



Trade Practices Legislation Amendment Bill (No.1) 2007

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Trade Practices Legislation Amendment Bill (No.1) 2007

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House: House of Representatives

Portfolio: Treasury

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Links: The [relevant links](#) to the Bill, Explanatory Memorandum and second reading speech can be accessed via BillsNet, which is at <http://www.aph.gov.au/bills/>. When Bills have been passed they can be found at ComLaw, which is at <http://www.comlaw.gov.au/>.

Purpose

The Trade Practices Legislation Amendment Bill (No.1) 2007 (the Bill) makes subtle, but arguably significant, pro-competition changes to existing 'misuse of market power' and 'unconscionable conduct' provisions of the *Trade Practices Act 1974* (the TPA).

It also allows for the creation of a second deputy chairperson within the Australian Competition and Consumer Commission (ACCC).

Background

In May 2002, the Government announced an inquiry into the operation and administration of the competition provisions (Part IV) of the *Trade Practices Act 1974*.¹ A particular focus of inquiry of the [Dawson Review](#)² – named after the Chair, former High Court Justice, Sir Daryl Dawson - was the 'misuse of market power' provisions in section 46 of TPA, (which is one of the two main themes of the Bill). The Government's response to many of the other areas covered by the Dawson Review was implemented through *Trade Practices Legislation Amendment Act (No. 1) 2006*.³ The Dawson Review took the law as it stood at the time which was prior to two cases which disturbed the prevailing understanding of the reach of those provisions.

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1. The inquiry had been foreshadowed by the Government during the 2001 Federal election.
 2. *Review of the Competition Provisions of the Trade Practices Act*, January 2003.
 3. More information on these can be found in [Bills Digest no. 130 2004-05](#).

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Misuse of market power

Section 46 prohibits a company with ‘substantial’ degree of power in a market from taking advantage of that power for any of the following *purposes*:

- eliminating or substantially damaging a competitor
- preventing market entry, or
- deterring or preventing competitive conduct.

With respect to the misuse of market power provisions, the Dawson Review recommended against amending section 46 on the basis that:⁴

- Existing case law on section 46 does not substantiate the view that *purpose* is an unnecessarily onerous hurdle to prove.
- The addition of an *effects* test (in addition to a *purpose* test) would increase the risk of regulatory error and render *purpose* ineffective as a means of distinguishing between pro-competitive and anti-competitive behaviour.
- Overseas experience, so far as it is of assistance, does not indicate that the introduction of an effects test would be appropriate.
- Cases presently before the Courts provide an opportunity for the section to be further clarified and it would not be in the interests of consumers or competition to change the section at this stage.

The major cases referred to above include *Boral v the Australian Competition and Consumer Commission (2003) 215 CLR 374*⁵ and *Australian Competition and Consumer Commission v Rural Press (2003) 216 CLR 53*.⁶

The *Boral* case concerned the activities of Boral during a price-war in the concrete masonry brick market in Melbourne during the mid 1990’s. The ACCC alleged that Boral used its market power to engage in predatory pricing for the purpose of driving at least one of its competitors out of the market. Whilst it was not disputed that driving competitors out of the market was a corporate objective of Boral’s, the Court found that it did not have substantial market power during the relevant period. This was because there were low barriers to entry into the market, plus Boral did have strong competitors at the time, even

4. Dawson Review, p. 88.

5. This was decided by the High Court on 7 February 2003, only a matter of days after the Dawson Review was handed to the Government.

6. This was decided by the High Court on 11 December 2003.

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after two companies exited the relevant market in 1995 and 1996. The three separate majority judgments also made observations regarding the concept of ‘recoupment’, which is the ability to compensate for losses (say those incurred by selling products at a loss) by subsequently raising prices to much higher levels after a competitor or competitors have been damaged or driven out of the market.

