22 July 2008

Committee Secretary
Senate Economics Committee
Department of the Senate
PO Box 6100
Parliament House
CANBERRA ACT 2600
Australia

By email: economics.sen@aph.gov.au

Dear Secretary

Re: Inquiry into Trade Practices Legislation Amendment Bill 2008

Please find enclosed my submission to the Senate Standing Committee on Economics for their inquiry into the Trade Practices Legislation Amendment Bill 2008.

Yours sincerely

Michael Hodge
Barrister-at-Law

SUBMISSION TO THE SENATE STANDING COMMITTEE ON ECONOMICS' INQUIRY INTO TRADE PRACTICES LEGISLATION AMENDMENT BILL 2008

Introduction and Summary of Submissions

1. This submission addresses three aspects of the proposed amendments to s.46 of the *Trade Practices Act* 1974 (Cth) ("the Act") by the Trade Practices Legislation Amendment Bill 2008 ("the Bill"):

    1. amendments in relation to predatory pricing (proposed s.46(1AA) and s.46(1AB) of the Act);

    2. defining "take advantage" (proposed s.46(6A) of the Act);

    3. conferring jurisdiction to hear actions based on contraventions of s.46 of the Act on the Federal Magistrates Court.

2. In summary, my submissions are as follows:

    1. s.46(1AA) should be repealed rather than amended as it would add nothing to s.46(1) once the proposed amendment in the Bill is made;

    2. existing s.46(1AB) should be repealed;

    3. existing s.46(4A) should not be repealed;

    4. recoupment should still be addressed and proposed s.46(1AB) should be amended to read:

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

    5. if the amendment to proposed s.46(1AB) submitted for in the preceding subparagraph is made then the proposed s.46(1AB) would be more logically inserted as s.46(4B);

    6. the proposed s.46(6A)(c) adds valuable clarification to the test to be applied in determining whether a corporation has taken advantage of market power;

7. the proposed s.46(6A)(a), s.46(6A)(b) and s.46(6A)(d) probably do not add anything of substantive value to s.46;

8. as a consequence of the submissions in the two preceding subparagraphs, consideration might be given to amending the proposed s.46(6A) to insert a s.46(3E) stating:

> **(1) In determining for the purposes of this section whether, by engaging in conduct, a corporation has taken advantage of its substantial degree of power in a market, the court may have regard to whether the corporation would have engaged in the conduct if it did not have a substantial degree of power in the market.**
>
> **(2) This subsection does not limit the matters to which the Court may have regard in determining whether a corporation has taken advantage of its substantial degree of power in a market.**

9. general jurisdiction to hear cases based on a contravention of s.46 should not be conferred upon the Federal Magistrates Court as the cases will remain complex regardless of what court they are heard in;

10. jurisdiction to hear cases arising under s.46 should be conferred on the Federal Magistrates Court where s.83 is relied upon to establish the contravention and an amendment should be considered to insert in s.86(1A) after "arising under", the words:

> **section 46 where section 83 is relied upon to prove the contravention,**

Predatory Pricing

3. The proposed amendment to s.46(1A) is theoretically sound but will also render s.46(1A) unnecessary because it will add nothing further to s.46(1). To explain this submission, I think it would be useful to briefly review the history of s.46(1AA).

A brief history of s.46(1AA)

4. Section 46(1AA) and s.46(1AB) were inserted in 2007 by the passage of the *Trade Practices Legislation Amendment Act (No.1) 2007* (Cth) ("the Amendment Act"). The

insertions, dubbed the "Birdsville Amendment", were passed through in under two weeks without public consultation.[1] Senator Joyce dubbed the amendments the "Birdsville Amendment" because he devised the amendment in a motel room in Birdsville.[2] It would appear that the amendments were actually drafted by Associate Professor Frank Zumbo of the University of New South Wales.[3]

5. The genesis of s.46(1AA) lies in Professor's Zumbo's paper "*The Boral Case: Has the High Court done justice to Section 46?*" (2003) 11 *Trade Practices Law Journal* 199. In that article, Professor Zumbo proposed certain amendments to s.46 that included:

