

Chapter 2

The Fares case

2.1 This chapter looks at the case of independent service station owner Mr William Fares. Mr Fares has been the owner and operator of the United service station at 128 Marion Road in West Richmond (Adelaide) for the past 20 years. Last year, Woolworths expressed interest in acquiring land next door to Mr Fares' business.

2.2 The Trade Practices Amendment (Material Lessening of Competition—Richmond Amendment) Bill 2009 was drafted by Senator Nick Xenophon in response to situations such as that of Mr Fares. As Senator Xenophon explained in the Second Reading Speech:

The Richmond Amendment takes its name from the Adelaide suburb of West Richmond, where, for the last twenty years, William and Samira Fares have owned and operated their independent United service station. Now, they face losing their business because Woolworths has sought to open a service station of their own, right next door. Under current laws, Woolworths can use their deep pockets to offer fuel at prices that are below cost or which undercut hard working independent petrol retailers like the Fares. Woolworths can even choose to operate their station at a loss, knowing that once the Fares are out of business, Woolies can once again raise their prices. With no local competition to force Woolies to moderate their prices, residents of West Richmond will end up paying at the pump for Australia's lax competition laws.¹

2.3 Mr Fares gave evidence to the committee in Adelaide on 9 April 2010. He told the committee that:

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.²

2.4 On 13 April 2010, the West Torrens Council gave planning approval for Woolworths' proposal. The development assessment panel, which passed the proposal 5–1, identified that competition was a relevant factor in its decision.³

1 *Second Reading Speech*, 26 November 2009.

2 Mr William Fares, *Proof Committee Hansard*, 9 April 2010, p. 2.

3 Adelaide Now, 'Council approves Woolworths service station next door to independent', 5 May 2010, <http://www.adelaidenow.com.au/news/south-australia/council-approves-woolworths-service-station-next-door-to-independent/story-e6frea83-1225853800089> (accessed 5 May 2010).

2.5 A Woolworths spokesperson was reported as saying that 'the existence of other petrol-filling stations within the surrounding area is not relevant to an assessment of the planning merits of the current application'.⁴ It was also reported that Woolworths spokesman, Mr Luke Schepen, explained that Woolworths was trying to 'bring competition to the market'. He added:

We place stations where we think they'll best serve customers. In this case, we're looking to bring convenience and competition for local motorists.⁵

Predatory pricing or creeping acquisition?

2.6 Prima facie, Mr Fares' situation seems, potentially, to relate more to the issue of predatory pricing than creeping acquisitions. The concern is that Woolworths may use its market power to undercut the United station's prices, thereby forcing Mr Fares out of business. Woolworths could subsequently increase both its prices at that location and its market share. This type of action is predatory pricing and is prohibited under section 46 of the Trade Practices Act (TPA).⁶

2.7 The drafter of this legislation, Associate Professor Frank Zumbo, has argued that the Fares case does relate to creeping acquisitions. He noted that section 50 of the TPA 'prohibits a corporation or a person from directly or indirectly acquiring shares of a body corporate or any assets of a person, if the acquisition has the effect or likely effect of substantially lessening competition in a market'. In this context, he observed that an asset includes leases and options, which in the Fares' case is the land adjacent to its business.⁷

2.8 It should be noted, however, that Mr Fares does not *own* the adjacent land. The obvious case of a creeping acquisition would be if Woolworths decided to buy the Fares business directly. It could either do this outright and pay the prevailing market price, or it could set up next door to Mr Fares and undercut his prices (or credibly threaten to do so) with a view to devaluing the market price of his business, before acquiring it cheaply.

4 'Woolies fuel fight sparks cost warning', 10 April 2010, <http://www.adelaidenow.com.au/news/south-australia/woolies-fuel-fight-sparks-cost-warning/story-e6frea83-1225852023860> (accessed 5 May 2010).

5 Adelaide Now, 'Council approves Woolworths service station next door to independent', 5 May 2010, <http://www.adelaidenow.com.au/news/south-australia/council-approves-woolworths-service-station-next-door-to-independent/story-e6frea83-1225853800089> (accessed 5 May 2010).

6 See Senate Economics References Committee, *Trade Practices Amendment (Predatory Pricing) Bill 2007*, 1 August 2007, http://www.apf.gov.au/Senate/committee/economics_ctte/completed_inquiries/2004-07/trade_practices/report/tp_pred_price/index.htm

7 Associate Professor Frank Zumbo, *Proof Committee Hansard*, 9 April 2010, p. 23.

The role of the ACCC

2.9 With Woolworths having received planning approval to set up a service station on Marion Road, the ACCC's interest will be in whether the company uses its market power to eliminate Mr Fares' business. As Dr Phillip Williams, a member of the Law Council of Australia's Trade Practices Committee, told the committee:

[Woolworths'] motivation is undoubtedly to make money. It is very likely that they will see that by entering and cutting prices they are going to eliminate some of the local people. The real issue is whether they are able to charge lower prices because of their efficiency or whether they are able to charge lower prices because of some advantage that has nothing to do with efficiency but has more to do with market power. That is really the fundamental issue for any antitrust authority. If the ACCC were of the view that the only reason they are able to eliminate Mr Fares is because of their market power, then they should bring an action under section 46. It would infringe section 46.⁸

The impact of the bill in Mr Fares' case

2.10 The following chapters will consider the effect of the proposed legislation in terms of the threshold for section 50(1) cases generally. The committee also heard evidence as to how the bill may affect Mr Fares' situation specifically.

