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Department of the Senate
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Inquiry into the Trade Practices Legislation Amendment Bill 2008
Inquiry into the Trade Practices (Creeping Acquisitions) Amendment Bill 2007 [2008]

Consumer Action Law Centre (**Consumer Action**) is pleased to make a submission to the Senate Economics Committee (**Committee**) inquiries into the Trade Practices Legislation Amendment Bill 2008 (the **TPA Bill**) and the Trade Practices (Creeping Acquisitions) Amendment Bill 2007 (the **Creeping Acquisitions Bill**).

Introduction

Consumer Action is generally supportive of the TPA Bill and the Creeping Acquisitions Bill. We strongly support many of the proposed amendments, but we oppose the proposed amendment to the TPA to require one Deputy Commissioner to be experienced in small business matters. Our detailed comments are set out below.

More broadly, however, we note that these proposals are the latest in a very long list of proposed and actual amendments to the competition provisions of the *Trade Practices Act 1974* (the **Act**) over its 30 plus years history. By contrast, the consumer protection provisions of the Act remain in need of reform. These bills represent yet another missed opportunity for the Government to make desperately needed amendments to the consumer protection provisions of the Act.

About Consumer Action

Consumer Action is an independent, not-for-profit, campaign focused, casework and policy organisation. Consumer Action provides free legal advice and representation to vulnerable and disadvantaged consumers across Victoria, and is the largest specialist consumer legal practice in Australia. Consumer Action is also a nationally-recognised and influential policy and research body, pursuing a law reform agenda across a range of important consumer issues at a governmental level, in the media, and in the community directly.

Misuse of market power - amendments to section 46

Consumer Action supports the proposed amendments to section 46 in the TPA Bill. Court proceedings alleging misuse of market power under section 46 of the Act have had 'an extraordinary lack of success'.[1] Predatory pricing conduct, in particular, has proved very hard to address, especially following the *Boral* case in the High Court.[2] Leading economists Niblett, Gans & King noted in 2004 that '…a firm that has an ability to behave in a way that is detrimental to competition over the longer term…appears to be exempt from a claim of abuse of market power under section 46'.[3]

Proposed subsection 46(1AA) amendment - the market power test

Establishing that a firm has 'a substantial degree of power in a market' has proved to be a significant stumbling block in previous cases under section 46 alleging that a firm's sustained price-cutting conduct constituted predatory pricing. The adoption of the 'substantial share of a market' approach in the 2007 "Birdsville amendment" to the Act (which introduced subsection 46(1AA)) attempted to address this problem, although there has been debate as to whether this was an effective means to do so.[4]

Given the other proposed amendments to section 46 contained in the TPA Bill, we consider that it is reasonable to amend subsection 46(1AA) to make its market power test consistent with the market power test under the general prohibition on misuse of market power in subsection 46(1). However, we urge the Committee to maintain an ongoing interest in monitoring the operation of subsection 46(1AA) to ensure that it effectively prevents predatory pricing.

Proposed subsections 46(1AB) - predatory pricing and recoupment of loss

Consumer Action supports the proposed new subsection 46(1AB). As noted above, proceedings alleging predatory pricing have been particularly difficult to prove. One of the reasons for this is that, in order to find that a firm had substantial market power, the courts have required the firm to be able to recoup the losses it has incurred by under-pricing. In our view, the requirement for recoupment of loss in every case of predatory pricing is misguided. The ability to recoup losses after eliminating competitors through sustained price-cutting conduct may be relevant to determining whether the conduct was predatory or simply competitive, but it is not determinative of such. Indeed, it has been suggested that the upshot of the *Boral* decision, in which the High Court dismissed allegations of predatory

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[1] Merrett, Alexandra, 'The court speaks for itself: what Australian decisions say about assessing market power for the purposes of s 36 of the TPA', (2004) 11 *Competition & Consumer Law Journal*, page 2.
[2] *Boral Besser Masonry Ltd v Australian Competition and Consumer* Commission (2003) 215 CLR 374.
[3] Niblett, Anthony, Gans, Joshua & King, Stephen, *Structural and Behaviorual Market Power under the Trade Practices Act: An Application to Predatory Pricing*, Melbourne Business School, The University of Melbourne, 2004, page 2.
[4] See, eg, Hay, George A. & Smith, Rhonda L, 'American and Australian Approaches to Exclusionary Conduct', Cornell Law School, Legal Studies Research Paper Series, *Melbourne University Law Review* [Vol. 31 2007], page 1121; Cambell, Garth, 'The big chill from Birdsville', [November 2007] *Law Society Journal* (Law Society of New South Wales).

