Chapter 2

Predatory pricing

2.1 Predatory pricing refers to a firm deliberately selling at unsustainably low prices in an attempt to drive a competitor out of the market. Charging consistently lower prices than rivals because of lower costs from greater efficiency is ***not*** predatory pricing. Nor is a temporary cut in prices to clear excess stock.

2.2 Predatory pricing is addressed by section 46 of the TPA, although the term is not actually used in the legislation. The bill addresses three significant 'threshold tests' to which the courts may have regard in assessing whether a firm has engaged in predatory pricing. The first concerns the firm's degree of power in a market; the second relates to the meaning of the term 'take advantage'; and the third refers to a firm's capacity to recoup the losses it incurs from below-cost pricing. All these issues were dealt with in the March 2004 Senate Economics Committee inquiry into the effectiveness of the Trade Practices Act.[1] The bill is a response to some of the report's key recommendations.[2]

Predatory pricing and 'power in the market'

Background

2.3 In August 2007, the Senate Economics Committee recommended passing an amendment to the TPA on predatory pricing. New subsection 46(4A) allowed the courts to take into account 'a sustained period' of selling goods and services at a price 'less than the relevant cost to the corporation of supplying such goods and services' and the corporation's reasons for engaging in this practice. Section 46(4A) was passed into law.

2.4 In a dissenting report to the August 2007 Senate inquiry, Senator Barnaby Joyce proposed bolstering the Act's provisions on predatory pricing through the following amendment:

> A company that has substantial market share or substantial financial power must not supply or offer to supply goods or services for a sustained period at a price that is less than the relevant cost to the company of supplying such goods or services for the purpose of:
>
> (a) eliminating or substantially damaging a competitor of the company in that or any other market;

---

1 The 2004 inquiry was chaired by a Labor Senator. The then Government Senators made a dissenting report.

2 The Explanatory Memorandum of the bill makes several references to the 2004 report.

> (b) preventing the entry of a person into that or any other market; or
>
> (c) deterring or preventing a person from engaging in competitive conduct in that or any other market.

2.5 This was known as the Birdsville amendment.[3] On 25 September 2007, this amendment (minus the reference to 'financial power') became law under new subsection 46(1AA) of the TPA.

2.6 While many commentators supported the Birdsville Amendment, there was concern in some quarters, both before and after it was passed, that the reference to 'relevant cost' was a significant departure to the familiar legal definition of 'below cost' pricing. It was also noted that the Birdsville Amendment was 'passed through in two weeks without public consultation'.[4]

'Market power' versus 'market share'

2.7 This bill amends subsection 46(1AA) to align it with the prohibition on the misuse of market power in subsection 46(1).[5] The reference in the Birdsville amendment (46(1AA) to 'a substantial share of a market' is changed to 'substantial degree of power in a market', consistent with subsection 46(1).

2.8 The Government argues that the present reference to 'share of a market' in section 46(1AA) 'has given rise to uncertainty and may reduce pro-competitive price competition in markets'.[6] The Minister explained:

> I have reached the view that having separate predatory pricing offences is, on balance a good thing…However, having strengthened the substantial degree of market power test, there is no need, in my view, to have a separate 'market share' test for predatory pricing. Having a new market share test creates considerable uncertainty in the market as to how it will be interpreted by the courts...Accordingly, we will legislate for the test of breaches of 46AA to be 'a substantial degree of market power'.[7]

---

3 The final draft of the amendment was sent by Senator Joyce from the hotel in the western Queensland town of Birdsville. For a good overview of the Birdsville Amendment, see Freehills, 'The Birdsville Amendment: Getting back on track', November 2008, http://www.freehills.com.au/publications/publications_7040.asp

4 Michael Hodge, *Submission 4*, p. 4. Matthew Drummond, 'New Law may turn predators into prey', *Australian Financial Review*, 28 September 2007.

5 The term 'substantial market power' replaced 'dominance' in 1986, with the intention of lowering the threshold; Associate Professor Frank Zumbo, *Proof Committee Hansard*, 5 August 2008, p. 5.

