



COMMONWEALTH OF AUSTRALIA

Official Committee Hansard

SENATE

STANDING COMMITTEE ON ECONOMICS

**Reference: Trade Practices (Creeping Acquisitions) Amendment Bill 2007 [2008];
Trade Practices Legislation Amendment Bill 2008**

TUESDAY, 5 AUGUST 2008

MELBOURNE

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**SENATE STANDING COMMITTEE ON
ECONOMICS**

Tuesday, 5 August 2008

Members: Senator Hurley (*Chair*), Senator Eggleston (*Deputy Chair*) and Senators Bushby, Cameron, Furner, Joyce and Pratt

Participating members: Senators Abetz, Adams, Arbib, Barnett, Bernardi, Bilyk, Birmingham, Bishop, Boswell, Boyce, Brandis, Bob Brown, Carol Brown, Bushby, Cash, Colbeck, Collins, Coonan, Cormann, Crossin, Ellison, Farrell, Feeney, Fielding, Fierravanti-Wells, Fifield, Fisher, Forshaw, Hanson-Young, Hefernan, Hogg, Humphries, Hutchins, Johnston, Joyce, Kroger, Ludlam, Lundy, Ian Macdonald, Marshall, Mason, McEwen, McGauran, McLucas, Milne, Minchin, Moore, Nash, O'Brien, Parry, Payne, Polley, Ronaldson, Ryan, Scullion, Siewert, Stephens, Sterle, Troeth, Trood, Williams, Wortley and Xenophon

Senators in attendance: Senators Bushby, Cameron, Hurley, Fielding and Joyce

Terms of reference for the inquiry:

To inquire into and report on: Trade Practices (Creeping Acquisitions) Amendment Bill 2007 [2008]; Trade Practices Legislation Amendment Bill 2008

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Committee met at 8.40 am

CHAIR—I declare open this meeting of the Senate Standing Committee on Economics inquiry into the [Trade Practices Legislation Amendment Bill 2008](#) and the [Trade Practices \(Creeping Acquisitions\) Amendment Bill 2007 \[2008\]](#). The hearing is designed to take evidence on both these bills. On 26 June 2008, the Senate referred the bill to this committee for report by 27 August 2008. The Trade Practices Legislation Amendment Bill 2008 would amend section 46 of the Trade Practices Act to clarify a number of terms relating to predatory pricing and section 51AC of the act relating to unconscionable conduct. The Trade Practices (Creeping Acquisitions) Amendment Bill 2007 [2008] would amend the Trade Practices Act so that an acquisition would be deemed to substantially lessen competition if it and other acquisitions over the previous six years would have had that effect.

These are public proceedings, although the committee may agree to a request to have evidence heard in camera or may determine that certain evidence should be heard in camera. I remind all witnesses that, in giving evidence to the committee, they are protected by parliamentary privilege. It is unlawful for anyone to threaten or disadvantage a witness on account of evidence given to a committee and such action may be treated by the Senate as a contempt. It is also a contempt to give false or misleading evidence to a committee. If a witness objects to answering a question, the witness should state the ground upon which the objection is taken and the committee will determine whether it will insist on an answer having regard to the ground which is claimed. If the committee determines to insist on an answer, a witness may request that the answer be given in camera. Such a request may of course also be made at any other time.

[8.42 am]

ZUMBO, Associate Professor Frank, Private capacity

CHAIR—Welcome. Do you wish to make an opening statement?

Prof. Zumbo—Yes. Firstly, I would like to thank the committee for the opportunity to comment on the proposed amendments to the Trade Practices Act. Having been closely involved in the debates surrounding all the proposed amendments, I am concerned that in some cases the proposed amendments take us backwards, to the detriment of small businesses and consumers. This is particularly the case with the proposed amendments in relation to section 46 of the Trade Practices Act.

As for the other proposed government amendments, they will not deliver the claimed benefits. The government's other 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.

I will just make some very quick opening comments in relation to each of the heads of proposed amendments. Firstly, on the abuse of market power contained in section 46, undoubtedly this has been a very controversial area. That controversy can be traced back to the beginning of 2003 when the High Court handed down its Boral decision. In that Boral case, the High Court took a very narrow view of substantial market power and basically defined it as the ability to raise prices without losing business. It is a very high threshold; it essentially only applies to monopolists or near monopolists. During the time since 2003, the ACCC has not taken any section 46 cases as a result of that High Court decision and a couple of other decisions by the High Court in Melway and Rural Press.

Given the High Court's very narrow interpretation of concepts of market power and take advantage, there was a growing consensus that something need today be done to clarify the meaning of market power and take advantage. Last year the previous government made some amendments to section 46 in an attempt to clarify market power. In my opinion, those amendments failed to clarify the definition of market power.

This government is also proposing to make some changes in relation to market power. In my opinion, those amendments by this government also fail to deal with the issue of defining market power as it was originally intended. Because those changes to market power do not change that underlying definition and interpretation by the High Court, it is clear that the market power threshold remains a very high threshold. Reinstating that threshold to the Birdsville amendment would render the Birdsville amendment useless.

Having drafted the Birdsville amendment, I have to say, for the record, that it was intended to define anti-competitive below cost pricing in clear terms able to understood by all parties. It draws on generally understood concepts that for the first time in Australia define in statute what predatory pricing is. One thing that you need to note about section 46 is that it does not specifically identify the types of conduct that can amount to abuses of market power. The one exception obviously is the Birdsville amendment that refers to anti-competitive below-cost pricing. No other conduct is specifically identified in relation to section 46, and that is a failing of section 46.