> (1AA) A corporation will be deemed to have a substantial degree of power in a market if it either in its own right or in combination with any related body corporate:
> (a) has a substantial market share in any relevant market; or
>
> …
>
> (1AB) For the purposes of subsection (1) "take advantage" means engaging in any of the following types of conduct:
>
> (a) below cost pricing; or
>
> …
> ((2003) 11 TPLJ 199 at 228)

6. Essentially, Professor Zumbo's proposal would deem a corporation with a substantial market share to have a substantial degree of power in a market and a corporation that engaged in "below cost pricing" to have taken advantage of market power. That kind of deeming is the basis for s.46(1AA): s.46(1AA) is s.46(1) with the words "substantial degree of power in a market" replaced with "substantial share of a market" and "shall not take advantage of that power in that or any other market" with "must not supply … for a sustained period at a price that is less than the relevant cost …".

7. The problem with this deeming is that it is theoretically unsound.

8. The proposition that a substantial share of a market is the same as having a substantial degree of power in a market is unarguable. It fails to take account of the many factors

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[1] Drummond, M. "New Law May Turn Prey into Predators" *The Australian Financial Review*, 28 September 2007. See also the letter of the Law Council of Australia to The Honourable Peter Costello, Treasurer, 19 September 2007.
[2] Senator Barnaby Joyce, Speech to the Senate on 11 September 2007 at the Second Reading of the *Trade Practices Legislation Amendment Bill (No.1) 2007.*
[3] Drummond, M. "New Law May Turn Prey into Predators" *The Australian Financial Review*, 28 September 2007.

that determine whether a corporation has market power including, probably most significantly, the threat of entry.

9. It is also incorrect to deem certain conduct as always being a taking advantage of market power. Whether conduct is engaged in as a result of market power is a question of fact to be determined in each case. The problem with deeming can be most easily seen when considering another of Professor Zumbo's proposals for conduct that would be deemed to take advantage of market power: "(d) Refusing to acquire or supply, or offering to acquire or supply at uncompetitive prices, or on uncompetitive terms or conditions…". On this deeming approach, a refusal to supply by a corporation with substantial market power would be deemed to take advantage of that market power. It would follow that if a corporation with substantial market power refused to supply a potential customer because of that potential customer's poor credit rating or insolvency, that would nevertheless take advantage of market power.

10. A similar type of problem occurs in relation to the present s.46(1AA) which effectively deems below cost pricing as a taking advantage: the pricing may be a competitive response to the pricing of competitors in the market but it is deemed to take advantage of market power.

Merit of the proposed s.46(1AA)

11. In my view, the proposed amendments to s.46(1AA) are excellent and theoretically sound. They remove the problem of deeming by reinstating "substantial degree of power in the market" and adding back the words "take advantage".

12. The submission of 16 June 2008 of the Law Council of Australia ("LCA") to the Assistant Treasurer and Minister for Competition Policy and Consumer Affairs expresses a concern that the proposed s.46(1AA) is deeming below cost pricing to be a taking advantage of substantial market power (p.4, [5]-[7]). The submission notes in a footnote that it may be that the proposed s.46(1AA) is meant to be read as requiring that the taking advantage element be established in each case but that the only conduct with which it is concerned is below cost pricing. In my view, that alternative view is the only way to understand proposed s.46(1AA); if the intention was not to require that taking advantage be established in each case then the words "take advantage of that power in that or any other market by" could have simply been omitted; if the first interpretation was correct then those words would have no work to do.

Problem with proposed s.46(1AA)

13. The problem with proposed s.46(1AA) is that it does its job too well. By removing the unsound deeming of the existing s.46(1AA), the proposed s.46(1AA) is left with no work to do. It is s.46(1) but restricted to a particular type of conduct. If below cost pricing took advantage of a substantial degree of power in a market for a proscribed purpose it would fall with the terms of s.46(1); if it did not, it would not be covered by s.46(1AA). For that reason, s.46(1AA) should be repealed rather than amended as proposed.