6 The Hon. Chris Bowen, 'Second Reading Speech', *House of Representatives Hansard*, 26 June 2008.

7 The Hon. Chris Bowen, 'Reviewing the federal government's amendments to the Trade Practices Act 1974', *Keynote address to the 4th Annual Trade Practices and Corporate Compliance Summit*, The Grace Hotel, Sydney, 28 April 2008.

2.9 Conceptually, 'market power' is more relevant to the ability to reduce competition in a market through engaging in predatory pricing.[8] It is possible in a readily 'contestable' market for a firm to have a large market share but little market power. The argument is that if a firm sets prices much above costs, it will quickly lead to new firms entering the industry and competing away the excess profits.[9]

2.10 A firm may also have market power and the ability to engage in predatory pricing despite a modest market share if it has 'deep pockets'. A large firm may have only recently entered a market and have a small market share but be able to cover losses in the new market easily from its profits elsewhere until it builds up a large share in the new market. The original Birdsville Amendment reflected this idea in its reference to 'financial power' but this was not incorporated in the legislated version.[10]

2.11 However, there are two reasons why despite this conceptual preference, it may be better to use a 'market share' test as an approximation to 'market power'. Firstly, it is much easier to measure 'market share' and therefore assess whether it is 'substantial'. This argument was put by the Fair Trading Coalition, an informal grouping of small business organisations; the National Association of Retail Grocers of Australia; and the Consumer Action Legal Centre.[11] It is also 'a better understood concept'.[12] It may also be a good proxy; 'if an entity does not have substantial market share, it is unlikely to have substantial market power'.[13]

2.12 Secondly, the High Court has adopted an interpretation of 'market power' (in the *Boral* case in 2003). It 'basically defined it as the ability to raise prices without losing business'.[14] Even monopolies face a downward-sloping demand curve for almost all products.[15] Monopolies therefore charge a higher price than would prevail

---

8 This point is made by Ms Nicole Rich, Consumer Action Law Centre, *Proof Committee Hansard*, 5 August 2008, p. 42.

9 This argument was put by Mr Graham Maher, *Proof Committee Hansard*, 5 August 2008, p. 25 and Mr Ian Stewart, *Proof Committee Hansard*, 5 August 2008, p. 29.

10 Associate Professor Frank Zumbo, *Proof Committee Hansard*, 5 August 2008, p. 9.

11 Fair Trading Coalition, *Submission 3*; Mr Kenneth Henrick, NARGA, *Proof Committee Hansard*, 5 August 2008, p. 35; Ms Nicole Rich, Consumer Action Law Centre, *Proof Committee Hansard*, 5 August 2008, p. 43.

12 Associate Professor Frank Zumbo, *Proof Committee Hansard*, 5 August 2008, p. 3.

13 Associate Professor Frank Zumbo, *Proof Committee Hansard*, 5 August 2008, p. 3. He also mentioned that 'Canada recently issued some predatory-pricing guidelines whereby they see a threshold of 35 per cent or more as a central element of determining market power'; pp 5-6.

14 Associate Professor Frank Zumbo, *Proof Committee Hansard*, 5 August 2008, p. 2.

15 Perhaps a monopoly supplier of insulin would come close to being an exception.

in a competitive market.[16] They do not charge an infinite price. As a result of this interpretation, the ACCC has not taken any section 46 cases.[17]

2.13 The use of *market share* is the 'door that gets you into the court'.[18] It may be a somewhat wider door than *market power*. (Indeed the High Court's definition may have made *market power* a locked door, or perhaps a cat flap.) But it is only the door. Once inside the court, the case must be made that the motivation for pricing below cost is to reduce competition, rather than clearing excess stock or some other reason.