pricing, is that 'it could be difficult to establish a breach of s.46 based on predatory pricing except in near monopoly markets.'[5]

Predatory pricing poses a significant danger to long-term competition, and because of this it is appropriate to amend section 46 to improve the efficacy of the law in dealing with such conduct. The proposed new subsection will ensure that the ability to recoup losses is a relevant, but not necessary, condition of proving predatory pricing.

Proposed subsection 46(6A) - proving the taking advantage of market power

In addition to the difficulty of establishing the existence of the requisite market power, another weakness that has been identified with section 46 is the difficulty in proving that a company has taken advantage of that power, for example as occurred in the *Melway* High Court case.[6] It is appropriate for the legislature to provide further guidance to the court as to the interpretation and application of legislative provisions.

Consumer Action therefore supports the insertion of proposed new subsection 46(6A). Given the historic problems with the enforcement of section 46, however, we again urge the Committee to monitor the operation of section 46 with the new subsection 46(6A) to ensure it does, in fact, prove effective in assisting section 46 to operate appropriately.

Federal Magistrates Court jurisidiction for breaches of section 46

Consumer Action supports the proposed amendment to subsection 86(1A) to give the Federal Magistrates Court of Australia jurisdiction to hear cases arising under section 46 of the Act that are brought by private plaintiffs. Third party enforcement actions, although generally limited in number, have an important role to play in ensuring legislation is enforced and should therefore be faciliated where appropriate.[7] Giving jurisdiction to the Federal Magistrates Court will reduce the cost of third parties seeking redress for a breach of section 46, for example, because court fees for commencing proceedings are lower in the Federal Magistrates Court than in the Federal Court of Australia and proceedings are generally quicker. This is therefore a helpful 'access to justice' improvement to the Act.

Removal of monetary limit for unconscionable conduct in business transactions

Consumer Action supports the proposed repeal of the monetary limits in relation to section 51AC of the Act and section 12CC of the *Australian Securities and Investments Commission Act 2001*, which prohibit unconscionable conduct in business transactions. While the inclusion of financial limits was intended to ensure the provisions were primarily for small business protection, the concept of unconcionable conduct already requires the court to consider relevant factors such as the relative strengths of the bargaining positions of the parties before it will make a finding of unconscionable conduct. Monetary limits impose an arbitrary and unnecessary additional restriction on the operation of the provisions.

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[5] Fallon, John & Menezes, Flavio, "Exclusionary conduct: Theory, tests and some relevant Australian cases, (2006) 13 *Competition & Consumer Law Journal*, page 232.
[6] *Melway Publishing Pty Ltd v Robert Hicks Pty Ltd* (2001) 205 CLR 1.
[7] See, eg, OECD Committee on Consumer Policy, *Best Practices for Consumer Policy: Report on the Effectiveness of Enforcement Regimes*, 20 December 2006, pages 57-58.

Strengthening the ACCC's information gathering powers

Consumer Action strongly supports the proposed insertion of new subsection 155(4) into the Act to clarify and strengthen the ACCC's capacity to use its information gathering powers. At present, it is unclear whether the ACCC may continue to use its information gathering powers under section 155 after it initiates court action for an interim injunction, even though the ACCC may still be investigating a matter, and may have taken the early court action to obtain an interim injunction to prevent ongoing or further potential harm while investigations continue. This dilemma either deters the ACCC from taking early action to prevent harm, or undermines its ability to pursue successful action seeking more permanent remedies later on. It is therefore appropriate for the Act to be amended to make it clear that the ACCC can continue to exercise these powers after commencing proceedings for an interim injunction but prior to commencing full proceedings or prior to the close of pleadings in relation to proceedings seeking a final injunction.