2.11 Associate Professor Zumbo was asked his view on how the bill would assist in Mr Fares' case. He told the committee:

The creeping acquisitions provisions of this bill would capture not only acquisition of shares, but would capture the acquisition of assets, which include leases and options. There would be a question of whether Woolworths has a substantial market share—it is a local market test—and whether that would then lead to a lessening of competition. There would be consideration of the impact of Woolworths acting unilaterally when they take over that site, but also the coordinated effects of Woolworths being in that market in the sense that they will coordinate with other large players in the market.⁹

2.12 However, Mr Tim Grimwade of the ACCC expressed doubt as to whether the bill would even apply to Mr Fares' situation given that Woolworths may not have 'a substantial market share' of the local market. He argued that the local market:

...might be a three-to-five kilometre radius, and there are a large number of competitors to Mr Fares even within a three-kilometre radius. You would have to question whether Woolworths indeed had a substantial market share if the market is the local market in which Mr Fares operates, because there are, as I understand it, in a five kilometre radius around 15 different

8 Dr Phillip Williams, *Proof Committee Hansard*, 9 April 2010, p. 16.

9 Associate Professor Frank Zumbo, *Proof Committee Hansard*, 9 April 2010, p. 23.

operations represented by maybe 35 sites. I think Mr Fares referred to 35 sites. I am not sure about that. So, Woolworths might have 10 per cent or 11 per cent within a five-kilometre radius. Whether that amounts to a substantial market share I would question. I am not sure whether this particular provision... would even really deal with this particular situation.¹⁰

2.13 Dr Phillip Williams, a member of the Law Council of Australia's Trade Practices Committee, argued that the bill may have the unintended consequence of limiting the option of a large competitor directly acquiring Mr Fares' business at a good market price. He explained:

Let us suppose Woolworths were on a knife edge between deciding whether they buy his business or whether they try to get a licence to open up next door... Presumably that is because they really have a strong preference to open up next door rather than to acquire his business. He would much prefer that they acquire his business. I was thinking that, if this amendment became law, it may well be that the law would bias them in favour of opening up next door rather than acquiring his business, and for this reason. Let us suppose that they have the necessary market share in order to knock over that hurdle, then the question would be: which of those two alternatives would be more likely to be found to be lessening competition—opening up next door and competing with him or acquiring his business and having that area to itself? My guess is the second would be much more likely to be found to be lessening competition than the first. I am not sure that the amendment would help Mr Fares. In fact, I think it might well make his situation worse.¹¹

2.14 Mr Fares himself confirmed his preference for Woolworths to buy out his business, rather than have them set up next door. He was asked whether there was any possibility that Woolworths might set up next door and then offer to buy his business. Mr Fares responded:

If they wanted to do that then why did they not just come in and say, 'We want your site for a service station', like they have done in the past. But they are not interested in that... They could have used the opportunity to walk in and say, 'We're interested in opening a service station here. Are you prepared to lease it out or sell out?' We would have probably said yes. I would prefer to sell out and not have competition from Woolworths next door to me.¹²

2.15 Associate Professor Zumbo suggested that for a large company such as Woolworths, the option of setting up next door to a smaller competitor will often be more attractive than buying them out. He told the committee that:

10 Mr Tim Grimwade, *Proof Committee Hansard*, 9 April 2010, p. 29.

11 Dr Phillip Williams, *Proof Committee Hansard*, 9 April 2010, p. 16.

12 Mr William Fares, *Proof Committee Hansard*, 9 April 2010, p. 2.

Traditionally...Woolworths or Coles...would go in and offer to buy out that independent, and many independents have taken that offer. If the independent said no, then they would open up next door.

...

Over time I suspect a large player...may take the view, 'Why would I give the Fares' any money for their business when I could simply open up next door? I save myself the money of buying out the Fares'. I would have to do up the Fares's site, anyway, because it is branded a different oil company name. I would have to spend money revamping the site. I might as well start afresh. I can save myself the money of paying out the Fares, which I can use to develop the site next door, up the road or wherever it is, and then I use pricing practices to drive out that independent.¹³

Committee view

2.16 The issues discussed in this chapter have raised areas of concern for the committee.

2.17 Firstly, the committee questions whether Mr Fares' situation is, in fact, indicative of a possible section 50 creeping acquisitions case. Having received council approval to build at the site in West Richmond, it would seem that any possible anti-competitive conduct on the part of Woolworths would fall under the predatory pricing provisions of section 46. This is because—if Woolworths was to use its market power anti-competitively—it is more likely that it would price the United Services station out of business rather than acquire it.

2.18 Secondly, the committee is concerned that the bill would disadvantage people like Mr Fares, whose preference is to be bought out by a large competitor for a good price rather than have the competitor move in and price them out of the market. The bill would encourage large competitors with substantial market share to set up next to small competitors rather than take them over because a direct acquisition would be more likely to lessen competition.

13 Associate Professor Frank Zumbo, *Proof Committee Hansard*, 9 April 2010, p. 23.