2.14 Proving predatory pricing is still a very difficult thing for a small business to do. As NARGA notes, one difficulty is assessing the costs of the alleged predator:

> whenever we have talked predatory pricing with the ACCC they have continually said to us: 'No, you don't even know whether it's predatory or not because you don't know what costs your competitors have. You may think the price is below their cost, but we don't think that is the case.'[19]

> it is impossible for a small business to know what a large business's relevant costs are. The only people with the power to investigate are the ACCC, and they do not. [20]

2.15 The desire to align the terms in different sections of part IV of the Act could be met by either changing section 46(1AA) to refer to 'market power' or changing other parts of section 46 to refer to 'market share'.[21]

2.16 An alternative means of getting around the interpretation of 'market power' by the High Court would be to embed a clear definition in the legislation.

2.17 The Law Council of Australia argues that section 46(1AA) should simply be repealed, on the grounds that sections 46(1) and 46(3) provide adequate statutory guidance for the courts to address anti-competitive pricing behaviour. In evidence to the committee, Mr Ian Stewart argued that there is now 'quite a developed body of law' in relation to section 46(1) and that at the High Court level, at least, the facts and the law have been correct.[22] Mr Stewart emphasised the distinction between below cost pricing which does not reflect the forces of market supply and demand, and the situation where a firm is setting prices below its costs because it is responding to the

---

16 This proposition is demonstrated in any standard economics textbook. For example, see Paul Samuelson and William Nordhaus, *Economics*, p. 198.

17 Associate Professor Frank Zumbo, *Proof Committee Hansard*, 5 August 2008, p. 2.

18 Senator Barnaby Joyce, *Proof Committee Hansard*, 5 August 2008, many instances.

19 Mr van Rijswijk, National Association of Retail Grocers of Australia, *Proof Committee Hansard*, 5 August 2008, p. 35.

20 Mr Henrick, NARGA, *Proof Committee Hansard*, 5 August 2008, p. 36.

21 Associate Professor Frank Zumbo, *Proof Committee Hansard*, 5 August 2008, p. 6.

22 Mr Ian Stewart, *Proof Committee Hansard*, 5 August 2008, p. 28.

market. He argued that the *Boral* case—in which he acted as junior counsel for Boral—was an example of the latter situation.

2.18 The Law Council argued in its submission that section 46(1AA) fails to acknowledge that all firms cut prices to win sales from their competitors: 'the ability to cut prices…does not of itself indicate market power'. It gives the example of a highly competitive market suffering from excess industry capacity, with that excess supply causing market prices to fall below competitors' costs. It adds: 'Far from reflecting the existence or use of substantial market power, the below cost pricing may merely signify that no competitor has the ability to raise its prices above its costs'.[23] However, it is hard to see how this situation could lead to below-cost pricing being sustained for an extended period, rather than firms leaving the industry, and so it would not in practice form the basis for an action on the grounds of predatory pricing.

2.19 The Law Council's submission noted that a corporation with substantial market power may need to price below its costs to meet the price of a competitor with a lower cost structure.[24] Mr Stewart told the committee:

> All firms cut their prices in order to win business from their competitors... Say you have two firms competing in a market, one of which has a lower cost structure than the other—for example, it might have more modern equipment and its cost of production might be lower than the other. In order for the second firm, with a higher cost structure, to meet the price of the first firm it might have to set its prices below its costs.[25]

2.20 It is not clear why any firm, let alone one with substantial market power, would 'need' or 'have to' make ongoing losses for an extended period rather than just leaving the market. Most cases where a firm chooses to continue operating at a loss for reasons other than a predatory pricing strategy are unlikely to lead to court cases. If it is running at a loss while it installs new equipment or restructures, this is likely to be only for a short period. If it is tolerating the loss because it believes the competitor cannot sustain the lower price, then it is more likely a victim than a perpetrator of predatory pricing, and it is unlikely to be taken to court. If it is just postponing a decision to leave a market in a vague hope that things will improve or out of loyalty to its staff and customers its rivals are more likely to just wait for its departure than start a court case.

