



19 July 2007

Mr Peter Hallahan  
The Secretary  
Senate Standing Committee on Economics  
PO Box 6100  
Parliament House  
CANBERRA ACT 2600

Dear Mr Hallahan

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

Thank you for giving Boral the opportunity to make a submission relating to the inquiries by the Committee into the provisions of the two Bills which propose changes to the Trade Practices Act.

I have been provided information on the submission to the Committee by the Law Council of Australia. That submission is comprehensive and in my view, an accurate analysis of applicable law and economics. It also mentions the political need to make changes to Section 46 and I agree that this need should be acknowledged. Boral thus supports the Law Council's submission.

Boral has no difficulties with the proposed amendments in the Federal Government's Trade Practices Act Amendment Bill (No. 1) 2007. The Law Council has suggested some minor changes to those amendments and if there is consensus that changes of this nature enhance the legislation, those changes should be included. Boral is however opposed to Senator Fielding's Trade Practices Amendment (Predatory Pricing) Bill 2007.

In this submission, I will not comment on the proposed amendments other than to Section 46. From the Boral Masonry case, the Company has working experience with misuse of market power and I have sought to utilise this experience in making this submission.

Generally speaking, the Government is not amending the basic structure of Section 46. In particular, the prerequisite for a firm to have market power before there is any possible contravention remains. This is consistent with the approach by the Dawson Committee in its review. Boral believes that the requirement for market power continues to provide business and the wider community with an appropriate context for judgement of behaviour involving alleged predatory pricing and other types of anti-competitive behaviour. It retains necessary tension between the underlying desire to promote competition and the need to regulate anti-competitive behaviour.

The Government's proposed changes to Section 46 thus set standards and provide clarification by which Section 46 is to be applied. Boral has no concerns with this approach and in general, the areas where and the manner in which the Government has chosen to provide clarification on the detail of the law and how it is to be applied.

On the other hand, Boral opposes the approach to Section 46 adopted by Senator Fielding. Even though Boral's businesses would not be affected by the proposals in his private Bill, I believe predatory pricing laws are best to have general application to all Australian businesses and see no need for more rigorous regulation to be applied to specific sectors. Vigorous competition throughout all business sectors is enhanced if the Trade Practices Act has general application.

The private Bill does raise the question of whether in the context of predatory pricing, the legislation should make specific reference to whether or not the prospect of recoupment should be an ingredient of a contravention. Boral agrees with the view of economists that such a prospect is in most circumstances relevant to determining whether there has been predation. The High Court in the Boral Masonry case, indicated the prospect of recoupment is a matter courts may have regard to in considering predation but there is no requirement for any such consideration. Boral is comfortable with the High Court's approach and sees no need for any specific legislative provisions on recoupment.

In regard to the words of Subsection (4) of the private Bill, I suggest the reference to "intention" is out of context in dealing with recoupment and the existing structure of Section 46.

I trust that this submission is of interest and assistance to the Committee.

Yours sincerely



**M B Scobie**  
General Manager, Corporate Services & Company Secretary