in the other market does not meet the test of what constitutes a taking advantage under s 46. As discussed above, the problem is the High Court’s currently restrictive test for “take advantage” rather than any suggestion that the Courts are segregating markets for the purposes of determining whether there is a breach of s 46.

To understand why this proposed amendment does not fix the problem arising from the High Court’s restrictive interpretation of the concept of “take advantage” it is necessary to consider the High Court’s decision in *Rural Press Limited v Australian Competition and Consumer Commission* [2003] HCA 75 (11 December 2003).

The High Court’s decision in the Rural Press case: Raising the bar for the key concept of `take advantage’

The High Court’s decision in the Rural Press case is an important one in relation to s 46 for the simple reason that the High Court has used that case to confirm that the key s 46 concept of `take advantage’ is to be interpreted in accordance with the conclusions the High Court expressed on the concept in its earlier decision in the Melway case (discussed in Part 2 of this Submission).

In a joint majority judgement by Gummow, Hayne and Heydon JJ., their Honours stated that the test to be applied in relation to the concept of `take advantage' was that adopted by a majority of the High Court in the Melway case; namely, that a corporation would not be `taking advantage' of its market power if the corporation could have engaged in the same conduct in the absence of the market power. The High Court majority in the Rural Press case were emphatic that any criticisms of that test must be dismissed:

> "52. The Commission's criticism of the Full Federal Court for asking whether Rural Press and Bridge "could" engage in the same conduct in the absence of market power must be rejected. A majority of this Court in *Melway Publishing Pty Ltd v Robert Hicks Pty Ltd* adopted the same test in saying[39]:
>
> > "Bearing in mind that the refusal to supply the respondent was only a manifestation of Melway's distributorship system, the real question was whether, without its market power, Melway could have maintained its distributorship system".
>
> The Commission did not demonstrate either that that did not mean what it said, or that what it said should be overruled."

Thus, the High Court majority in the Rural Press has left no doubt as to the test to be applied in relation to the key s 46 concept of `take advantage.' It is now clear that, according to the present High Court, a corporation is not to be considered to be `taking advantage' of its market power if it is merely engaging in conduct that it could have engaged in in the absence of the market power. The ramifications of the High Court's decision in relation to the meaning of the key concept of `take advantage of' are clear: a large and powerful corporation can now defend an allegation that its conduct is in breach of s 46 by simply arguing that it could have engaged in the same conduct in the absence of market power. Given that it is theoretically possible to engage in the same conduct with or without market power, the High Court's Rural Press case means that anti-competitive conduct engaged in by a large and powerful corporations will not be caught by s 46 if the conduct is of a kind that the corporation could have also engaged in in the absence of market power.

The High Court's Rural Press decision in relation to the concept of `take advantage' gives a large and powerful corporation a simple and complete defence against s 46 allegations. By enabling a corporation to argue that it could have engaged in the same conduct with or without market power, the High Court in the Rural Press case has excluded from the scope of s 46 most, if not all, types of anti-competitive conduct simply because the corporation *could* have engaged in those same types of conduct in the absence of market power.

In doing so, the High Court has lost sight of the original parliamentary intention behind the concept of `take advantage.' Under that original parliamentary intention, the concept of `take advantage' was seen as critical

to focusing attention on the nature of the conduct involved and determining whether or not conduct in question was inherently anti-competitive.[15] By failing to do justice to the parliamentary intention behind the concept of `taking advantage,' the majority of the High Court in the Rural Press case (as in its earlier decision in the Melway case discussed in Part 2 of this Submission) has given the concept such a narrow interpretation that a large and powerful corporation engaging in inherently anti-competitive conduct can escape prosecution under s 46 by simply arguing that the conduct was of a kind that it *could* have also engaged in in the absence of market power.

According to the High Court majority in the Rural Press case, the successful prosecution of a s 46 case required proof that the conduct in question was attributable only to the corporation's substantial degree of power in a market. Indeed, the conduct had to be of kind that it was unique to a corporation having a substantial degree of market power. If the corporation could have also engaged in the same conduct in the absence of market power, then the conduct was not unique to a corporation having a substantial degree of power in a market. It was this uniqueness that the High Court in the Rural Press case was looking for to demonstrate a `taking advantage' for the purposes of s 46.

This is a particularly onerous test and made even more onerous by the view of High Court majority in the Rural Press case that a `taking advantage' required more than simply proof that the corporation was trying to protect its market power:

> "51. Conclusion on s 46. The words "take advantage of" … do not encompass conduct which has the purpose of protecting market power, but has no other connection with that market power. … The conduct of "taking advantage of" a thing is not identical with the conduct of protecting that thing. … If a firm with market power has a purpose of protecting it, and a choice of methods by which to do so, one of which involves power distinct from the market power and one of which does not, choice of the method distinct from the market power will prevent a contravention of s 46(1) from occurring even if choice of the other method will entail it."

Within this context, it is particularly troubling that the High Court majority in the Rural Press case would be suggesting that conduct engaged in for the protection of market power is justifiable provided the conduct in question is of a kind that could have also been engaged in by a corporation lacking market power. The most troubling aspect is that the focus of the High Court majority in the Rural Press case is on the theoretical possibility that the conduct *could* have also been engaged in in the absence of market power and not the more critical question of whether or not the conduct is inherently anti-competitive in the circumstances. As noted above, this is clearly at odds with the parliamentary intention behind the concept of `take advantage.'

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[15] See discussion in Zumbo F., "The Boral case: Has the High Court done justice to s 46?" (2003) *Trade Practices Law Journal*, Vol. 11, p. 199 at 212.