2.21 There therefore seems to be little need to follow the Law Council's suggestion that a problem could be addressed by something analogous to the American approach:

> in the United States the Robinson-Patman Act has what I think is called the 'meeting the competition' defence, so that in the case of predatory pricing

23 Law Council of Australia, *Submission 8*, p. 5.

24 Law Council of Australia, *Submission 8.*

25 Mr Ian Stewart, Law Council, *Proof Committee Hansard*, 5 August 2008, pp 28, 32.

> allegations it is a defence if a corporation, in good faith, tries to meet the lower price of a competitor.[26]

2.22 The argument for moving from 'market share' to 'market power' would be stronger if it could be shown that 'market share' was leading to excessive numbers of successful prosecutions for predatory pricing.[27] But this has *not* been the case:

> the ACCC…recently said that they had 75 complaints so far under the Birdsville amendment and none of those represented a breach of the Birdsville amendment, clearly indicating to me that there are sufficient safeguards in the Birdsville amendment as currently drafted to ensure that it only targets predatory pricing and in no way undermines legitimate discounting practices.
>
> Coles gave evidence to the ACCC price inquiry where they said that their pricing behaviour had not changed as a result of the Birdsville amendment. So, if there was any suggestion that Coles had been frightened into not discounting as a result of the Birdsville amendment, that would have been the time for Coles to put their hand up—but they did not and they said that their pricing practices have not changed.[28]

Committee view

2.23 The committee believes that the term 'market share', as currently legislated in section 46(1AA) of the TPA, is a better defined and more readily measurable term than 'market power'. Moreover, it is concerned that the High Court's definition of 'market power' in the *Boral* ruling has set the threshold for predatory pricing cases far too high. The best evidence of this is that the ACCC has not brought a predatory pricing case before the High Court since the *Boral* ruling.

2.24 The committee believes that—regardless of whether there is or is not the potential for predatory pricing to occur in Australian markets—there should be a clear and straightforward threshold test for predatory pricing cases to reach the courts. The committee recognises that decisions of the High Court 'have, to some degree, shifted the focus of S46 to the 'market power' and 'take advantage' elements of the provisions.'[29] The committee recognises that the government has addressed the important 'take advantage' element in amendments to this Bill. However, if the government believes that section 46(1AA) should use the term 'market power' it is important that it seeks advice on the precise definition of 'market power'. The

---

26 Mr Ian Stewart, Law Council of Australia, *Proof Committee Hansard*, 5 August 2008, p. 33.

27 As Treasury put it, 'Preventing a corporation or dissuading a person from discounting or otherwise providing a benefit to a consumer simply through an examination of their share in that market'; *Proof Committee Hansard*, 5 August 2008, p. 16.

28 Associate Professor Frank Zumbo, *Proof Committee Hansard*, 5 August 2008, p. 3.

29 ACCC, Submission to the Senate Economics References Committee inquiry into the effectiveness of the Trade Practices Act 1974 in protecting small business.

committee is concerned that deleting reference to the term 'market share' will give a green light for the courts to interpret 'market power' based on the *Boral* precedent.

Recommendation 1

2.25 The committee recommends the government reconsider the implications of changing 'market share' to 'market power' in section 46(1AA).

Predatory pricing and the meaning of 'take advantage'

2.26 The bill aims to clarify what is meant by the term 'take advantage'. For a corporation with substantial power to contravene section 46(1), it must 'take advantage' of that power for the purpose of:

> (a) eliminating or substantially damaging a competitor of the corporation or of a body corporate that is related to the corporation in that or any other market;
>
> (b) preventing the entry of a person into that or any other market; or
>
> (c) deterring or preventing a person from engaging in competitive conduct in that or any other market.[30]

2.27 There have been important test cases interpreting the meaning of 'take advantage' in the context of section 46. The High Court found in the *Melway* case that Melway had not taken advantage of its market power because the conduct in question was habitual and occurred before the company had obtained its market power. In its decision on *Safeway*, the Federal Court found that the rationale of the company's action matters. A company cannot contravene section 46(1) if it did not act with the intent of taking advantage of its market power. In the *Rural Press* case, the High Court emphasised the physical capacity of the company to take advantage of its market, as distinct from its rationale or intent. The key test was whether Rural Press could have acted in the same way if it did not have market power.[31]

2.28 The ACCC pointed out the absurdity of the High Court's judgement in the *Rural Press* case:

> What this test means is that so long as it *could* physically be possible for a firm to engage in the conduct in the absence of its having market power, it will be held not to have taken advantage of its market power, even though it

30 *Trade Practices Act 1974*.