14. While I doubt that the existing s.46(4A) adds anything of substance to an understanding of s.46, I would also submit that s.46(4A) should be retained if s.46(1AA) is repealed to remove any doubt about whether predatory pricing could conceivably fall within the ambit of s.46.

Recoupment

15. The Assistant Treasurer and Minister for Competition Policy and Consumer Affairs stated in the Second Reading Speech to the House of Representatives on 26 June 2008 that, "[t]he High Court's decision in the Boral case meant the ability to recoup losses incurred from below-cost pricing is a necessary precondition in establishing a breach of section 46." (p.6032) That is, I would suggest, a doubtful interpretation of the High Court's decision in *Boral Besser Masonry Ltd v. ACCC* (2003) 215 CLR 374. Of the seven judges that sat on the High Court in that case only one (McHugh J) stated that recoupment would be a necessary precondition for a predatory pricing claim under s.46. Gleeson CJ and Callinan J expressly stated that recoupment was not “legally essential” to a contravention of s.46 though “it may be of factual importance” (215 CLR 374 at 422, [130]). Gaudron, Gummow and Hayne JJ seem to have, at best, accepted recoupment as relevant at an evidentiary level though even that is doubtful as they may have simply been pointing out the error in reasoning of Beaumont J in the Full Federal Court below (215 CLR 374 at 440, [191]). Kirby J appears to have expressly rejected recoupment as a necessary precondition to a contravention of s.46 (215 CLR 374 at 514, [436]). I do not mean to suggest that the High Court did not think that recoupment could not be useful at an evidentiary level; clearly, they generally did.

16. To the extent that there is any doubt about this issue, the terms of proposed s.46(1AB) could serve a useful though limited purpose. I am wary of the possibility that recoupment should be deemed to be entirely irrelevant not least because it may be strong evidence for

an applicant alleging a contravention of s.46 of either the existence of substantial market power or the taking advantage of that market power. As I have submitted above, s.46(1AA) should be omitted; in my submission, the proposed s.46(1AB) should be amended to read:

> "**A corporation may contravene subsection (1) even if the corporation cannot, and might not ever be able to, recoup losses incurred by supplying goods or services for a sustained period at a price that is less than the relevant cost to the corporation of supplying such goods or services.**"

17. The subsection would probably better be placed in the legislation as s.46(4B). This assumes that s.46(4A) is not repealed.

Defining "Take Advantage"

18. In my submission, the "take advantage" element should be solely concerned with whether conduct is economically rational as a result of substantial market power. The best starting point for considering this submission is, I think, *Rural Press v ACCC* (2003) 216 CLR 53.

Rural Press

19. The facts in *Rural Press* can be relatively shortly stated.

20. A subsidiary of Rural Press published a newspaper called the "the Murray Bridge Standard" ("the Standard") in the town of Murray Bridge in South Australia. The prime circulation area for the Standard extended north along the Murray River to include the town of Mannum. Further along the Murray River from Mannum is the town of Waikerie. It was there that Waikerie Printing House Pty Ltd "(Waikerie Printing") printed a newspaper called the "River News". The prime circulation area of the River News was the Riverland area which ended about 40 kilometres north of Mannum. In 1997, following a Council amalgamation, Waikerie Printing began to expand the River News into and around Mannum. In response, Rural Press made a conditional threat to begin publishing a rival newspaper to the River News in the Riverland area if Waikerie Printing did not withdraw from its incursion into the prime circulation area of the Standard. The conditional threat was made through various private communications from offices and employees of Rural Press to the Taylors, the owners of Waikerie Printing. Waikerie Printing withdrew circulation and promotion of the River News from the Mannum area.

