

**DAVID LIEBERMAN AND ASSOCIATES**  
LAWYERS\* AND MEDIATORS

67 Cambridge Street  
PADDINGTON, NSW 2021  
PH: (02) 9361 0468  
FAX: (02) 9360 3643  
MOBILE: 0407 702 301  
EMAIL: [dlieber@bigpond.net.au](mailto:dlieber@bigpond.net.au)  
ABN 93 486 956 815

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

By email [economics.sen@aph.gov.au](mailto:economics.sen@aph.gov.au)

Dear Sir,

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

There are now three proposals to amend s46 and calls for still more changes from some sectors.

How should one judge what approach to take?

The object of the Trade Practices Act states:

*The object of this Act is to enhance the welfare of Australians through the provision of competition and fair trading and provision of consumer protection.*

Respectfully, I suggest that the gold standard by which the appropriate change should be judged is "the welfare of Australians". Not the welfare of big or small business.

Any change which chills or limits competition and thus denies benefits of competition (lower prices and innovative offerings) to Australians must be most carefully considered.

The prohibition on misuse of substantial market power in section 46 is not a cure all for the concerns of small business. It should be difficult to bring actions under the section. Otherwise one risks creating, for example, pricing "umbrellas" under which large

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companies keep their prices higher than they may wish for fear of breaching the section thus allowing other companies to be protected from the full force of the competition (and in turn keep their prices higher) and causing Australians to miss out on the lower prices that would otherwise apply.

“Predatory pricing” is particularly problematic as allegations will arise when products are offered at particularly low prices –something that is usually be considered to be of value by Australians. One needs to look closely at the circumstances to understand the reason for such low prices – is there excess stocks which will otherwise have to be destroyed? Is there a new entrant with new technology to which the incumbent is responding pending its ability to adjust to the new technology? Is a new entrant with deep pockets (eg Aldi) seeking to penetrate a market with powerful incumbents ?

The presumption should be that low prices are attractive to and good for consumers. That presumption should only be displaced in very limited circumstances.

Competition has brought us many obvious benefits – lower airfares, cheaper electronic goods, (helped by currency and China), a wider selection of products and prices in our supermarkets, innovative mobile phone offerings.

The result of the competitive pressures may be that smaller businesses have to become more efficient, go into other businesses or find ways to differentiate their offerings in order to compete with larger businesses.

It may be that rather than seek to amend s.46 more would be done to improve competition and allow for fair trading by improving the law in relating to cartels (as has been proposed by the Treasurer), giving the ACCC access to greater information gathering powers, forcing greater disclosure and testing further the use of the unconscionability provisions.

It may be that there are other areas outside the TPA that would be of greater assistance to small businesses – for example, training subsidies, research grants, town planning.

I was a Commissioner at the time the Commission filed the Boral proceedings and supported that action by the Commission. However, it is my view now that, as all the facts emerged through the litigation process, Boral was correctly decided. It is a tough decision but I believe leads ultimately to supporting the object of the Act in enhancing the welfare of Australians.

Yours faithfully,



David Lieberman  
Principal

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For the information of the Committee I was until 1995 General Counsel at IBM Australia. I was then for a short time an Associate Commissioner of the Trade Practices Committee before becoming a full time Commissioner for 3 years (1995- 1998) at the ACCC. On leaving the ACCC I was for 2 years Special Counsel at Blake Dawson Waldron in their Competition Group. That firm acted for Boral. I excluded myself from any participation in those proceedings. I then went into practice in my own right working solely in the field of competition and consumer protection. My clients include large and small companies. I am also a consultant to Thomson Playford in their competition group.