# Coalition Senators' Dissenting Report[1]

The Federal Government's proposals to amend Section 46 in relation to predatory pricing takes small business back to the former complexities and improbabilities of having to prove the market power test. The market power test was given an onerous interpretation by the High Court in the Boral Decision in 2003. Small businesses seeking to take legal action for predatory pricing under the market power test have been required to satisfy the High Court market power test before they could even argue that the behaviour by the big business was anti-competitive. If the small business could not prove market power then they could not have any remedy under law against predatory pricing. Reliance on the market power test would be a retrograde step as is clearly exemplified in the evidence delivered to the Senate Inquiry which showed under the market power test the ACCC has not commenced any new court prosecutions under s 46 since the Boral Case in 2003.

> …if a small business feels that it has been the subject of predatory pricing or predatory conduct of any sort they are effectively looking down the barrel of a 10-year case appealed all the way to the High Court and a cost of $1 million or more —God knows how much. That is just an impossibility for a small business. The only recourse that a small business has is if the ACCC will take up a case and prosecute it. There has been a clear reluctance on the part of the ACCC to do that…[2]

In contrast, the market share test as stated in Section 46(1AA), generally known as the Birdsville Amendment, gives Australians, especially those in small business, access to an effective legal remedy against predatory pricing. Predatory pricing is anti competitive as it removes efficient competitors from the market and with a reduction in competition comes inflation leading to higher interest rates and a general disfunctionality in the economy.

So often it is put that proving substantial market share is all that one has to do to win a case on predatory pricing but the evidence stands for itself in that over 75 cases have been taken to the ACCC, under the Birdsville Amendment, involving a complaint against an entity with substantial market share but this has not been held to be a breach of the law as the other hurdles in the Birdsville amendment had not been satisfied.

Far more needs to be proved to win a case of predatory pricing under the Birdsville Amendment than just having substantial market share. There are sufficient safeguards in the Birdsville Amendment that have ensured that it has not dampened legitimate competition in any way. Accordingly, the Birdsville Amendment strikes an appropriate balance in preventing predatory pricing while in no way undermining legitimate competition. In summary, there is no evidence that the Birdsville Amendment is undermining competition in any way. Rather, there is ample evidence from the ACCC alone that there are sufficient safeguards in the Birdsville Amendment.

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1 Senator Alan Eggleston (Deputy Chair), Senator Barnaby Joyce and Senator David Bushby

2 Mr Kenneth Michael Henrick, Chief Executive Officer, National Association of Retail Grocers of Australia, *Proof Committee Hansard*, 5th August, 2008.

In this environment, the Federal Government has failed to make out a case for amending the Birdsville Amendment. Instead, the Government is proposing to undermine the effectiveness of the Birdsville Amendment by reintroducing the very onerous market power test.

> The government's…proposed amendments are what can be described as procedural changes and do not deal with the underlying substantive weaknesses or gaps in key sections of the Trade Practices Act dealing with abuses of market power and unconscionable conduct by large and powerful entities.[3]

In addition, the Government is proposing adding a further hurdle; the Take Advantage Test. The Take Advantage Test will add extra complexities to the process of proving predatory pricing which will be to the detriment of small business. The additional hurdle of the Take Advantage Test is unnecessary given the already sufficient safeguards in the Birdsville Amendment. Clearly, the Federal Government's proposal to insert the Take Advantage Test as an additional hurdle is yet another form of excluding small business from recourse to the courts against anti competitive actions such as predatory pricing.

The Government has put forward the argument that having both a market power and a market share test leads to uncertainty yet has stated that having separate predatory pricing offences, is on balance a good thing.

> 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'.[4]

The Federal Government's assertion that market share tests lead to uncertainty fails to recognise that the ACCC will, when assessing predatory pricing claims, closely review the market share of the entity allegedly engaging in the predatory pricing. Market share is a well understood concept and can be easily defined by reference to the relevant market. While market share depends on the market definition, it is clear that once we define the relevant market we can determine the market shares of each entity and determine if that market share is substantial. The word “substantial” is a generally understood term which has long been used throughout the competition law sections of the *Trade Practices Act*.

The Federal Government's further assertion that having both market share and market power tests in s 46 means that there is a “dual track” process under s 46 fails to acknowledge that other competition law sections of the *Trade Practices Act* also contain a “dual track” process. Having two different tests within s 46 is not a valid criticism and a dual track approach is totally consistent with the approach taken in other competition law sections of the *Trade Practices Act*.

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

4 The Hon Chris Bowen MP, Keynote Address to the 4th Annual Trade Practices and Corporate Compliance Summit, 28th April, 2008.

If there is a concern that the substantial market share test should be discarded as it is not used elsewhere in the *Trade Practices Act*, one would presume that the most effective way to deal with this lack of use elsewhere would be to expand the use of the market share test to other sections of the act and remove the market power test altogether. In fact, the real concern is with the narrow ambit of the market power test and the fact that not one witness through out the whole enquiry was able to provide any conclusive evidence that the market power test would fully capture all forms of predatory pricing.