31 Senate Economics References Committee, *The effectiveness of the Trade Practices Act 1974 in protecting small business*, pp. 12–14.

> *would not on any rational commercial basis* have engaged in the conduct in the absence of market power.[32]

2.29 The 2004 Senate committee report supported the ACCC's view that the interpretation of the term 'take advantage' should be broadened from the Court's interpretation in the *Rural Press* case. It recommended that the Act should be amended to include a declaratory provision outlining the elements of the term 'take advantage'.[33] To this end, the report cited the ACCC's suggestions that in determining whether a corporation has taken advantage of its market power, the courts should consider whether:

(a) the conduct of the corporation is materially affected by its substantial degree of market power;

(b) the corporation engages in the conduct in reliance upon its substantial degree of market power;

(c) the corporation would be likely to engage in the conduct if it lacked a substantial degree of market power; or

(d) the conduct of the corporation is otherwise related to its substantial degree of market power.[34]

2.30 The bill incorporates these four non-exclusive factors, as new subsections 46(6A)(a–d), to provide a basis for the courts' consideration in determining whether a corporation has taken advantage of its substantial market power. The Explanatory Memorandum emphasises that the new provision enables the courts to consider whether the corporation could have engaged in the conduct in a competitive market and whether it *would* have been likely to do so.[35]

2.31 These provisions have been criticised in some submissions. The Law Council of Australia argues that the criteria in 46(6A)(a) and (c) are unnecessary, as they 'merely codify principles of law established by the several High Court decisions interpreting s 46'. The Business Council of Australia goes further, arguing that adding unnecessary prescription in the legislation poses a risk they would have 'unintended consequences and introduce uncertainty into how the law will be applied in practice'.[36]

---

32 Senate Economics References Committee, *The effectiveness of the Trade Practices Act 1974 in protecting small business*, p. 13. The quotation comes from the ACCC's submission, p. 4.

33 Senate Economics References Committee, *The effectiveness of the Trade Practices Act 1974 in protecting small business*, p. xii.

34 Senate Economics References Committee, *The effectiveness of the Trade Practices Act 1974 in protecting small business*, p. 14.

35 The Hon. Chris Bowen, Second Reading Speech, *House of Representatives Hansard*, 26 June 2008.

36 Business Council of Australia, *Submission 7*, p. 4.

2.32 The Law Council argues that sections 46(6A)(b) and (d) should not be incorporated because they are:

> …unsound in principle, susceptible of differing interpretations, and likely to lead to uncertainty and error in the application of s 46(1).[37]

2.33 The Law Council also argues that the term 'reliance' in proposed subsection 46(6A)(b) had the potential to mislead the courts to consider the corporation's opinion as to whether it *believes* it is taking advantage of its market power, rather than the objective matter of whether it is using that power.

2.34 Both the Business Council of Australia and the Law Council argued that proposed subsection 46(6A)(d) will result in uncertainty and confusion and may penalise competitive activities.[38] The Business Council argued that the words 'otherwise related to' in proposed subsection 46(6A)(d) are much wider than the current judicial interpretation of the words of 'take advantage'. The result could be to 'dilute, or even eliminate, the current causal connection which is required between a corporation's market power and its purpose'.[39]

