

Minority Report by Senator Xenophon

- 1.1 The *Competition and Consumer Legislation Bill 2010* addresses the issues of creeping acquisitions and unconscionable conduct currently defined under Section 50 and 51 of the Trade Practices Act.

Creeping Acquisitions

- 1.2 Under the Trade Practices Act, creeping acquisitions are a series of small-scale acquisitions that, individually, do not substantially lessen competition in a market, but collectively may do so over time¹.

- 1.3 Section 50(1) of the Trade Practices Act states:

A corporation must not directly or indirectly:

- a) acquire shares in the capital of a body corporate; or
- b) acquire any asset of a person;

if the acquisition would have the effect, or be likely to have the effect, of substantially lessening competition in a market.

The market is then defined under Section 50(6) as being "a substantial market for goods or services in Australia, a State, a Territory or a region of Australia".

- 1.4 Under the Competition and Consumer Legislation Bill 2010, the word 'substantial' will be deleted and the term 'any market' will replace references to 'a market'.

This will address the inclusion of local markets, as is currently the interpretation used by the ACCC, and also will remove the risk that a court could adopt the view that acquisitions in geographically confined markets may not be considered 'substantial' and therefore not be considered under Section 50 of the Trade Practices Act.

- 1.5 Some of the comments to the Competition and Consumer Legislation Bill 2010 include that the Bill puts into legislation what is the current interpretation by the ACCC, and in that regard is ineffective.

- 1.6 Associate Professor Frank Zumbo from the University of New South Wales says:

1 Law Council of Australia, *Submission 1*, p. 5.

"The proposed amendments to section 50 would not involve additional costs to businesses or the ACCC as these changes largely confirm the existing administration of that section."²

- 1.7 In comparison, the Trade Practices Amendment (Material Lessening of Competition – Richmond Amendment) sought to strengthen sections 50 (1) and 50 (2) of the *Trade Practices Act 1974* by tightening the test for proposed mergers or acquisitions, and to prevent ‘creeping acquisitions’.
- 1.8 The Private Senator's Bill was referred to the Senate Economics Committee for inquiry and the majority report recommended that the Senate not pass the Bill.
- 1.9 The Bill was introduced in part in response to the case of small business owners, William and Samira Fares, who have owned and operated an independent United service station in the Adelaide suburb of West Richmond for the last twenty years.
- 1.10 In late 2009 the Fares were notified that supermarket giant, Woolworths, who currently shares 44 percent of the petrol market and 80 of the dry packaged goods market with its direct competitor, Coles, applied to lease the land adjacent to the Fares on Marion Road, and submitted plans for a service station to be built on this site.
- 1.11 The impact of this aggressive tactic, the Fares' believe, will result in them being priced out of business and forced to close.

"If a Woolworths site ends up being next door to us then I am pretty sure that within no time, three months, six months or whatever it might be, that our doors will close. That is what I believe because they can afford to go as low as they can."
- 1.12 The Trade Practices Amendment (Material Lessening of Competition – Richmond Amendment) Bill sought to address instances such as these, where corporations who already hold a substantial share of a market would be prevented from acquiring shares or an asset (in this case, leasing land) that would have the effect of lessening competition in the market.
- 1.13 Meanwhile, this Bill will not address the concerns highlighted by the Richmond Amendment, rather will only put into legislation what is currently in practice.

Recommendation 1

That the bill be amended to incorporate the provisions as contained within the Trade Practices Amendment (Material Lessening of Competition – Richmond Amendment) Bill 2010.

2 Associate Professor Frank Zumbo, University of NSW – Media Release, 27 May 2010.

Unconscionable conduct

- 1.14 The Trade Practices Act does not currently include a statutory definition and it was not recommended that a definition be inserted under the Competition and Consumer Legislation Bill 2010.
- 1.15 However this Bill will insert interpretative principles within the Act, stating that:
- the prohibition against unconscionable conduct in the TPA is not limited to the equitable or common law doctrines of unconscionable conduct;
 - unconscionable conduct is not limited to the bargaining practices leading to the formation of a contract but can also be apparent in the way a party exercises its rights under a contract or the way in which a party behaves once a contract is made; and
 - unconscionable conduct applies to systemic conduct or patterns of behaviour and there is no need to identify a person at a disadvantage in order to attract the prohibition and is not limited to consideration of the circumstances relating to formation of the contract.

The Government argues that a list of examples would not improve the understanding or implementation of the unconscionable conduct provisions, but that interpretive principles "would assist the courts in interpreting the provisions, stakeholders in understanding them and regulator in enforcing them."³

- 1.16 Again, this Bill will not address the concerns surrounding unconscionable conduct and behaviours.
- 1.17 The 2008 Senate Economics Committee inquiry into "The need, scope and content of a definition of unconscionable conduct for the purposes of Part IVA of the Trade Practices Act 1974" explored the proposal by Associate Professor Frank Zumbo that the definition of unconscionable conduct rely on "nine term to guide the courts: unfair, unreasonable, harsh, oppressive, (or contrary to the concepts of) fair dealing, fair-trading, fair play, good faith and good conscience."
- 1.18 As stated in the Additional Comments to the 2008 Inquiry, submitted by Coalition Senators and myself, such a definition would make it clear to the courts that the term "unconscionable conduct" under Section 51 AC is to be interpreted in a manner that prohibits unethical conduct in general.

3 Treasury, Department of Innovation, Industry Science and Research, Strengthening statutory unconscionable conduct and the Franchising Code of Conduct, February 2010, p. ix.

Recommendation 2

That a statutory definition of unconscionable conduct be included within the Bill.

Conclusion

- 1.19 While I broadly support this legislation and it's clarification of creeping acquisitions and unconscionable conduct, I do not believe it addresses the issues effectively, rather only clarifies what is already in practice.
- 1.20 Given this, I believe more needs to be done to truly ensure fair competition in the market.

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