The *Rural Press* case involved a small publisher expanding the geographical coverage of an existing newspaper (the *River News*) into a new region where the large Rural Press company already had an established paper. Rural Press responded by telling the small publisher that they would consider launching a rival newspaper in the region originally covered by the *River News*. The publisher subsequently ceased covering the expanded area, pulling the *River News* back to its original circulation area. The Court found that taking advantage of market power in one market for anti-competitive purposes in a second market was not prohibited by section 46. It also found that, even if a company has the requisite market power, if it takes advantage of other forms of ‘power’ – such as financial strength or logistical capabilities – this would also not be prohibited by section 46.

The Government released the Dawson review, and its response to it on 16 April 2003.⁷ It supported the Review’s recommendation that no change be made to section 46. In part the response said:⁸

In March 2003, the Committee reaffirmed its recommendations in light of the High Court decision in *Boral v ACCC*, maintaining that no amendment should be made to section 46, although the position could be reviewed after a number of other cases are determined, such as *Safeway*, *Rural Press* and *Universal Music*. The Committee noted and endorsed observations by the High Court in the *Boral* case that the purpose of section 46 is to promote competition and that successful competition is bound to cause damage to some competitors.

Unconscionable conduct

Historically, the concept of unconscionable conduct allows a court to disallow or set aside an otherwise legally binding transaction, contract or other arrangement in cases:⁹

...where one party to a transaction is at a special disadvantage in dealing with the other party because of illness, ignorance, inexperience, impaired faculties, financial need or other circumstances affecting his ability to conserve his own interests, and the

7. [Commonwealth response to the review of the competition provisions of the Trade Practices Act 1974](#), January 2003.

8. *ibid.*, p. 4.

9. *Blomley v Ryan* (1956) 99 CLR 362 at 415

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other party unconscientiously takes advantage of the opportunity thus placed in his hands.

Both the TPA and the *Australian Securities and Investment Commission Act 2001* (the ASIC Act) have provisions prohibiting unconscionable conduct. Both have three separate offence provisions of which two, at sections 12CB-CC and 51AB-AC respectively, are relevant to this Bill. The ASIC Act applies to dealings in financial services, whereas the TPA also applies to goods and other services. Both the ASIC Act and TPA provisions include a list of matters to which the Courts may have regard in determining whether a company has acted unconscionably.

Sections 12CC and 51AC also have various limitations as to their application. Notably, they do not apply where the complainant is a publicly listed company or where the services involved are priced at more than \$3 million.¹⁰

The 2004 Senate Committee report and subsequent Bills

On 25 June 2003, on the motion of ALP Senator Stephen Conroy, the Senate initiated an inquiry by the Senate Economics References Committee into 'whether the *Trade Practices Act 1974* adequately protects small businesses from anti-competitive or unfair conduct'. The terms of reference of the inquiry particularly required the committee to examine:

- whether section 46 of the Act deals effectively with abuses of market power by big businesses, and, if not, the implications of the inadequacy of section 46 for small businesses, consumers and the competitive process, and
- whether Part IVA of the Act deals effectively with unconscionable or unfair conduct in business transactions.

The March 2004 [report](#) of the Committee made six recommendations in relation to section 46 and three in relation to unconscionable conduct.

Of the six section 46 recommendations, some related to suggested clarifications of the meaning, or application, of key terms and concepts. Others were intended to widen the range of activities that might breach section 46.

Both the minority report of the Committee, authored by Government Senators, and the subsequent formal [Government response](#) to the majority report rejected three of the majority recommendations, and partially or accepted fully the remaining three. The Bill implements the Government's legislative response to these later three recommendations. Specifically, the three recommendations related to:

10. Depending on the circumstances, sections 12CB or 51AB may still apply.

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- predatory pricing
- leveraging market power in one market to restrict competition in a second market, and
- obtaining market power by acting in concert with another company.

Regarding the three recommendations with respect to unconscionable conduct, two were accepted by Government and one rejected. The Government proposed an alternative response to the one it rejected. Thus, the Bill introduces two unconscionable conduct amendments resulting from the 2004 Senate Committee inquiry.