In the Rural Press case the making of a threat seeking the withdrawal of a competitor and its product from the market, was not, according to the High Court majority in that case, conduct that was attributable to or "materially facilitated" by the market power of the corporation making the threat. According to the High Court majority the threat could have also been made in the absence of market power (ie the making of the threat was not conduct uniquely attributable to a corporation having a substantial degree of market power) and, in any event, the corporation in question was able to issue the threat not because of the corporation's market power but because of the "material and organisational assets" at the disposal of that corporation. The High Court majority of Gummow, Hayne and Heydon JJ put their position as follows:

> 53. The Commission failed to show that the conduct of Rural Press and Bridge was materially facilitated by the market power in giving the threats a significance they would not have had without it. What gave those threats significance was something distinct from market power, namely their material and organisational assets. As the Full Federal Court said, Rural Press and Bridge were in the same position as if they had been new entrants to the Murray Bridge market, lacking market power in it but possessing under-utilised facilities and expertise."

Under this reasoning, a large and powerful corporation with substantial financial and material resources can engage in intimidatory conduct or, as happened in the Rural Press case, issue a threat seeking the withdrawal of a competitor and its product from the market to the detriment of the competitive process simply because (i) that threat *could* have been also made by a corporation lacking market power; and (ii) the economic power the corporation has (ie substantial financial and material resources) are not considered by the majority of the High Court as contributing to the corporation's market power. Clearly, the majority of the High Court in the Rural Press case has failed to recognise that a corporation's substantial financial and material resources, like a substantial market share, are the very attributes that allow a corporation to act free from competitive constraint and, more critically, to the detriment of the competitive process.

This restrictive interpretation of the concept of "take advantage" will not in any way be altered by the Government's proposed amendment to add the words "in that or any other market" after the words "of that power" in s 46(1). In this regard, this proposed amendment by the Government does not fix the real problem arising from the High Court's restrictive interpretation of the concept of "take advantage." As a result, s 46 will remain ineffective despite to the Government's proposed amendments.

(ii) Inserting a new s 46(3A) and s 46(3B) – Simply saying what the Courts have long said about "Coordinated market" power

This amendment proposes to insert a new s 46(3A) and s 46 (3B):

> (3A) In determining for the purposes of this section the degree of power that a body corporate or bodies corporate has or have in a market, the Court may have regard to the power the body corporate or bodies corporate has or have in that market that results from:
> (a) any contracts, arrangements or understandings, or proposed contracts, arrangements or understandings, that the body corporate or bodies corporate has or have, or may have, with another party or other parties; and
> (b) any covenants, or proposed covenants, that the body corporate or bodies corporate is or are, or would be, bound by or entitled to the benefit of.
> (3B) Subsections (3) and (3A) do not, by implication, limit the matters to which regard may be had in determining, for the purposes of this section, the degree of power that a body corporate or bodies corporate has or have in a market.

This proposed amendment adds nothing as the Courts may already have regard to any power a corporation may have through contracts, arrangements or understandings with other parties. This was specifically recognized by Lockhart J in *Dowling v Dalgety Australia Ltd* (1992) 34 FCR 109:

> 132. In my opinion, it is permissible … when considering the market power of a corporation, to have regard not only to its individual power but to additional power which it has through agreements, arrangements or understandings with others.

Further recognition that the Court can already have regard to any contracts, arrangements or understandings that the corporation may have with others may be found in the following comments by Gleeson CJ and Callinan J. in *Boral Besser Masonry Limited v Australian Competition and Consumer Commission* [2003] HCA 5 (7 February 2003):

> 131. In this connection, it should be remembered that the ACCC originally endeavoured to make out a case involving at least conscious parallelism between BBM and Pioneer. That attempt failed. If it had succeeded, the case may have taken on a different complexion.

Clearly, the Courts have always been mindful of the possibility that contracts, arrangements or understandings may add to the power that a corporation may have for the purposes of s 46. Accordingly, this proposed amendment is merely cosmetic.

(iii) Inserting a new s 46(3C) – The exclusion of matters that the Courts do not require to be established under s 46

This amendment proposes to insert a new s 46(3C):

> (3C) For the purposes of this section, without limiting the matters to which the Court may have regard for the purpose of determining whether a body corporate has a substantial degree of power in a market, a body corporate may have a substantial degree of power in a market even though:
> (a) the body corporate does not substantially control the market; or
> (b) the body corporate does not have absolute freedom from constraint by the conduct of:
> (i) competitors, or potential competitors, of the body corporate in that market; or
> (ii) persons to whom or from whom the body corporate supplies or acquires goods or services in that market.

The insertion of the proposed new s 46(3C) will not alter the matters that the Courts currently apply in determining whether a corporation as a substantial degree of power in a market. This proposed amendment merely dismisses matters that are currently not being used by the Courts to determine whether a corporation has a substantial degree of power in a market. Indeed, not even the High Court in its decision in *Boral Besser Masonry Limited v Australian Competition and Consumer Commission* [2003] HCA 5 (7 February 2003) required proof of those matters when considering if the corporation had a substantial degree of power in the market.

Thus, merely stating that a corporation can have a substantial degree of power in a market even though it does not substantially control a market or is not absolutely free from constraint adds nothing as it will not alter the fact the Courts will continue to look at a corporation's ability to raise prices without losing business to rivals when assessing whether the corporation has a substantial degree of power in a market.

Significantly, this proposed amendment does not state the circumstances when a corporation will in fact have a substantial degree of power in a market. As this and other proposed amendments fail to actually define what is meant by the concept of "a substantial degree of power in a market," the current judicial interpretation of the concept will continue to apply when deciding s 46 cases. It is that ongoing application of the currently restrictive judicial interpretation of the concept of "a substantial degree of power in a market" that is a central cause of the continued ineffectiveness of s 46. As the Government's proposed amendments do not alter the existing judicial interpretation of the concept of "a substantial degree of power in a market" it is clear that s 46 will continue to be ineffective irrespective of whether those proposed Government amendments are enacted.

(iv) Inserting a new s 46(3C) – Stating only a theoretical possibility

This amendment proposes to insert a new s 46(3D):

> (3D) To avoid doubt, for the purposes of this section, more than 1 corporation may have a substantial degree of power in a market.