Creeping Acquisitions Bill amendments

Consumer Action supports the amendments proposed in the Creeping Acquisitions Bill. The current operation of section 50 essentially allows a "loophole" for acquisitions that, taken as a total, have the effect of substantially lessening competition but on their own do not do so in comparison with the situation immediately prior to the acquisition. The gradual increase in market power achieved through creeping, smaller, acquisitions is just as undesirable as one-off, larger-scale anti-competitive acquisitions. Creeping acquisitions pose a long-term threat to competition and consumer welfare, and amendments that allow the court to take a longer term view of the effect of combined acquisitions in deciding whether an acquisition is anti-competitive are appropriate.

Requiring the appointment of a 'Small Business' Deputy Chairperson

Consumer Action does *not* support the insertion of proposed subsection 10(1B) into the Act to require one Deputy Chairperson of the ACCC to be experienced in small business matters.

While we agree that it is appropriate for at least one member of the ACCC to have some experience of small business concerns, the fact remains that the overall objective of the Act is, appropriately, not to protect smaller businesses from the conduct of larger businesses, but to enhance the welfare of Australian consumers. Conduct by larger businesses that impacts on smaller businesses is relevant only to the extent that such conduct is anti-competitive or constitutes unfair trading and so harms the end-interests of consumers.

An assumption seems to be developing that the Chairperson of the ACCC will be a person with experience in industry, while one of the Deputy Chairpersons should be a person with experience in consumer protection. By this view, the proposed new subsection 10(1B) would simply add that the second Deputy Chairperson should be the member of the ACCC with small business experience.

However, the Act says no such thing. Section 7(4) requires only one member of the ACCC to be a person 'who has knowledge of, or experience in, consumer protection', and this member is not required to be appointed as a Deputy Chairperson. By contrast, section 7(3) of the Act already requires the Minister, when considering *all* appointments of members to the ACCC, to consider whether the person 'has knowledge of, or experience in, small business matters'.

This proposed amendment would elevate small business interests over the interests of Australian consumers, even though the Act is supposed to protect the consumer interest, not business interests. This is entirely inappropriate. Further, all members of the ACCC, including the Chairperson and Deputy Chairpersons, are ultimately responsible not as individuals but together as the ACCC for ensuring the effective administration of all of the provisions of the Act, including those relating to anti-competitive conduct, unconscionable conduct against small business, and consumer protection.

Small business interests should of course be taken into account in the administration of the Act as with other relevant stakeholder concerns. However, this proposed amendment sends a signal that certain business interests are more important than the overall goal of promoting competition, fair trading and consumer protection in the interest of all Australians, thus we cannot support it.

Missed opportunities for reform

As a final matter, Consumer Action notes that, since the enactment of the Act over 30 years ago, there has been constant attention on the operation of the anti-competitive conduct provisions of the Act, with piecemeal attention brought to the consumer protection provisions of the Act. Despite the urgent need for reform of certain provisions of the Act directly affecting consumers, these bills represent yet another instance in which such reforms have been ignored while reforms directly affecting business interests have been progressed. The proposed insertion of a requirement for one Deputy Chairperson to have knowledge of or experience in small business matters would seem symptomatic of this larger trend.

Given the Committee's role in inquiring into the bills at hand, as opposed to the Act more generally, we merely note here some of the matters that, in our view, need to be progressed as amendments to the Act in a timely manner. These include the insertion of powers that would allow the ACCC to:

- seek civil penalties against companies, and banning orders against individuals, for breaches of the consumer protection provisions of the Act, as are currently available for breaches of Part IV of the Act; and
- apply to the court for refunds or other compensation for consumers affected by conduct in breach of the Act, as part of other proceedings taken by the ACCC against a company in breach.[8]

[8] The cases of *Medibank Private Ltd v Cassidy* (2002) 124 FCR 40 and *ACCC v Danoz Direct* [2003] FCA 1580 demonstrate that the ACCC is currently hamstrung to do so.

A recent report by the OECD found that the more effective the enforcement mechanisms available to regulators, the less intrusive regulators need to be in regulating business conduct.[9] These additional powers for the ACCC would therefore not only be positive for Australian consumers, they would also reduce the need for instrusive regulation of all law-abiding Australian businesses.

Should you have any inquiries in relation to this submission please contact us on (03) 9670 5088.

Yours sincerely
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[9] OECD Committee on Consumer Policy, *Best Practices for Consumer Policy: Report on the Effectiveness of Enforcement Regimes*, 20 December 2006, page 9 (citing the UK Hampton Report).