The Bill was introduced into Parliament on 20 June 2007. Two days earlier, a related Bill, the [Trade Practices Amendment \(Predatory Pricing\) Bill 2007](#) was introduced into the Senate by Family First Senator, Steve Fielding. Senator Fielding's Bill proposes to amend the TPA to prohibit predatory pricing in three areas:

- groceries
- fuel, and
- pharmaceutical products, proprietary medicines and toiletries.

Senator Fielding's Bill also amends the TPA to give more explicit guidance on what constitutes predatory pricing, and also extends its potential application to situations including where a company has substantial 'financial' power rather than substantial market power.

Both Senator Fielding's Bill and this Bill were the subject of inquiry by the Senate Economics Committee. The Committee reported on both Bills on 1 August 2007 following public hearings on 27 July 2007.

In the relevant [report](#), Coalition, ALP and Democrat Senators recommended against supporting Senator Fielding's Bill.

Whilst supporting the Government Bill, ALP and Democrat Senators foreshadowed in that [report](#) that they would move amendments to it. National Party Senator Barnaby Joyce also criticised the Bill in a dissenting report, although he stated:¹¹

I feel there will be nothing gained voting against the bill. However, I am disappointed it does not offer a substantial remedy to the predatory pricing and other issues discussed which are currently encountered by the small business operator in a shopping mall near you.

11. Senate Economics Committee, *Report into the provisions of the Trade Practices Legislation Amendment Bill (No. 1) 2007*, [Dissenting report](#) by Senator Barnaby Joyce, at p. 36.

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Financial implications

The Explanatory Memorandum states that the Bill is not expected to have any significant impact on commonwealth expenditure or revenue.¹²

Key issues

Market power

In the *Boral* case, the High Court found that Boral did not have substantial market power because there were low barriers to entry into the relevant market and it faced strong competitors. Many of the submissions to the 2004 Senate Committee and the more recent Senate inquiry into this Bill appear to take the view that the Court should have found Boral did have substantial market power. Whilst the proposed **new subsection 46(3C) (item 2 in Schedule 2)** does not require that a company ‘substantially control the market...or...have absolute freedom from constraint by the conduct of competitors’ in order to have substantial market power, it is doubtful this provision would have brought about a different finding in *Boral*. From this perspective, it is arguable the threshold what constitutes substantial market power will remain fairly high.

Financial power

One of the recommendations of the majority report of the 2004 Senate Committee was that:¹³

The Committee recommends that s.46 of the Act be amended to state that, in determining whether or not a corporation has a substantial degree of power in a market for the purpose of s.46(1), the court may have regard to whether the corporation has substantial financial power.

‘Financial power’ should be defined in terms of access to financial, technical and business resources.

The Government rejected that recommendation in its response to the report, citing that such an amendment would ‘considerably extend the scope of section 46 to a degree that is both uncertain and undesirable’.¹⁴

12. *Explanatory Memorandum*, p. 24.

13. *op. cit.* p.xiv.

14. *op. cit.* p. 7.

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A number of submissions to the Senate inquiry into the Bill urged the recommendation be implemented, as did ALP and Democrat Senators, but there was little substantive analysis or discussion of the issue in the recent Senate Committee report.

Predatory pricing

The object of the TPA is not to protect businesses, small or large, but to ‘enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection’.¹⁵ The line between vigorous and healthy competition and anti-competitive conduct can be hard to draw. This is particularly so in relation to a particular kind of anti-competitive conduct, predatory pricing.

The reason it is difficult to assess whether predatory pricing is occurring in a particular instance is that the main sign of it – reduced prices – can be indication of both of the operation of good competitive forces and of anti-competitive predatory pricing. Other factors must therefore be taken into consideration in determining whether the requisite anti-competitive purpose exists and so on which side of the line particular conduct falls.