One argument that is raised is that the Trade Practices Act is there to protect competition and not competitors. It stands to reason that you will not have competition without competitors and the more efficient and vigorous competitors you have, the stronger the competition. Predatory Pricing and other like actions remove competitors so as to reduce competition. They remove the competitors that are competitive, or are likely to be competitive, which means that they remove from the market the potential for the consumer to get a better price. The destruction of competition is not good for consumers and therefore we need the retention of the Birdsville Amendment in its current form as this is essential to the preservation of competition. It is the role of Government to make sure a competitive environment exists. A corporation with substantial market share should not be allowed to reduce competition to the detriment of consumers. The Government's proposed undermining of Section 46(1AA) only serves the interests of those corporations with substantial market share as these corporations will be given the green light to engage in predatory pricing by the Government's proposal to replace the current market share test in the Birdsville Amendment with the new and extremely onerous hurdles of the Market Power and Take Advantage tests.

In the representations from the law council it was made clear and apparent that, to the best of their knowledge, they had not represented a plaintiff in bringing a successful s 46 case under the Market Power Test but they had been quite successful in their representations on behalf of defendants that have escaped prosecution under s 46. We see this as clear evidence of the inadequacies of the Market Power Test under s 46 as it stood. Now the Government is proposing to take us back to a point where there will be no s 46 cases taken to Court. It seems paradoxical that the Government would say that they are concerned about competition and prices and in the same breath be moving amendments to the Birdsville Amendment to make the situation worse.

***Take Advantage***

The take advantage amendments proposed by the Government are merely a codification of the case law on the interpretation of take advantage. The opposition does agree that the Rural Press Case requires that the current onerous interpretation of the Take Advantage Test should be relaxed. However, we believe that the Government's proposed amendments on take advantage will not make it easier to take s 46 cases. Under the present court interpretation of take advantage, the ACCC needs to prove that the corporation is engaging in conduct that is unique to the market power held by the corporation. If the corporation can engage in the same conduct with or without market power, then the corporation is not taking advantage of its market power according to the High Court. So for instance, since selling below cost may be an action that one could undertake whether one had market power or not, such conduct would not represent a taking advantage and therefore the entity would not be in breach of s 46.
In short the Corporation with market power had to have done something they wouldn't have otherwise done in order to be deemed to have taken advantage of their market power. The Government's position once more is flawed as it relies on the market power and take advantage tests. Since proving a substantial degree of market power and a taking advantage

has been proved to be near impossible, the Govt position means that the ACCC and small business will not be able to take s 46 cases to court unde the Government's proposals.

> We already know from price surveys that, if a major chain store has no local competition, as is the case in some areas of Sydney or Melbourne, their prices are relatively higher than the same store in areas where there is competition. In answering your question about whether prices go up in the absence of competition, certainly, yes.[5]

***Removing the monetary ceiling to bringing cases under s 51AC***

The removal of the monetary ceiling will not assist small businesses in bringing unconscionable conduct cases under s 51AC. The Courts have interpreted the concept of unconscionable conduct in such an onerous manner that there have been very few successful cases under s 51AC. The fundamental problem with s 51AC is that it currently lacks a statutory definition of what is unconscionable conduct. Unless the fundamental problem with s 51AC is dealt with, the removal of the monetary ceiling will be of no practical benefit to small businesses.

***The appointment of an ACCC Deputy Chairperson with responsibility for small business***

The appointment of an ACCC Deputy Chairperson with responsibility for small business will be of no practical benefit to small businesses unless the Deputy Chairperson is given new powers to assist small business. We have seen the failure of the Petrol Commissioner because the appointee was not given new powers and this serves as a reminder that appointments to the ACCC must be given new powers if they are to be effective.

***Access to the Federal Magistrates Court***

Allowing access to the Federal Magistrates Court for cases under s 46 will be of no practical benefit to small businesses unless the Birdsville Amendment is retained and small businesses are given financial assistance to bring s 46 cases. Consideration should be given to the establishment of a Small Business Advocate that can help small businesses bring s 46 cases in the Federal Magistrates Court.

**Recommendation 1**

**Section 46 (1AA) be left as is.**

**Recommendation 2**

**A statutory definition of unconscionable conduct be in inserted 51(AC);**

**Recommendation 3**

**A new statutory duty of good faith be inserted into the Trade Practices Act;**

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5 Mr Kenneth Michael Henrick, *Proof Committee Hansard,* 5 August 2008.

**Recommendation 4**

**ACCC Small Business Deputy Chair be given adequate funding and powers to take section 46 and 51(AC) cases on behalf of small business;**

**Recommendation 5**

**A small business advocate be established to help small business to take action under s46 and s51(AC) in the Federal Magistrates court; and**

**Recommendation 6**

**Divestiture powers be inserted into the Trade Practices Act.**

**Senator Alan Eggleston**
**Deputy Chair**
**LP**

**Senator Barnaby Joyce**
**LNP**

**Senator David Bushby**
**LP**