

# SHOPPING CENTRE

COUNCIL OF AUSTRALIA

5 July 2007

The Secretary  
Senate Standing Committee on Economics  
Department of the Senate  
PO Box 6100  
Parliament House  
Canberra ACT 2600

Dear Sir/Madam,

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

We would like to make the following comments on the Trade Practices Legislation Amendment Bill (No.1) 2007 and the Trade Practices Amendment (Predatory Pricing) Bill 2007.

We consider the **Trade Practices Amendment (Predatory Pricing) Bill** to be an ill-considered response to the *Boral* case. It proceeds on the premise that the *Boral* decision was wrong but fails to show a proper understanding of the facts of the case. Although the Bill is limited to only three markets this is of little comfort as this list could readily grow if the Bill was passed.

The key flaws of this Bill are the addition of the "substantial financial power in a market" test; the removal of the need for a corporation to be "taking advantage" of market power; and the addition of an "effects" test. Under Bill any large, financially sound competitor in a market may be in breach of the Act and liable to potentially massive fines if it offers for sale goods or services at "unreasonably low prices" which may have the effect (though not the intended purpose) of eliminating a competitor – no matter how inefficient that competitor may have been, nor how many other effective competitors remain thereafter in the market. In effect this Bill would likely stifle effective competition from larger, financially sound and efficient competitors with the result that market places will likely become less competitive and efficient. The very essence of competition is that more efficient competitors (who therefore have a greater capacity to make profit and attain financial strength) do seek to, and in fact do, take market share from their less efficient competitors. Pricing is the primary means by which this is achieved. The threshold of "unreasonably low" prices provides vague, subjective and unsatisfactory protection.

The **Trade Practices Legislation Amendment Bill (No.1) 2007** is a more measured response to recent developments and political pressures. Largely the Bill serves the purpose of providing greater clarity to members of the public. It does this by reducing to words in the Act principles and concepts already determined by judges interpreting the existing sections 46 and 51AC.

Leaders in Shopping Centre Advocacy

ABN 41 116 804 310

Shopping Centre Council of Australia Limited  
Level 1 11 Barrack Street Sydney NSW 2000

Telephone: 02 9033 1902 ~ Facsimile: 02 9033 1976 ~ [www.scca.org.au](http://www.scca.org.au)

We would make the following specific comments on this Bill:

- The insertion in section 46(1) of the words "in that or any other market" provides clarity on an issue as yet undetermined by the Courts – leveraging market power in one market in another market. Its effect is likely to be limited and in any event was probably how the Courts would have determined the section currently operates (see dicta in *Rural Press*).
- The insertion of section 46(3A) provides clarity by stating that a corporation may attain "market power" as a result of its contractual arrangements and understanding with other entities. The cases to date have tended to indicate that how a corporation has attained its "market power" is irrelevant - the issue being whether it has it that market power and whether it has taken advantage of it.
- The insertion of section 46(3C) provides some clarity and is the most significant change proposed in the Bill. In 1986 the threshold under section 46 was changed from the requirement that a corporation be "in a position substantially to control a market" to the requirements that a corporation have a "substantial degree of power in a market". On one level the proposed section 46(3C) merely reflects this 1986 change from "control"/"freedom from constraint" to "substantial degree of power" – a change the Courts already may have regard to when interpreting a current provision by having regard to the 1986 explanatory memorandum and second reading speeches. Significantly the explanatory memorandum to this Bill affirms the settled meaning of a corporation with a "substantial degree of power in a market" which was laid down in *Queensland Wire*.
- That said the proposed express stipulations that a corporation may have a substantial degree of power in a market absent "control" and "absolute freedom of constraint" and notwithstanding a competitor likewise having such power in the market, in our opinion tends to cement the divide between the older higher control test and lower substantial degree of power test.
- The insertion of section 46(4), which is specifically directed to predatory pricing, reflects the current position as interpreted by the Courts and implements no change.
- The insertion of section 51AC(3)(j) and (4)(j) serve to highlight a particular example of a matter suggestive of unconscionable conduct. Since this list of factors is non-exhaustive the Courts already could have regard to such a matter. Nevertheless we have no objection to this example being specifically itemised.
- We have no objection to the alteration of the monetary threshold in section 51AC(9) AND 51AC(10) although we doubt this is necessary.

The Shopping Centre Council of Australia (SCCA) represents the major owners and managers of shopping centres in Australia. Our members are: AMP Capital Investors, Centro Properties Group, Colonial First State Property, DB RREEF Funds Management, GPT Group, Jen Retail Properties, Jones Lang LaSalle, Lend Lease Retail, Macquarie CountryWide Trust, McConaghy Group, McConaghy Properties, Mirvac, Multiplex, Perron Group, Precision Group, QIC, Savills, Stockland, Westfield Group and the Yu Feng Group. More information about the SCCA can be obtained from our website at: [www.scca.org.au](http://www.scca.org.au).

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Milton Cockburn', written in a cursive style.

Milton Cockburn  
**Executive Director**