This amendment merely restates the theoretical possibility that more than one corporation can have a substantial degree of power in a market. This theoretical possibility has always been there under s 46 and, therefore, this proposed amendment adds nothing. At present more than one corporation can have a substantial degree of power in a market ***provided that*** each corporation has the ability to raise prices without losing business to rivals. Thus, expressly stating in s 46 (as this amendment proposes to do) that more than one corporation can have a substantial degree of power in a market is cosmetic as it merely restates a theoretical possibility without in any way altering the current judicial test for the concept of a substantial degree of power in a market.

Importantly, even the Government has previously stated that this proposed amendment is unnecessary. Indeed, in its response to the Senate Inquiry into the Effectiveness of the *Trade Practices act 1974* in Protecting Small Business the Government stated that:

> The third proposal [that more than one corporation can have a substantial degree of power in a market] is redundant because both the courts (see, for example, the majority judgement in *Safeway*) and the explanatory material accompanying the 1986 amendments make it clear that more than one firm may have substantial market power in a given market.[16]

(v) Inserting a new s 46(4A) – The so-called "predatory pricing amendment" – Merely stating that the courts may have regard to a factor that they already have regard to

This amendment proposes to insert a new s 46(4A) and has been referred by some as the "predatory pricing" amendment:

> (4A) Without limiting the matters to which the Court may have regard for the purpose of determining whether a corporation has contravened subsection (1), the Court may have regard to:
>
> (a) any conduct of the corporation that consisted of supplying goods or services for a sustained period at a price that was less than the relevant cost to the corporation of supplying such goods or services; and
> (b) the reasons for that conduct.

This so-called predatory pricing amendment is cosmetic given that it merely states that the courts "may have regard to" sustained below cost pricing by a

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[16] The Government's response to the Senate Inquiry into the Effectiveness of the *Trade Practices act 1974* in Protecting Small Business can be found at: http://www.treasurer.gov.au/tsr/content/publications/TPA_Small_Business.asp

corporation and the reasons it has done so. This amendment does not in any way affect the Court's ability to consider other matters, such as whether the corporation has the ability to raise prices without losing business to rivals, in determining whether the corporation has breached s 46. The Courts already "have regard to" sustained below cost pricing by a corporation and the reasons it has done so. In fact, the Courts in the Boral case had very close regard to the question of sustained below cost pricing and the reasons for such pricing. Clearly, the question of sustained below cost pricing and the reasons for such pricing are already matters Court can have regard to and in this regard the so-called "predatory pricing" amendment does nothing new. Ultimately, therefore, it is misleading to describe the amendment as the "predatory pricing" amendment as it does not in any way alter the current judicial position regarding predatory pricing.

(iv) replicating the proposed s 46 amendments in the Telecommunications provisions and Schedule version of the competition provisions of the *Trade Practices Act*

A number of the Government's proposed amendments replicate those amendments in provisions of the Trade Practices Act that mirror s 46. These additional amendments are cosmetic in the same way that the Government's proposed s 46 amendments are cosmetic.

Schedule 3—Unconscionable conduct

Schedule 3 provides for a number of amendments to s 51AC of the *Trade Practices Act*. Each proposed amendment to s 51AC will be considered individually.

(i) Adding to the non-exhaustive list of factors the court may have regard to in determining whether there is breach of s 51AC of the *Trade Practices Act 1974*

The Bill provides for the inclusion of the following "new" factor:

> After paragraph 51AC(3)(j)
>
> Insert:
> (ja) whether the supplier has a contractual right to vary unilaterally a term or condition of a contract between the supplier and the business consumer for the supply of the goods or services; and
>
> 6 After paragraph 51AC(4)(j)
>
> Insert:
> (ja) whether the acquirer has a contractual right to vary unilaterally a term or condition of a contract between the acquirer and the small business supplier for the acquisition of the goods or services; and

The inclusion of a "new" factor dealing with a contractual right to vary unilaterally a term or condition of a contract adds nothing meaningful to s 51AC as the court is already able to consider any matter that it considers relevant to determining whether conduct is unconscionable under s 51AC.

It would be misleading to suggest that the insertion of a "new" factor to the non exhaustive list in s 51AC(3) and s 51AC(4) is necessary to allow the Courts to have regard to that factor in future cases. Similarly, it would be misleading to suggest that in the absence of such a "new" factor the Courts could not have regard to the factor. Clearly, these proposed amendments need to be considered against the background of the existing opening words of s 51AC(3) and s 51AC(4). In doing so, one is best able to appreciate that the "new" factor adds nothing substantively new to the consideration of cases under s 51AC:

> (3) Without in any way limiting the matters to which the Court may have regard for the purpose of determining whether a corporation or a person (the ***supplier***) has contravened subsection (1) or (2) in connection with the supply or possible supply of goods or services to a person or a corporation (the ***business consumer***), the Court may have regard to:
> …
> (4) Without in any way limiting the matters to which the Court may have regard for the purpose of determining whether a corporation or a person

> (the ***acquirer***) has contravened subsection (1) or (2) in connection with the acquisition or possible acquisition of goods or services from a person or corporation (the ***small business supplier***), the Court may have regard to:

The opening words clearly state that “without in any way limiting the matters to which the Court may have regard” the Court “may have regard to” a number of factors listed in s 51AC(3) and s 51AC(4). Thus, the Courts may have regard to any matter, whether or not listed in s 51AC(3) or s 51AC(4), in determining whether or not there has been a breach of s 51AC.

It is important to note that the listing of factors in s 51AC(3) and s 51AC(4) does not elevate those factors to a definition of unconscionable conduct. Indeed, it would also be misleading to suggest that the factors included in s 51AC(3) or s 51AC(4) provide a definition of what is “unconscionable” under s 51AC. The question of whether or not conduct is unconscionable under s 51AC is considered by reference to the individual circumstances of the case having regard to all matters considered relevant by the Court irrespective of whether or not those matters are listed in s 51AC(3) or s 51AC(4). So under s 51AC(3) and s 51AC(4) the listed factors may be considered by a Court, but so can factors not listed if the Court considers them to be relevant.