There has been a considerable amount of discussion in the Senate inquiries as well as in the decided cases and by commentators about the factors that a Court should have regard to in determining whether below-cost selling is unlawful predatory pricing in the circumstances of the case. In particular, there is an issue about whether a finding of predatory pricing requires that the offending firm recoup its losses after it has driven competitors from the market with sustained below cost pricing. Section 46 is silent about recoupment and it has arisen as a requirement in Australia only as a judicial gloss on the provision. The requirement sets the bar quite high for a finding of predatory pricing under section 46.

Calls have been made to clarify the position with regard to the recoupment test – that is for the legislation to say that recoupment either is or is not necessarily required for a finding of predatory pricing. The 2004 Senate Committee took the latter approach in recommendation 3 of its report. A middle position is that the legislation should provide that recoupment is a factor that the Courts may examine when considering allegations of predatory pricing - a position also seemingly taken by the Committee although not in a recommendation. Given the high cost of overstepping the mark and making unlawful what is really healthy competition, such an incremental approach to tightening the test is warranted.

In this Bill, the Government has taken an even smaller step by leaving the TPA silent about recoupment and merely requiring the Court to have regard to any below cost pricing and the reasons for that conduct. It is not clear whether this adds anything to the law given

15. Section 2, TPA.

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that, wherever predatory pricing is alleged, this is the natural inquiry that the Court would undertake.

Main provisions

Schedule 1 – *Trade Practices Act 1974* and a Second deputy chairperson of the ACCC

Items 1-13 amend the TPA to enable the creation of a second deputy chairperson position in the ACCC. This was first announced by the Prime Minister in July 2004, when releasing the Government's [*Committed to Small Business*](#) Statement. According to the second reading speech, it is intended that the position be filled by a person 'experienced in small business matters'.¹⁶ The Bill does not list any required qualifications or experience, although the Commonwealth is required to confer with the States and Territories about any potential candidate.¹⁷

Schedule 2 – *Trade Practices Act 1974* and the misuse of market power

Item 1 implements the legislative response to the 2004 Senate Committee's recommendation on leveraging market power in one market to restrict competition in a second market. It amends subsection 46(1) to prohibit a company that has a substantial degree of market power in one market from taking advantage of that power in another market.

Item 2 inserts **new subsections 46(3A)-(3B)** to implement the legislative response to the 2004 Senate Committee's recommendation concerning companies obtaining market power by acting in concert with another company. There is an issue whether a company has to have some agreement or understanding with another company or whether 'parallel conduct' is sufficient. Parallel conduct may occur, for example, where price changes by one company are quickly mimicked by another company, but without any collusion between the two. **New subsections 46(3A)-(3B)** somewhat hedges its bets in that it does not restrict the Court from considering whether parallel conduct between companies could result in a company having or obtaining a substantial degree of market power.

Item 2 also inserts **new section 46(3C)**. This deals with a recommendation of the 2004 Senate Committee that initially seems to have been rejected by the Government in its 2004 response. That recommendation covered a number of matters, one of which was that section 46 be amended to include a 'declaratory provision' that substantial degree of

16. The Hon. Peter Costello, House of Representatives *Debates*, 20 June 2007, p. 7.

17. *ibid.*

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market power does not require a company to have absolute freedom from constraint – it is sufficient if the company is not constrained to a significant extent by competitors or those to or from whom it supplies or acquires goods and service in that market. In its response, the Government said such an amendment ‘would likely to generate further complexity and uncertainty to the interpretation of section 46’. However, **new section 46(3C)** appears to make that change, even though again it is expressed only as a consideration to which the Court ‘may have regard’.

Item 3 inserts **new subsection 46(4A)** to implement the legislative response to the recommendation on predatory pricing. Specifically, it deals with whether a company has taken advantage of its market power for one or more of the prohibited purposes in section 46(1). Under new subsection 46(4A), the Court may to have regard to:

- the conduct of the corporation in selling goods or services for a sustained period at a price that is below cost; and
- the corporation’s reasons for such below-cost selling.