21. A majority in the High Court held that the ACCC had failed to establish that Rural Press had taken advantage of its substantial degree of power in the Murray Bridge newspaper market. Gleeson CJ and Callinan J did not separately consider the question of a contravention of s.46 but agreed with the judgment of Gummow, Hayne and Heydon JJ. The judgment of Gummow, Hayne and Heydon JJ relevantly stated, "[t]he words "take advantage of" do not extend to any kind of connection at all between market power and the prohibited purposes described in s 46(1). Those words do not encompass conduct which has the purpose of protecting market power, but has no other connection with that market power … The conduct of "taking advantage of" a thing is not identical with the conduct of protecting that thing. To reason that Rural Press and Bridge took advantage of market power because they would have been unlikely to have engaged in the conduct without the "commercial rationale" – the purpose – of protecting their market power is to confound purpose and taking advantage." (216 CLR 53 at 76).

22. Kirby J dissented. His Honour relevantly stated, "If Rural Press and Bridge did *not* enjoy substantial market power in the Murray Bridge market, they would have faced competitive restraints from other suppliers. Such restraints would have deprived them of any significant benefit from procuring an undertaking from Waikerie to withdraw from the Murray Bridge market." (216 CLR 53 at 102).

Protecting a monopoly

23. Corporations are rational profit-maximising entities. A rational profit-maximising actor would not protect a monopoly merely for the sake of having a monopoly; a rational actor would protect a monopoly because the expected cost of the conduct that "protects" the monopoly is less than the benefit that the rational actor expects to derive from the conduct.

24. An oversimplified example of this can be put in numerical terms. Assume that a market incumbent is a monopolist in the market and could attempt to drive off a potential entrant into the market at a cost of $100,000. There is a 50% chance that the conduct will drive off the potential entrant. If the potential entrant actually enters the market and stays in the market then the monopolist expects to lose $1M. The cost of the conduct is $100,000, the expected benefit is $500,000 ($1M x 0.50 representing the 50% chance that the conduct will succeed in driving off the potential entrant) and therefore the expected benefit outweighs the cost and a rational monopolist would engage in the conduct.

25. Now assume that the market incumbent is not a monopolist and does not have a substantial degree of power in the market. The incumbent could again spend $100,000 to drive off a potential entrant. As in the case with the monopolist, there is a 50% chance that the incumbent could succeed in driving off the potential entrant. If the potential entrant enters and stays in the market then the incumbent expects to lose $150,000. In this case, the cost, $100,000, outweighs the expected benefit, $75,000 ($150,000 x 0.50). Therefore, the incumbent, acting rationally, would not engage in the conduct. It follows that it is only the substantial degree of power in the market that makes the conduct rational conduct for the market incumbent.

26. In a competitive market, a market incumbent would not incur the cost to attempt to drive off the potential entrant. In a market where the incumbent was a monopolist, the incumbent would incur the cost to attempt to drive off the potential entrant.

27. If there is a distinction between "would" and "could" then the preceding analysis does not answer the question of whether a corporation has taken advantage of market power. It only describes what a rational corporation would do but not what it could do.

28. Could a rational corporation engage in the conduct in a competitive market if the expected cost outweighed the expected benefit? If "could" refers to "physical possibility" then it would almost certainly be the case that a corporation could engage in the conduct in a competitive market. If "could" refers to whether persistence with the conduct would eventually drive the corporation out of business, then the answer becomes uncertain. The corporation might engage in the conduct and continue to be profitable rather than loss-making notwithstanding that it would be more profitable to not engage in the conduct. In such a case (and this assumes an imperfectly competitive market) the corporation is not driven out of business. It makes a profit but less than it might have; does it follow that the corporation could engage in the conduct without taking advantage of market power? In my view, there are two reasons why the answer is "no".

29. First, in this hypothesised situation, the corporation is not acting to maximise its profits. A rational corporation is a profit-maximiser. It follows that it is only possible for the conduct to occur in a competitive market where the expected cost outweighs the expected benefit if the rational corporation acts irrationally. This is an oxymoron. Quite aside from physical or accounting possibilities, it is not definitionally possible for the corporation to engage in the conduct in a competitive market.

30. Secondly, this interpretation confuses s.46. s.46 involves an economic inquiry and, in my submission, if a corporation engages in conduct that is only economically rational because of the existence of substantial market power, that corporation has, on the ordinary meaning of the words, taken advantage of that power.