In short, the addition of a factor in s 51AC(3) and s 51AC(4) does not better define the term “unconscionable conduct” but merely makes a cosmetic change to the list. Importantly, adding or subtracting factors to s 51AC(3) and s 51AC(4) as currently drafted would not impact on what the Courts consider to be “unconscionable” as the Courts have defined the term independently of the factors in s 51AC(3) and s 51AC(4).

As the addition of a “new” factor in s 51AC(3) and s 51AC(4) does not impact on the definition of the term “unconscionable,” the proposed amendment does not address the central question of whether the term “unconscionable” under s 51AC is being applied in a way that allows small business to have appropriate recourse to the courts for unethical conduct by big businesses. In this regard, it is readily apparent that the Courts are setting a very high threshold for what constitutes unconscionable conduct under s 51AC and, in doing so, are increasingly requiring that a very high level of procedural unconscionability be established in order to succeed under s51AC. This notion of procedural unconscionability has its origins in the narrowly focused equitable doctrine of unconscionability and requires proof of extreme conduct by the stronger party towards the weaker party.

The extreme nature of the conduct that needs to be demonstrated under s 51AC can be seen from the following comments by the Full Federal court in *Hurley v McDonald's Australia Ltd* [1999] FCA 1728 (17 December 1999)

> 22 For conduct to be regarded as unconscionable, serious misconduct or something **clearly unfair or unreasonable**, must be demonstrated - *Cameron v Qantas Airways Ltd* (1994) 55 FCR 147 at 179. Whatever "*unconscionable*" means in sections 51AB and 51AC, the term carries

> the meaning given by the Shorter Oxford English Dictionary, namely, actions **showing no regard for conscience**, or that are **irreconcilable with what is right or reasonable** - *Qantas Airways Ltd v Cameron* (1996) 66 FCR 246 at 262. The various synonyms used in relation to the term "*unconscionable*" import a **pejorative moral judgment** - *Qantas Airways Ltd v Cameron* (1996) 66 FCR 246 at 283-4 and 298.

This judicial definition of what constitutes “unconscionable” conduct is, in the absence of legislative definition of “unconscionable” under s51AC, the test to be applied in s 51AC cases. Significantly, the test is a very difficult one to satisfy in practice. This is particularly so given that under s 51AC the weaker party must point to more than just an allegedly unfair contract term. Indeed, allegedly unfair contract terms or what is known as “substantive unconscionability” typically escapes judicial scrutiny because of the judicial focus on procedural unconscionability and the need for the weaker party to show that the conduct surrounding the contract or commercial relationship was extreme. The judicial focus on procedural unconscionability under s 51AC can be seen from the following comments by the Full Federal court in *Hurley v McDonald's Australia Ltd* [1999] FCA 1728 (17 December 1999):

> “24 No allegation of unconscionable conduct is made in … relation to the making of the alleged contracts between McDonalds, on the one hand, and the Applicant and the group members, on the other. The allegation is simply that it would be unconscionable for McDonalds to rely on the terms of such contracts.
> …
> 29 There is no allegation of any circumstance that renders reliance upon the terms of the contracts unconscionable. For example, it might be that, having regard to particular circumstances it would be unconscionable for one party to insist upon the strict enforcement of the terms of a contract. One such circumstance might be that an obligation under a contract arises as a result of a mistake by one party. The mistake is an additional circumstance that might render strict reliance upon the terms of the contract unconscionable. Mere reliance on the terms of a contract cannot, without something more, constitute unconscionable conduct.

This procedural unconscionability focus gives rise to two problem areas under s 51AC: (i) the Courts are taking a restrictive view of what is “unconscionable;” and (ii) in the absence of procedural unconscionability, the Courts refrain from considering unfair contract terms in their own right.

Within this context, the possible presence of unfair contract terms (also known as substantive unconscionability) is something the Courts have not been open to considering. This judicial focus on procedural unconscionability effectively means that unfair contract terms (or allegations of substantive unconscionability) escape scrutiny by the Courts. Thus, unfair contract terms may currently be included by big businesses in contracts with small

businesses in the full knowledge that small businesses have little or no recourse to the Courts regarding those allegedly unfair contract terms.[17]

(ii) Increasing the threshold for cases under s 51AC of the *Trade Practices Act 1974*

The Bill provides for the threshold to be increased from $3 million to $10 million:

> 7 Subsection 51AC(9)
>
> Omit "$3,000,000", substitute "$10,000,000".
>
> 8 Subsection 51AC(10)
>
> Omit "$3,000,000", substitute "$10,000,000".

This amendment is contrary to the recommendation of the Senate Inquiry into the Effectiveness of the Trade Practices act 1974 in Protecting Small Business that the monetary threshold under s 51AC be removed all together.[18] A monetary threshold is arbitrary and detracts from what should be the central issue under s 51AC; namely, whether or not the conduct is unconscionable.

In any event, the proposed $10 million threshold may not be enough to cover all small businesses. In this regard, it needs to be remembered that the monetary threshold under s 51AC refers to the "price" for the supply or acquisition, or for the possible supply or acquisition, of goods or services. This "price" may be the value of the specific transaction alleged to be unconscionable, but the "price" may also be the value of the goods or services covered by a commercial arrangement where it is the commercial arrangement itself that is alleged to be unconscionable. This point was made by Jessup J in *Ford Motor Company of Australia Ltd v Jefferson Ford Pty Ltd* [2007] FCA 870 (6 June 2007)

> 26. It is not in dispute that the "supply" to which s 51AC(1) refers includes supply pursuant to a transaction based on a particular contractual obligation. However, the term is a wide one (and is widely defined in the TP Act) and I can think of no reason why it should be confined to such a context, or even to a number of such contexts pursuant to s 23 of the *Acts Interpretation Act 1901* (Cth). In the commercial or business settings with which the TP Act is concerned, it is not unlikely that there would be many situations in which the supply of

[17] See Zumbo F., "Commercial Unconscionability and Retail Tenancies: A State and Territory perspective," (2006) *Trade Practices Law Journal*, Vol. 14, p 165 at p. 173 – 174. See also Zumbo F., "Promoting fairer franchise agreements: A way forward?" (2006) *Competition and Consumer Law Journal*, Vol. 14, p 127- 145.

