

Small business success on Section 46 of the *Trade Practices Act 1974*

Senate Economics References Committee Report (March 2004)

On 1 March 2004, the Senate Economics References Committee (the Economics Committee) tabled its report on, *The effectiveness of the Trade Practices Act 1974 in protecting small business*.¹

One of the significant issues examined in the report is the effectiveness of the provision in the *Trade Practices Act 1974* (the TPA) which deals with misuse of market power and, in particular, which addresses matters such as predatory pricing.² The relevant section of the TPA is section 46. Parliament amended section 46 in 1986 to address oligopolistic conduct.

Misuse of market power occurs when a corporation with a substantial degree of market power takes advantage of that power for the purpose of eliminating or harming a competitor.

In April 2003, the government accepted the finding of the independent Dawson Inquiry³ that section 46 not be amended and that its interpretation continue to be a matter for the courts.

The High Court decisions in 2003 in the *Boral Besser* case⁴ (which was examined by the Dawson Inquiry) and the subsequent *Rural Press* case⁵ in December 2003 have confirmed that section 46 is not the remedy that parliament and small business thought it was. The High Court has set the test for section 46 conduct as acting without constraint which small business sees as more akin to the conduct of a monopolist.

In June 2003, the Senate referred the problem-prone section 46 and other key issues affecting small business to its Economics Committee.

The unanimous finding of the Economics Committee was that small business and the Australian Competition and Consumer Commission (ACCC) have now demonstrated that section 46 has not achieved what parliament intended. A legislative revision of section 46 is recommended. The key focus of the revision will be to clarify what is meant by ‘a substantial degree of market power’.

The Business Council of Australia (BCA) has consistently argued against amendments to section 46 and it asserts that changes to section 46 will harm competition.⁶ For example, in an opinion piece in the *Australian Financial Review*, the BCA argued that making it easier for small firms to attack market conduct of larger firms may inhibit competition.⁷

While unanimously agreeing on revising section 46, the Economics Committee diverged on the detail of how that may best be achieved.

Divided views on the extent of amendments to the TPA

Government senators on the Economics Committee submitted a separate report which argues for minimal change. Their report did not support arguments for:

- the inclusion in section 46 of guidance for the courts on the meaning of ‘taking advantage’—government

senators, noting the interpretation by the courts, see no significant ambiguity in the TPA

- no requirement to confirm a plan to recoup revenue when a firm has engaged in unlawful predatory pricing and eliminated a competitor—government senators argue that a plan to recoup revenue is often the best test to identify unlawful predatory pricing, or
- that the courts determine (or have regard to) whether the corporation has substantial *financial* power as a factor to be considered in assessing its market power—government senators argued that, in conjunction with the other amendments they supported, this enhancement is unnecessary and would add uncertainty.

Government senators also argued against legislative amendments that would allow the ACCC to regulate ‘creeping acquisitions’ of small businesses that may eventually lead to further concentration in the market. The Economics Committee notes that there is significant debate about how best to deal with the issue. Not surprisingly, government senators also did not support divestiture (a court order to sell recently acquired or merged assets) as part of the proposed regulation of creeping acquisition arising in a situation where section 46 conduct is involved.

On enforcement issues, government senators did not support the addition of a cease and desist power for the

ACCC, arguing that such a remedy is already available in the form of interim or interlocutory orders currently available from the Federal Court. A cease and desist order is used in some other countries and it is an urgent interim administrative order issued by a competition regulator as an alternative to a court injunction. A regulator is subject to penalties for any misuse of such a power.

On separate TPA matters examined by the Economics Committee, government senators did not support the removal of the statutory limits (for example, there is currently a transaction limit of \$3 million) in section 51AC (unconscionable conduct in business transactions), nor did they support measures to allow retail tenants to disclose what are confidential rental conditions between the tenant and the landlord, to other tenants. Government senators indicated that they were prepared, however, to see the transaction limit in section 51AC lifted to \$10 million.

Where to from here?

The small business sector and the ACCC have finally made a breakthrough on recognition by the Economics Committee of the need to amend section 46. They have turned around what was a major setback in 2003 with the acceptance by the government of the Dawson Inquiry's recommendation that section 46 remain untouched.

The formal implementation by the government of other recommendations made by the Dawson Inquiry, such as a simplified collective bargaining option for small business, is yet to eventuate. Given the recommendations of the Economics Committee, the process of more general TPA reform is now complicated by the fact that these two studies differ on key points.

The opposition has indicated that it strongly supports all of the Senate Economics Committee's

recommendations. It is expected that the Leader of the Opposition, Mr Latham MP, will deliver a speech on the Economics Committee's report shortly.⁸

The Australian Democrats supported all of the Economics Committee's recommendations and suggest that it will be surprising if the government does not accept the need for TPA reform to protect small business, even if it is just to adopt the more limited government senators' report.⁹

Concluding comments

The Dawson Inquiry report contains recommendations for some refinements to the enforcement powers of the regulator (ACCC). These include the need to ensure that the powers of the ACCC under section 155 of the TPA to enter and inspect a business should be recast so that it is exercisable only under a warrant issued by a judicial officer, such as a judge or magistrate.

At present, the ACCC's powers under section 155 cease once court proceedings (including obtaining an interim injunction) commence. The Economics Committee noted the Dawson Inquiry's recommendation on section 155 and further recommended that the TPA be recast to allow the ACCC's powers under section 155 to continue, with the permission of the court, after any injunctive proceedings up until the point of substantive court hearings. This will enable the ACCC to continue to investigate alleged breaches of the TPA without challenge as to a possible interference in the judicial process.

Considered with the separate Economics Committee recommendation for a 'cease and desist' order for the ACCC, these new powers will raise important legal issues with the possibility of a constitutional difficulty with cease and desist orders. The Economics Committee recognises that a legislative power in the TPA for a cease and desist order to be used by

the ACCC (an agency of the Executive) needs to be carefully drafted because it has the appearance of a quasi-judicial power.

It will be a challenge for the government to weave the findings of the two major studies of the TPA together and to come up with a policy response that satisfies both small and large businesses while also protecting competition.

1. *Economics References Committee Report*, Senate, *Debates*, 1 March 2004, pp. 20313–20317.
2. Misuse of market power and predatory pricing are discussed in Brendan Bailey, 'Protecting Small Business from Misuse of Market Power', *Research Note* no. 15, Parliamentary Library, 27 October 2003.
3. *Review of the Competition Provisions of the Trade Practices Act*, Review Committee, January 2003.
4. *Boral Besser Masonry v ACCC* (2003) 77 ALJR 623.
5. *Rural Press v ACCC* [2003] HCA 75.
6. Toni O'Loughlin, 'Call for fair go for small firms', *Australian Financial Review*, 2 March 2004, p. 3.
7. Opinion, 'Senate misses point on TPA', *Australian Financial Review*, 3 March 2004, p. 54.
8. Mark Fenton-Jones, 'Bid to deal with TPA shortcomings', *Australian Financial Review*, 9 March 2004, p. 48.
9. *ibid* (per Senator A. Murray).

Brendan Bailey* **Law and Bills Digest Section** **Information and Research** **Services**

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*The author is on secondment to DPS and is an officer of the ACCC.