Implications of this analysis for *Rural Press*

31. If Gummow, Hayne and Heydon JJ were accepting that the conduct of Rural Press would not have been engaged in without the commercial rationale of protecting market power then they should have concluded that Rural Press did take advantage of its market power because it was only the existence of market power that made the conduct economically rational.

32. On the other hand, it is not clear they were accepting that the conduct would not have been engaged in in the absence of the commercial rationale of protecting market power. Their judgment is, in my view, ambiguous on this point.

33. Kirby J concluded that there was a taking advantage but the passage from his judgment quoted above undermines this conclusion. He states that it was only by virtue of the market power that there was a "significant benefit" to Rural Press in engaging in the conduct. This seems to leave open the possibility that there would nevertheless have been a benefit to Rural Press of engaging in the conduct in a competitive market. If Rural Press would have derived a benefit from the conduct whether it had market power or not, the conduct was economically rational without market power and Rural Press did not take advantage of its market power notwithstanding that the benefit was greater because it had market power.

34. There are two reasons to think that the conduct would have been to Rural Press' benefit even without market power. First, one part of the conduct was the making of a threat that was presumably costless and therefore expected benefit would essentially always outweigh cost. Secondly, entering the Riverland market might have cost Rural Press money (Rural Press was considering entering by publishing a free newspaper) and so the expected benefit would, again, substantially outweigh the cost regardless of whether the Murray Bridge market was competitive or not.

Value of proposed s.46(6A)

35. The preceding analysis has illustrated some of the doubt that surrounds the "take advantage" element as a result of *Rural Press*. There is insufficient focus on the economic analysis of conduct. The proper question to be asked is "would a corporation have engaged in the conduct in the absence of a substantial degree of power in the market?" This question goes to the heart of whether conduct is economically irrational in the absence of market power.

36. In my submission, there is no particular reason not to make the amendment inserting the proposed subsection (6A) into s.46 of the Act though I doubt that any of the sub-subparagraphs except (c) offers anything of substantive importance to the law and it is of some concern that neither the Explanatory Memorandum to the Bill nor the 2004 Senate Economics Committee's Report give an explanation for what each of the individual sub-subparagraphs (a) to (d) are meant to mean or designed to cover.

Proposed s.46(6A)(a)

37. In my view, the "materially facilitated" test is nebulous. It appears that the term "materially facilitated" is meant to encapsulate the situation where the substantial degree of power in a market makes it easier for a corporation to act in a particular way even though the conduct may not have been absolutely impossible without the power (*Melway Publishing v. Robert Hicks* (2001) 205 CLR 1 at 23, [51]). In my submission, asking whether conduct is made easier by the existence of market power is meaningless. As I submitted above, the only focal point of the "take advantage" enquiry should be upon whether conduct would be economically rational in the absence of a substantial degree of market power. The question for the court is whether, on the balance of probabilities, the absence of market power would have made the conduct economically irrational. Conduct being made "easier" does not fit into an analysis of whether conduct is economically rational.

38. If the conduct is found to be economically irrational in the absence of market power then there is no need to make any further enquiry: it follows that because the corporation had market power and engaged in the conduct it must have done so because the market power made the conduct economically rational.

39. If the finding is that the conduct would be economically rational even in the absence of market power then it should follow that the conduct has not taken advantage of market

power even if the conduct is made more profitable or less costly than it would have been in the absence of market power.

40. If "easier" is meant to refer to the likelihood that conduct would be economically rational (for example, by increasing the chance of the pay-off of conduct) then, again, this seems to add an unnecessary and irrelevant issue to the enquiry. At the point at which "take advantage" is being considered, the corporation has engaged in the conduct and has a substantial degree of power in the market. To look at whether the conduct was more likely to be profitable with market power goes nowhere because what matters is whether on the balance of probabilities the conduct would have been profitable in the absence of market power.