2.35 The Law Council's submission cited the High Court's ruling in the *Rural Press* case that the conduct of taking advantage of a thing is not identical with the conduct of protecting a thing. The Council's submission gave the example of a corporation which is a market leader with substantial market power developing a product which preserves its leadership and power in that market. By so doing, the corporation's conduct is related to its power in the market 'but the connection is not causal'. The Council cited and endorsed the judgement of Justice French in *Natwest Australia Bank v Boral Gerrad Strapping Systems Pty Ltd (1992)* that 'there must be a causal connection between the conduct alleged and the market power pleaded such that it can be said that the conduct is a use of that power'.[40]

2.36 Two lawyers appearing as witnesses questioned 46(6A)(d):

> I would, however, query subsection 46(6A)(d) of the proposed amendments—that is, the need for the remaining catch-all provision that exists there…whether it is going to lead to distraction from the other

---

37 Law Council of Australia, *Submission 8*, p. 6.

38 Business Council of Australia, *Submission 7*, p. 3.

39 Business Council of Australia, *Submission 7*, p. 4. Minister Bowen has also emphasised the importance of maintaining 'a sufficient causal connection between the offending conduct and substantial market power'. The Hon. Chris Bowen, 'Reviewing the federal government's amendments to the Trade Practices Act 1974', *Keynote address to the 4th Annual Trade Practices and Corporate Compliance Summit*, The Grace Hotel, Sydney, 28 April 2008.

40 Law Council of Australia, *Submission 8*, p. 8.

> provisions which I think have root in some of the jurisprudence in the previous cases. [41]
>
> that is quite a dangerous proposal because it does not necessarily imply there has been a taking advantage of market power. We have given an example of a corporation with substantial market power which, in order to protect its market power, introduces a new and innovative product. That might be said to be related to its market power because it aims to protect it. However, it does not involve a taking advantage of market power.[42]

2.37 On the other hand, the Fair Trading Coalition was strongly supportive of the bill's section 46(6A) amendments, arguing that any suggestion that proposed subsections (c) and (d) be deleted 'would weaken a very necessary and welcome change to section 46'.[43] The Consumer Action Law Centre argued that given the past difficulty of proving that a company has taken advantage of its market power, it is appropriate for the Parliament to provide further guidance to the courts.[44]

2.38 There are other legal regimes that take a much stronger line than is envisaged in the bill. In some states in the United States, pricing below cost is regarded as 'prima facie evidence of predatory pricing'.[45]

Predatory pricing and 'recoupment'

Background

2.39 The matter of recoupment is another whether the law requires modification in response to the High Court making a ruling which frustrates the intent of the legislation by setting the barrier to prove predatory pricing unrealistically high. In February 2003, the High Court delivered its finding on the *Boral Besser Masonry v ACCC* case. The ACCC claimed that Boral was guilty of predatory pricing, highlighting that one of Boral's competitors had left the market as a result of its below-cost pricing. The High Court disagreed, arguing that Boral was not guilty of predatory pricing because it did not have the market power to recoup the losses it sustained when it dropped its prices. They made this ruling despite there being no reference in the TPA to recoupment.[46] Apparently the Court did not explain why it thought Boral was pricing consistently below cost if it would not gain from it in the longer run.

---

41 Mr Graham Maher, *Proof Committee Hansard*, 5 August 2008, p. 21.

42 Mr Ian Stewart, Law Council of Australia, *Proof Committee Hansard*, 5 August 2008, p. 29.

43 Fair Trading Coalition, *Submission 3*, p. 1.

44 Consumer Action Law Centre, *Submission 5*, p. 3.

45 Mr Graham Maher, *Proof Committee Hansard*, 5 August 2008, p. 20.

46 Mr Scott Rogers, Treasury, *Proof Committee Hansard*, 5 August 2008, p. 12.

2.40 This decision meant that the ability to recoup losses incurred from below cost pricing is a necessary precondition to establish that a corporation has engaged in predatory pricing.[47] It would not be possible to establish whether a firm had actually recouped its losses until years after the anticompetitive conduct had occurred. Proving that future market conditions will allow a firm to recoup losses would be very difficult.