[18] See recommendation 7 at p. 37 of the Report.

> goods was effected, arranged or even contemplated without there being any particular, or even identifiable, contract or transaction in mind. The prohibition in s 45 upon understandings containing exclusionary provisions is an obvious example. So too the reference in s 51AC(1) itself to the "possible supply" of goods. If a corporation engaged in unconscionable conduct in its negotiation for the intended supply – and in that sense for the "possible supply" – of goods of a particular kind over a period of some five years, for example, there would have been a contravention of s 51AC, notwithstanding that no particular contract for the supply of goods then existed, and that no transaction had by then occurred. If the putative purchaser of the goods would, as matter of probability, have been required to pay, say, $5,000,000 for them, if and when they were supplied, that sum should, in my view, be treated as the "price" at which, at the time of the negotiation, the goods might possibly be supplied. In such an example, subs (9) would exclude the conduct complained of from the purview of s 51AC.

Thus, where the “price” of the supply or acquisition, or the possible supply or acquisition of goods or services to a small business exceeds the proposed $10 million monetary threshold, that possible supply or acquisition would be excluded from s 51AC. As the “price” may relate to the value of a specific transaction alleged to be unconscionable or to the value of goods or services under a commercial arrangement alleged to be unconscionable, a price exceeding the proposed $10 million will mean that the small business is excluded from s 51AC.

(iii) replicating the proposed changes to the *Trade Practices Act* dealing with unconscionable conduct in the equivalent sections of the *Australian Securities and Investments Commission Act 2001*

The comments made above in relation to the proposed s 51AC amendments are equally applicable to the proposed amendments to the unconscionable conduct sections of the *Australian Securities and Investments Commission Act 2001*. These amendments merely replicate the Government’s proposed changes to s 51AC of the *Trade Practices Act*:

> Australian Securities and Investments Commission Act 2001
>
> 1 After paragraph 12CC(2)(j)
>
> Insert:
> (ja) whether the supplier has a contractual right to vary unilaterally a term or condition of a contract between the supplier and the service recipient for the supply of the financial services; and
>
> 2 After paragraph 12CC(3)(j)

Insert:
(ja) whether the acquirer has a contractual right to vary unilaterally a term or condition of a contract between the acquirer and the business supplier for the acquisition of the financial services; and

3 Subsection 12CC(8)

Omit "$3,000,000", substitute "$10,000,000".

4 Subsection 12CC(9)

Omit "$3,000,000", substitute "$10,000,000".

Like the Government's proposed amendments to s 51AC, the proposed amendment to insert a "new" factor adds nothing to the operation of the unconscionable conduct sections of the *Australian Securities and Investments Commission Act 2001*. Similarly, the increase in the threshold may fail to cover some small businesses. As s 12CC is intended to cover the supply or acquisition of financial services to small businesses, there is a risk that the provision of some financial services to small businesses may exceed the $10 million threshold. This is particularly so given that under s 12CC(10)(e) the capital value of a loan or loan facility is included in the "price" for the purposes of the threshold:

(10) For the purposes of subsections (8) and (9):
…
(e) the price for the supply or possible supply, or the acquisition or possible acquisition, of services comprising or including a loan or loan facility is taken to include the capital value of the loan or loan facility.

Finally, the question arises as to whether it is appropriate that a prohibition against unconscionable conduct be split between the *Trade Practices Act* and the *Australian Securities and Investments Commission Act 2001*. This is an artificial split which not only may potentially creates unnecessary definitional issues, but is quite unnecessary as it would make considerable sense from a consistency point of view that the Australian Competition and Consumer Commission alone enforce this area of the law.

Unconscionable conduct: a way forward

The following proposals are intended to address a number of problem areas in relation to the prohibition of unconscionable conduct.

(1) Reviewing the need for a threshold or having a threshold higher than the proposed $10 million threshold

In keeping with Recommendation 7 of the Majority Report of the Senate Inquiry into the Effectiveness of the *Trade Practices Act 1974* in Protecting

Small Business,[19] the threshold amount for s 51AC cases should be removed altogether. The position of having no threshold in s 51AC cases can readily be supported on the basis that (i) a monetary limit may exclude some small businesses from s 51AC; (ii) raises questions of definition regarding the application of the limit; and (iii) the limit is an artificial one and detracts from what should be the only issue in s 51AC cases; namely, whether or not the conduct is "unconscionable."

In the event that the Committee was of the view that a threshold amount should be implemented, there would be considerable merit in the Committee proposing a higher amount than the $10 million currently proposed by the Government. A higher threshold can be justified on the basis that the Government itself has accepted higher threshold amounts of up to $20 million in relation to its new small business collective bargaining notification procedure under the *Trade Practices Act*.[20] In short, as both the collective bargaining notification procedure (s 93AB(4)) and s 51AC(9) & (10) look to the "price" at which goods or services are supplied or acquired, there is a real likelihood that a $10 million threshold may, by the Government's own admission, exclude some small businesses contrary to the intention behind s 51AC.