41. The majority in the Full Federal Court in *ACCC v. Safeway* (2003) 129 FCR 339 found that Safeway's conduct in four instances was "materially facilitated by the existence of its market power even though that same conduct would not have been "absolutely impossible" without that power" (129 FCR 339 at 408, [333] per Heerey and Sackville JJ). That appears to be an application of the materially facilitated test. However, the finding immediately preceding this conclusion was that, "there would have been no purpose in Safeway acting in this manner in a competitive market. On the contrary, had Safeway done so it would have inflicted economic harm on itself for no gain". That finding seems to make clear that in the absence of market power the conduct would have been economically irrational. It follows that in a competitive market Safeway would not have (and, as a rational profit maximiser, could not have) engaged in the conduct.

42. Reference to whether conduct is "absolutely impossible" or made "easier" seems to go to something other than a pure economic enquiry; it may be as to whether the conduct is physically possible but that is not the proper test nor the proper focus of enquiry. In my submission, there is some risk that this alternative formulation draws the enquiry away from a concentrated economic focus and exacerbates the problems that have beset the section for years.

Proposed s.46(6A)(b)

43. In my view, it is likely that the only conduct that could be said to rely upon market power would be conduct that would be economically irrational in the absence of market power. For that reason, I doubt that s.46(6A)(b) adds anything to the question encapsulated in

s.46(6A)(c) as to whether a corporation would have engaged in conduct in the absence of market power.

Proposed s.46(6A)(c)

44. As I have already indicated, in my submission, a section in the terms of or terms similar to proposed s.46(6A)(c) would be of great value. My only concern is the inclusion of the words "it is likely that" in the proposed s.46(6A)(c); it is difficult to see what this adds other than ambiguity. These words appear to trespass across issues better left to the burden of proof. It is for an applicant to establish on the balance of probabilities (subject to technical questions about the applicable burden of proof) that conduct would not have been engaged in absent market power. Referring to whether "it is likely that" conduct would have been engaged in might be understood as either decreasing or increasing the degree of satisfaction required as compared with the ordinary burden of proof. It might also be meant to refer to whether conduct is made "easier" but, as I have indicated above, in my view, this is an irrelevant line of enquiry.

Proposed s.46(6A)(d)

45. Proposed s.46(6A)(d) introduces a test of whether "conduct is otherwise related to the corporation's substantial degree of power in the market". As noted above, there is no explanation, of which I am aware, in the Explanatory Memorandum or the 2004 Senate Economics Committees' Report of what this test means.

46. In their submission of 16 June 2008 to the Assistant Treasurer and Minister for Competition Policy and Consumer Affairs, the LCA expresses concern that this test might apply in circumstances where, "a corporation which is the market leader and has substantial power in its market might develop a new and improved product which preserves its leadership and power in that market. By protecting or preserving its power in the market, the corporation's conduct is related to its power in the market in which it is operating". This strikes me as an unlikely and tenuous basis for suggesting a relationship between the power and the conduct. Presumably, there is no suggestion that the product would not have been developed in the absence of market power, nor that the product would not have been marketed in the absence of market power. The connection appears to arise not from the conduct itself but from the effect of the conduct on the market power.

47. If this interpretation of the provision was correct then it would likely catch any conduct of a corporation with market power. If a corporation ceased to sell goods in the market its market power would decrease; therefore, the sale of goods is conduct related to the market power. That seems like an unlikely interpretation. It does not distinguish between the effect of the conduct on the market power and the conduct itself.

48. I doubt that the proposed s.46(6A)(d) would add anything to the "would" test proposed in s.46(6A)(c). My principal concern would be that it might be read as meaning that conduct that a corporation would engage in even if it did not have market power would fall within s.46(1) because the benefit of the conduct was greater as a result of the market power or, more likely and of more concern, the cost of the conduct was less because of the market power. I think the first possibility, that the benefit of the conduct was greater, could arguably be excluded for the same reason that the LCA's example could excluded: it is relating the effect of the conduct to the market power rather than the conduct itself. I think the second possibility, that the cost of the conduct was less, is of more concern because it does appear to create some connection between the conduct and the market power. That gives rise to the risk that conduct that would be economically rational without market power would be unlawful for a corporation with market power to engage in.