2.41 This problem was discussed by the Senate Economics References Committee in its March 2004 inquiry into the effectiveness of the TPA. The majority report recommended that the Act be amended to state that:

> where the form of proscribed behaviour alleged under s.46(1) is predatory pricing, it is not necessary to demonstrate a capacity to subsequently recoup the losses experienced as a result of that predatory pricing strategy.[48]

2.42 The then-government Senators disagreed with this recommendation. Their dissenting report stated:

> The issue of recoupment is important, in particular because it often provides the best test of whether price-cutting is a genuine exercise in competition or has a predatory intent. (A firm which is genuinely competing on price does not plan to recoup its foregone revenue from the elimination of its competitor; a firm which is engaged in a predatory pricing strategy almost invariably will.) Rather, Government Senators consider that recoupment should be one of the criteria to which the court may (and ordinarily will) have regard in determining whether price-lowering behaviour is predatory.[49]

2.43 The explanatory memorandum which accompanied the legislation enshrining the Birdsville amendment stated that 'recoupment no longer needed to be proved'.[50]

The bill's response

2.44 The Government believes that while the likelihood of recoupment may be an indicator of predatory pricing, proving it should not be an essential precondition to

---

47 The Hon. Chris Bowen, Second Reading Speech, *House of Representatives Hansard*, 26 June 2008.

48 Senate Economics References Committee, *The effectiveness of the Trade Practices Act 1974 in protecting small business*, pgs. xiii and 19.

49 Senate Economics References Committee, *The effectiveness of the Trade Practices Act 1974 in protecting small business*, p. 87.

50 Senator Barnaby Joyce, *Proof Committee Hansard*, 5 August 2008, p. 43. See Amendment to Explanatory Memorandum, *Trade Practices Legislation Amendment Bill 2007*, p. 5.

establishing that predatory pricing is occurring.[51] The bill replaces subsection 46(1AB) and substitutes:

> A corporation may contravene subsection (1AA) even if the corporation cannot, and might not ever be able to, recoup losses incurred by supplying the goods or services at a price less than the relevant cost to the corporation of the supply.

2.45 This reasoning is applauded by the Fair Trading Coalition.

2.46 The Business Council of Australia, on the other hand, argues that the provision on recoupment is unnecessary because:

> …based on judicial decision-making, it is not currently necessary to prove that a business must be able to recoup its losses in order to show the firm has market power and has taken advantage of that power. Rather, recoupment has been one element that the courts have used in considering whether a firm has market power, and has taken advantage of that power.[52]

2.47 Similarly the Law Council argued:

> the existing law is that one does not need to establish recoupment but it may be relevant in a given case.[53]

2.48 These views seem clearly at odds with the High Court's ruling in the *Boral* case. They may be relying on the explanatory memorandum that set out that 'recoupment no longer needed to be proved'.[54] However, 'statements that are made in explanatory memoranda and so on are relevant to courts in interpreting legislation but are not necessarily conclusive. It obviously has more force if it is included in legislation'. [55]

2.49 Moreover, the Business Council suggested that by inserting the provision with specific reference to recoupment, 'the amendment arguably creates the impression that recoupment is not an important element in assessing conduct under section 46'.[56]

---

51 The Hon. Chris Bowen, Second Reading Speech, *House of Representatives Hansard*, 26 June 2008.

52 Business Council of Australia, *Submission 7*, p. 5.

53 Mr Ian Stewart, Law Council of Australia, *Proof Committee Hansard*, 5 August 2008, p. 28.

54 Amendment to Explanatory Memorandum, *Trade Practices Legislation Amendment Bill 2007*, p. 5.

55 Ms Nicole Rich, Consumer Action Law Centre, *Proof Committee Hansard*, 5 August 2008, p. 43.

56 Business Council of Australia, *Submission 7*, p. 5.

Recommendation 2

2.50 The committee recommends the Senate support the provisions of the bill relating to the meaning of 'take advantage' and recoupment.