(2) Inserting a legislative definition of what is meant by the term "unconscionable conduct"

The Committee could recommend the inclusion of a definition of what is meant by the term "unconscionable conduct." Currently, the Courts are taking a restrictive view of what constitutes "unconscionable conduct" which focuses increasingly on procedural unconscionability. In doing so, the Courts continue to be influenced by the narrow equitable doctrine of unconscionabilty. Indeed, the problem with using a concept like "unconscionable conduct" is that it has been previously used under the equitable doctrine of unconscionability. Given the procedural unconscionability focus of the equitable doctrine it is not surprising to find the Courts continuing with that focus under s 51AC. Thus, to ensure that the concept of "unconscionable conduct" in s 51AC is given a wider application than is currently the case it would by very useful to include a legislative definition of the concept of "unconscionable conduct" under s 51AC. Such a definition should be non-exhaustive and define "unconscionable conduct" to include a variety of other concepts that make it clear that the term "unconscionable" as used under s 51AC is one concerned with dealing with unethical conduct directed against small businesses. By way of example, the following non-exhaustive definition of "unconscionable conduct" could be adopted:

> "unconscionable conduct" includes any action in relation to a contract or to the terms of a contract that is unfair, unreasonable,

[19] See p. 79 of the Report.
[20] See The Treasurer's media release: http://www.treasurer.gov.au/tsr/content/pressreleases/2007/015.asp.

> harsh or oppressive, or is contrary to the concepts of fair dealing, fair-trading, fair play, good faith and good conscience.

The proposed definition is intended to be non-exhaustive and its plain English drafting is clearly aimed at promoting a better understanding of the intended broad operation of provisions like s 51AC and its State and Territory equivalents. Importantly, the expression draws on concepts that have been recommended or are already in use in other legislation dealing with unethical conduct within a commercial context. For example, the word "unfair" was originally proposed as the central concept in what was to become s 51AC.[21] The word "unfair" has also been used to describe the types of contracts that the Industrial Relations Commission of New South Wales has had power to vary or set aside under s 106 of the *Industrial Relations Act 1996* (NSW). Similarly, such words as "harsh" and "oppressive" are already used in s 22 of the *Leases (Commercial and Retail) Act 2001* (ACT). By relying on concepts already in use or which are capable of being readily understood by those covered by s 51AC or its State and Territory equivalents, the proposed definition would not only assist in promoting consistency in the way that the statutory concept of "unconscionable conduct" is interpreted by Courts and Tribunals across Australia, but it would also be in keeping with the intended broad scope of the statutory concept. Such consistency is particularly valuable in an environment where there has been a proliferation of statutory provisions against unconscionable conduct.

(3) Enacting a new legislative framework within the Trade Practices Act to deal with unfair contract terms in contracts between large and small businesses

The Committee could in the interests of promoting greater judicial scrutiny of unfair contract terms or "substantive unconscionability" recommend the inclusion of a new targeted legislative framework within the *Trade Practices Act* to deal with unfair contract terms that big businesses may seek to impose on small businesses. Such a framework could be based on the United Kingdom[22] and Victorian[23] legislation for dealing with unfair terms in consumer contracts which have been drafted to specifically target unfair terms in consumer contracts.[24]

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[21] See para. 6.73, p 181 of the Report which may be accessed at http://www.aph.gov.au/house/committee/isr/Fairtrad/report/CHAP6.PDF

[22] The UK legislation was implemented first and is now found in the *Unfair Terms in Consumer Contracts Regulations 1999*. These Regulations came into force on 1st October 1999.

[23] The Victorian legislation is found in Part 2B of the *Fair Trading Act 1999* and came into force on 9 October 2003.

[24] For a discussion of the operation of the United Kingdom and Victorian legislation see Zumbo, F., (2005), "Dealing with Unfair Terms in Consumer Contracts: Is Australia Falling Behind?" *Trade Practices Law Journal*, Vol. 13, pp. 70 - 89; Zumbo, F., (2005), "Dealing with Unfair Terms in Consumer Contracts: The search for a new regulatory model," *Trade Practices Law Journal*, Vol. 13, pp. 194 - 213; and Zumbo, F., (2007), "Promoting Fairer Consumer Contracts: Lessons from the United Kingdom and Victoria", *Trade Practices Law Journal*, Vol. 15, pp. 84-95.

Indeed, the sole focus of that legislation is to make void or unenforceable unfair terms in consumer contracts. Both begin by defining unfair terms primarily by reference to the concept of good faith and a significant imbalance in the contractual rights and obligations of the parties to the detriment of the consumer. For example, Regulation 5 of the UK legislation states:

> "**5.** - (1) A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer.
>
> (2) A term shall always be regarded as not having been individually negotiated where it has been drafted in advance and the consumer has therefore not been able to influence the substance of the term.
>
> (3) Notwithstanding that a specific term or certain aspects of it in a contract has been individually negotiated, these Regulations shall apply to the rest of a contract if an overall assessment of it indicates that it is a pre-formulated standard contract.
>
> (4) It shall be for any seller or supplier who claims that a term was individually negotiated to show that it was."

Similarly, s 32W of the Victorian legislation states:

> "A term in a consumer contract is to be regarded as unfair if, contrary to the requirements of good faith and in all the circumstances, it causes a significant imbalance in the parties' rights and obligations arising under the contract to the detriment of the consumer."

Where a term is found to be unfair, Regulation 8 of the UK legislation provides that (i) the term will be unenforceable against the supplier, and (ii) the remainder of the contract is binding provided it can continue without the unfair term. Under s 32Y of the Victorian legislation an unfair term in a consumer contract is void, with the contract also continuing to bind the parties where it is capable of existing without the unfair term.

Both the UK and Victorian legislation provides a more targeted and effective mechanism for dealing directly with unfair terms in consumer contracts than do the equitable doctrine of unconscionability and the existing statutory prohibitions against unconscionable conduct. Given that dealing with unfair terms in a consumer context is the sole focus of both the UK and Victorian legislation the enforcement agency in the particular jurisdiction is able to target such terms in a direct manner. In doing so, the enforcement agency has the ability to directly approach sellers and suppliers and seek their cooperation in modifying a term perceived to be unfair under the terms of the legislation. Although a cooperative approach is expected to be used in the overwhelming majority of cases, the enforcement agency in each jurisdiction is given sufficient powers to take enforcement action against the continued use of an allegedly unfair term.