Suggested amendments

49. In my submission, proposed s.46(6A)(a), s.46(6A)(b) and s.46(6A)(d) add little to the inquiry into economic rationale that is properly made the focus of the "take advantage" element by proposed s.46(6A)(c). There is potentially value in limiting the amendment to the terms of proposed s.46(6A)(c) so as to decrease the risk of confusion and diversion in relation to s.46 cases and simultaneously override the claim that *Rural Press* means that the test is one of "could" rather than "would".

50. Such an amendment might insert a s.46(3E) which states:

> **1. In determining for the purposes of this section whether, by engaging in conduct, a corporation has taken advantage of its substantial degree of power in a market, the court may have regard to whether the corporation would have engaged in the conduct if it did not have a substantial degree of power in the market.**

2. This subsection does not limit the matters to which the Court may have regard in determining whether a corporation has taken advantage of its substantial degree of power in a market.

Jurisdiction of the Federal Magistrates Court

51. The Explanatory Memorandum to the Bill states that the amendments to confer jurisdiction on the Federal Magistrates Court in respect of contraventions of s.46 are a response to submissions made to the 2004 Senate Inquiry. The recommendation of the 2004 Senate Inquiry was that the jurisdiction of the Federal Magistrates Court be extended to s.46 cases where those cases relied upon s.83 (recommendation 17 of the 2004 Senate Economics References Committee's Report, p.79). In my submission, that recommendation is a sensible one. The Bill, which proposes to grant general jurisdiction over all s.46 claims to the Federal Magistrates Court, is probably overreaching.

52. The Explanatory Memorandum states that,

> "[i]f the costs associated with enforcing s.46 are prohibitively high, then it will not be effective in addressing anti-competitive conduct no matter how well it is otherwise suited to doing so…[t]he Bill addresses these concerns by amending subsection 86(1A) of the Act to confer jurisdiction on the FMC in any matter arising under s.46 in respect of which civil proceedings are instituted by a person other than the Minister or the ACCC. This is consistent with the FMC's objective to provide a simpler and more accessible alternative to litigation in the superior courts." (p.17, [1.53] - [1.54])

53. Section 46 cases are complex. They are legally complex as the extensive academic and legislative consideration of the past decade demonstrates. They are factually complex by virtue of the need to enquire into the mechanics, operations and motivations of not merely a business or businesses but also the market or markets in which the business or businesses compete. They are economically complex, generally requiring substantial expert evidence.

54. Pushing complex cases into a court designed to expeditiously hear simpler matters does not make those cases simpler. The cases remains complex and the mechanisms of the court, supposedly designed to provide a simpler and more accessible alternative to superior court litigation, must now deal with those complex pieces of litigation.

55. It is difficult to understand why having s.46 cases run in the Federal Magistrates Court would have any substantive impact on the cost or time required to hear one of these cases

through to judgment. There is nothing in the Explanatory Memorandum that explains why it is thought that this would be a likely outcome.

56. There also appears to be a danger in giving false encouragement to small businesses by suggesting to them that complex and difficult litigation is somehow transformed into simple and easy to prosecute cases. The 11 April 2008 letter of the ACCC Chairman to the Assistant Treasurer and Minister for Competition Policy and Consumer Affairs illustrates the danger of a different kind of false encouragement when the Chairman states that, "over the period 25 September 2007 until 14 February 2008, the ACCC received 47 complaints alleging predatory pricing. None of these complaints were assessed as being matters that should be investigated further by the ACCC." (p.3).

57. In my submission, the Bill should be amended to allow s.46 cases to be brought in the Federal Magistrates Court only where s.83 is relied upon. Such an amendment probably requires very careful consideration but I would suggest the result might be achieved if s.86(1A) was amended so that after "arising under", "**s.46 where s.83 is relied upon to prove the contravention**" was inserted.