The amendment appears to leave a maximum amount of discretion in the hands of the Court to decide whether a company’s actions in selling goods or services at less than cost for a sustained period is predatory pricing after taking all of the particular circumstances into account. Indeed, as already suggested, this appears to add little if anything to the position as it is currently dealt with by the Courts.

As noted in the Explanatory Memorandum, there may be a wide of range of reasons for below-cost selling that not would constitute predatory pricing:

including the benefit to the firm’s wider corporate group of continuing to supply the item, the willingness of a firm to bear short-term losses in the hope that market conditions will improve, costs that would be incurred by the firm in withdrawing from the market, and accounting for the firm’s ‘sunk costs’ of investing in the industry in the first place.

Notably, new subsection 46(4A) says nothing about whether to Court should have regard to the concept of ‘recoupment’, which is the ability to compensate for losses (those incurred by selling products at a loss) by subsequently raising prices to much higher levels after a competitor or competitors have been damaged or driven out of the market.

Part XIB of the TPA contains provisions on anti-competitive conduct in the telecommunications industry. Existing sections 151AH-AJ contain similar provisions to those in section 46 discussed earlier in this Digest. **Items 4-8** make the same amendments as **items 1-3**, but applying them to sections 151AH and 151AJ.

Items 9-11 amend section 46 of the Schedule to the TPA. The Schedule largely replicates Parts IV and VB of the TPA, including section 46 for the purpose of allowing the States and Territories to implement mirror legislation in their own jurisdiction. The difference is

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that the Schedule applies to natural persons, whereas for constitutional reasons Parts IV and VB of the TPA proper apply to companies. **Items 9-11** amend section 46 in the Schedule in exactly the same way as **items 1-3** amend section 46 in the TPA proper.

Item 12 provides that the amendments made by **items 1-11** only apply to activities that occur after the commencement of those items – that is, the amendments are not retrospective.

Schedule 3 – Unconsciable conduct and the *Australian Securities and Investment Commission Act 2001* and *Trade Practices Act 1974*

As noted earlier in this Digest, section 12CC of the ASIC Act and 51AC of the TPA have various limitations as to their application. Notably, they do not apply where the complainant is a publicly listed company or where the services involved are priced at more than \$3 million. The 2004 Senate Committee report recommended that the \$3 million threshold be removed. This was rejected by Government Senators who instead recommended the threshold be lifted to \$10 million. **Items 3-4** and **7-8** make this change to the threshold in sections 12CC and 51AC respectively.

Sections 12CC and 51AC contain a list of matters that the Court may take into account in determining whether a company or person has engaged in unconscionable conduct. Both Government and non-Government Senators recommended in the 2004 Committee inquiry that the ability of one party to the relevant contract to unilaterally amend a term or condition of that contract should be added to this list. **Items 1-2** and **5-6** implement this with respect to section 12CC and 51AC respectively.

Item 9 provides that the amendments in **items 1-8** only apply to activities that occur after the commencement of those items – that is, the amendments are not retrospective.

Conclusion

The point has been made earlier that the object of the TPA is not to protect businesses, small or large, but to ‘enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection’.¹⁸ Calls for greater protection of small business through competition policy (rather than industry policy) are misdirected and tend to lead to calls for amendments to the Act which go too far so as to be not in the interests of the welfare of Australians.

However, the interpretation given to the existing provisions by the Courts has rendered them less effective than was originally envisaged and some amendments are clearly

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necessary. But, given the regulatory risk of overstepping the mark and making unlawful conduct which is no more than vigorous competition (a risk particularly apparent in the case of predatory pricing), an incremental approach is warranted. In this regard, the amendments proposed in this Bill are, with the possible exception of those concerning predatory pricing which appear to add little to the law, a step in the right direction.

It is may be hoped that these amendments will be tested by the ACCC and that in the absence of any such actions - or of any successful actions - in the next couple of years, the Government will conduct a further review with the aim of tightening these provisions further if required in the interest of consumers.

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