There can be no doubt that this ability under the UK and Victorian legislation to pro-actively deal with unfair terms in consumer contracts in a timely manner

is of considerable benefit to consumers. Not only does this legislation seek to clearly define the nature of an unfair term covered by the legislation and provide examples of the type of terms likely to be unfair, but the legislation empowers the enforcement agency to take appropriate action to prevent the continued use of the allegedly unfair term. While early days for the Victorian legislation, the UK experience is particularly positive as the UK Office of Fair Trading has had a great deal of success in securing enforceable undertakings from sellers and suppliers agreeing to modify or refraining from using allegedly unfair terms.[25] Clearly, the UK experience demonstrates that legislative frameworks directly targeting unfair terms do offer consumers considerable benefits. Such benefits are not only much more tangible and long lasting than could ever be the case under the equitable doctrine of unconscionability and the existing statutory prohibitions against unconscionable conduct, but have been secured in a very timely manner.

With the sole focus of the United Kingdom and Victorian legislation being to make void or unenforceable unfair terms in consumer contracts, it is clear that the legislation is aimed at providing a mechanism for dealing with contract terms that go beyond what is reasonably necessary to protect the legitimate interests of the stronger party. By dealing with allegedly unfair contractual terms, this legislation is concerned to ensure that the inequality of bargaining power increasingly faced by consumers in their dealings with large businesses is not taken advantage by the business to include terms not reasonably necessary for the legitimate protection of its interests.

This growing recognition among legislatures that a significant imbalance of bargaining power between consumers and large business may be exploited by the large business in the drafting of contracts has prompted debate as to whether a growing imbalance of bargaining power between small businesses and larger businesses may also lead to the larger businesses drafting contracts to include terms not reasonably necessary to protect its legitimate interests. This debate has emerged from discussion papers prepared by law reform bodies in Australia and the United Kingdom. In January 2004 the Australian Standing Committee of Officials of Consumer Affairs (SCOCA) released a national discussion paper on the issue of unfair contract terms in which it called for comment on the possible inclusion of business to business contracts in any legislation dealing with unfair contract terms.[26] Similarly, in 2002 the English Law Commission issued a consultation paper on unfair terms in contracts in which it considered extending the protection against unfair terms to businesses.[27]

Both papers include a number of arguments both for and against including business to business contracts within a legislative framework for dealing with

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[25] The Office of Fair Trading publishes regular Bulletins on all concluded cases, including undertakings, under the Regulations. These Bulletins can be accessed at: < http://www.crw.gov.uk/Other+legislation/Unfair+contract+terms/unfair+contract+terms+%2D+bulletins.htm>

[26] http://www.fairtrading.qld.gov.au/oft/oftweb.nsf/web+pages/CD456F7C38F523684A256E240014EF7C?OpenDocument&L1=Publications

[27] http://www.lawcom.gov.uk/docs/cp166.pdf

unfair contract terms. In doing so, it is readily apparent that both papers have identified allegedly unfair terms in business to business contracts involving small business as an issue needing to be addressed. Indeed, while both papers acknowledged the commercial character of business to business contracts and the possibly greater sophistication of small businesses as compared to consumers,[28] both papers expressed concern that small businesses in many cases faced comparable imbalances in bargaining power when dealing with larger businesses as the imbalances faced by consumers when dealing with large businesses.[29]

Similarly, both papers also formed the view that the use of standard form contracts offered on a "take it or leave it" basis within a business to business context could, as in the case of consumer contracts, possibly lead to the inclusion of potentially unfair terms in contracts between small businesses and larger businesses.[30] Within this context, both papers identified examples of what could potentially be seen as unfair terms in a business to business context. For example, the English Law Commission identified that the following contractual terms as potentially going beyond what was reasonably necessary to protect the legitimate interests of the stronger party:

- deposits and forfeiture of money paid clauses;
- high default rates of interest (unless these can be shown to be penalties);
- clauses allowing unilateral variation in price;
- termination clauses allowing one party to terminate in a wider set of circumstances than allowed for the other party;
- unequal notice periods; and
- arbitration and jurisdictional clauses which seek to severely restrict the rights of a party to choose the forum for dispute resolution.[31]

In short, while both papers recognized that the potential problems with allegedly unfair terms could, when compared to consumer contracts, be less severe in business to business contracts involving small business, such problems could arise and, therefore, needed to be considered.[32]

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[28] See The Law Commission, *Unfair terms in contracts: A joint consultation paper*, Consultation Paper No 166, London, England, 2002, at p. 131. See also The Standing Committee of Officials of Consumer Affairs (SCOCA), *Unfair contract terms: A discussion paper*, 2004, at p54.

[29] See The Law Commission, *Unfair terms in contracts: A joint consultation paper*, Consultation Paper No 166, London, England, 2002, at p. 131. See also The Standing Committee of Officials of Consumer Affairs (SCOCA), *Unfair contract terms: A discussion paper*, 2004, at p50.

[30] See The Law Commission, *Unfair terms in contracts: A joint consultation paper*, Consultation Paper No 166, London, England, 2002, at p. 130. See also The Standing Committee of Officials of Consumer Affairs (SCOCA), *Unfair contract terms: A discussion paper*, 2004, at p50.

[31] See The Law Commission, *Unfair terms in contracts: A joint consultation paper*, Consultation Paper No 166, London, England, 2002, at p. 126. See also The Standing Committee of Officials of Consumer Affairs (SCOCA), *Unfair contract terms: A discussion paper*, 2004, at p51.

[32] See The Law Commission, *Unfair terms in contracts: A joint consultation paper*, Consultation Paper No 166, London, England, 2002, at p. 131. See also The Standing

In doing so, it must be remembered that consideration of allegedly unfair terms in business to business contracts involving small businesses is only concerned with the question of whether or not the large business has included terms that are not reasonable necessary for the protection of the large business's legitimate interests. Clearly, a large business is perfectly entitled to rely on contractual terms that are reasonably necessary to protect its legitimate interests. Indeed, both contracting parties should be entitled to include contractual terms that are reasonably necessary to protect their respective legitimate interests. In this sense, freely negotiated contracts may be seen as involving a sharing or an apportioning of the contractual risks and rewards between the parties. In particular, in any genuine negotiation process the parties will seek to strike a balance in their respective rights and obligations arising from the contract. Where, however, the contract includes terms that are not reasonably necessary to protect the large business's legitimate interests there is a real danger that the contract has been drafted in a way that seeks to shift those contractual risks disproportionately onto the small business; creates an significant imbalance in the respective rights and obligations of the parties in favour of the large business; or simply seeks to impose an additional detriment on the small business or minimizes the potential benefit to the small business under the contract without any offsetting reward.

Thus, the issue of fairness when dealing with unfair terms in business to business contracts such as small business involves an objective assessment of particular contractual terms. Fairness within this context is to be tested by an objective standard of whether or not a contract term that places a small business at a disadvantage is reasonably necessary for the protection of the legitimate interests of the large business. Implicit in such a standard is the recognition that a contract involves trade offs whereby a small business may be disadvantaged in one way, but is rewarded in another way so as to offset the disadvantage. Where the offsetting reward is reasonably proportionate to the disadvantage, the large business would be entitled to contractually protect the trade off. As the reward is reasonably proportionate to the disadvantage and the large business may itself be at a financial disadvantage if the trade off is not contractually protected, the large business would be entitled to claim the relevant contract terms protecting the trade off are reasonably necessary for the protection of the legitimate interests of the franchisor. In this way seeking to deal with unfair terms in contracts between large and small businesses would in no way detract from, or undermine the, large business's ability to include contractual terms that are reasonably necessary to protect its legitimate interests.

Committee of Officials of Consumer Affairs (SCOCA), *Unfair contract terms: A discussion paper*, 2004, at p50.

Part 5: *Trade Practices Amendment (Predatory Pricing) Bill 2007* (The Family First proposed amendments) – A critique

From the outset, the Family First proposed amendments are clearly restricted in their application to (a) a market for groceries; (b) a market for the sale of fuel; and (c) a market for pharmaceutical products, proprietary medicines and toiletries. This restricted application is arbitrary and quite limiting as predatory pricing may occur in other market across the economy. In addition, such restrictions raise definitional issues such as what is covered by "groceries," "proprietary medicines" and "toiletries." These terms are not defined in the Bill and, accordingly, valuable court time may be spent trying to define these terms. A further definitional issue arises from the use of the expression "unreasonably low prices" in the definition of predatory pricing and in the proposed s 46AA(3)(c) of the Family First proposed amendments.

The Family First proposed amendments, like the Government's proposed amendments, do not alter the current judicial interpretation of the concept of "a substantial degree of power in a market" and, therefore, to the extent that the Family First proposed new s 46AA relies on that concept the amendment will be as ineffective as the current s 46 and the Government's proposed amendments. The Family First proposed amendments do, however, usefully rely on the concept of "substantial financial power" as an alternative to the concept of "a substantial degree of power in a market." The Family First proposed amendments also usefully provide in the proposed new s 46AA(4) that "a corporation may be held to have engaged in predatory pricing even where the corporation has no intention of recouping the costs of its predatory conduct."

Part 6: Senator Joyce's proposed amendment - A critique

In a media release dated 28 June 2007 Senator Joyce has indicated that he proposes to move the following amendment:

> "A company that has substantial market share or substantial financial power must not supply or offer to supply goods or services for a sustained period at a price that is less than the relevant cost to the company of supplying such goods or services for the purpose of:
>
> (a) eliminating or substantially damaging a competitor of the company in that or any other market;
> (b) preventing the entry of a person into that or any other market; or
> (c) deterring or preventing a person from engaging in competitive conduct in that or any other market."[33]

For the sake of completeness a number of comments can be made about Senator Joyce's proposed amendment. From the outset, it clear that the amendment points to "substantial market share" or "substantial financial power" as alternatives to the existing s 46 concept of "a substantial degree of power in a market." By relying on either "substantial market share" or "substantial financial power" Senator Joyce's proposed amendment overcomes the current narrow judicial interpretation of the s 46 concept of "a substantial degree of power in a market" and instead relies on concepts that, as discussed in Part 2 of this Submission, are in keeping with the parliamentary intention behind the 1986 amendments to s 46.

Senator Joyce's proposed amendment, unlike the Government's so-called "predatory pricing" amendment discussed in Part 4 of this Submission, is quite clear in identifying the conduct that is being targeted by the proposed amendment; namely, the supplying or offering to supply goods or services for a *sustained* period at a price that is *less* than the relevant cost to the company of supplying such goods or services. In doing so, Senator Joyce's proposed amendment also usefully omits reference to the s 46 concept of "take advantage," a concept that, as discussed in Part 2 of this Submission, has not been interpreted by the High Court in keeping with the parliamentary intention behind that concept.

Finally, Senator Joyce's proposed amendment usefully draws on the existing s 46(1)(a)(b) and (c) paragraphs to require that predatory below cost pricing must be engaged in for an anti-competitive purpose in order to be a breach of Senator Joyce's proposed amendment.

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[33] See media release, *JOYCE TO MOVE THE 'BIRDSVILLE AMENDMENTS' FOR SMALL BUSINESS*, dated 28 June 2007. This media release can be accessed at: http://www.barnabyjoyce.com.au/news/default.asp?action=article&ID=400