The Birdsville amendment relies on the concept of substantial market share and the federal government is proposing to remove that concept of market share and reinstate the two previous hurdles in section 46 of substantial market power and take advantage. As I have indicated, reinstatement of these two hurdles will make it next to impossible to bring section 46 cases. The change in relation to recruitment makes no difference either because the question of whether you have market power is a threshold question determined by reference to whether the company has the ability to raise prices without losing business. That High Court definition of market power has not been changed, as I said, to amendments last year in relation to market power and will not be changed by amendments that this government is proposing.

The fact that no section 46 cases have been taken since the Boral High Court decision in 2003 is very damning evidence of the fact that section 46 has fallen into disuse. Sadly, that provides a green light for any entity intent on engaging in anti-competitive conduct because, if they do not have the substantial market powers that the government is proposing, they will not be caught by section 46.

Given that substantial market power and take advantage were very narrowly interpreted by the High Court and given that previous proposals to clarify market power were not, in my opinion, effective, it was decided to seek a new concept or draw on a concept of market share as the threshold issue. The question of market share

is a better understood concept ordinarily and I believe is a more appropriate measure of the level of influence exerted by an entity. Market share has always been a key determinant of market power. It has always been central to ask what market share is. If an entity does not have substantial market share, it is unlikely to have substantial market power. So the question of market share was always very critical to any assessment of abusive predatory conduct.

In the absence of a definition of market power consistent with the original intention behind section 46, the concept of market share better enables section 46 to capture the conduct of those entities that have a significant influence on a market. With the market share concept, the ACCC does not have to prove the Boral High Court requirement that the entity has the ability to raise prices without losing business, which is a near impossible threshold question. As I have said, market share generally understood is a concept that is heavily scrutinised and reported upon regularly by market analysts in tracking company performance in the marketplace.

Clearly, there is no evidence that the Birdsville amendment has dampened competition or is having any unintended consequences. In fact, the ACCC in their own evidence to the committee recently said that they had 75 complaints so far under the Birdsville amendment and none of those represented a breach of the Birdsville amendment, clearly indicating to me that there are sufficient safeguards in the Birdsville amendment as currently drafted to ensure that it only targets predatory pricing and in no way undermines legitimate discounting practices.

Coles gave evidence to the ACCC price inquiry where they said that their pricing behaviour had not changed as a result of the Birdsville amendment. So, if there was any suggestion that Coles had been frightened into not discounting as a result of the Birdsville amendment, that would have been the time for Coles to put their hand up—but they did not and they said that their pricing practices have not changed.

Even the ACCC has dismissed many of the initial criticisms levelled at the Birdsville amendment. In the face of an absence of evidence to suggest the Birdsville amendment is creating uncertainty or that it is undermining legitimate competitive practices, there is nothing wrong with the Birdsville amendment. There are sufficient safeguards. It operates to target the particular evil, which is anti-competitive below-cost pricing, whereas the government's proposal to reinstate market power and take advantage will introduce two hurdles, which have been very narrowly interpreted and which will mean the end of an effective section against predatory pricing.

I should note for the record that the federal government did support the Birdsville amendment while in opposition. That in itself is a very important fact that I bring before the committee. In the absence of any evidence that the Birdsville amendment is dampening competition, it would be submitted that the Birdsville amendment should not be changed, as proposed by the federal government.

The next head of changes is access to the federal Magistrates Court on section 46 cases. Access to the Federal Magistrates Court in relation to cases under section 46 will do nothing to assist small business in the absence of amendments to section 46 to enable section 46 to operate in a manner consistent with the original parliamentary intention behind the currently drafted section 46. It is well known, as I have indicated, that key High Court decisions have interpreted key concepts very narrowly, which means it is near impossible to bring section 46 cases. The fact that the government is proposing to reinstate that in the Birdsville amendment will bring along all the problems with those key concepts of market power and take advantage which have been narrowly interpreted. As a result access to the Federal Magistrates Court will deliver nothing of practical benefit because you just will not be able to bring section 46 cases; they are too difficult, given the very narrow interpretation given by the High Court to those two concepts of market power and take advantage. So simply having greater access to justice means nothing if you cannot get your cases up because the law is against you, the law is being too narrowly interpreted and the one provision where you had some chance of bringing cases, the Birdsville amendment, will be undermined by reinstating two flawed concepts.

In relation to 51AC, the removal of the cap, there is a \$10 million cap at the moment. Once again the removal of the cap will do nothing to assist small businesses given that the courts have given a very narrow interpretation to the concept of unconscionable conduct under section 51AC. The courts are requiring proof of such extreme conduct that there have been very few successful cases under 51AC. The narrow interpretation of the concept of unconscionable conduct has been recognised in a discussion paper on retail leases in New South Wales and recently in a South Australian parliamentary inquiry into franchising, and I will provide both those documents to the committee.

In the absence of amendments to section 51AC to define unconscionable conduct in a manner that clearly targets unethical conduct, there is no benefit to small businesses from removing the cap, as small businesses

will still find it next to impossible to bring those section 51AC cases. So once again the procedural nature is obvious there that, unless you change the substantive meaning or the substantive flaws in 51AC as they currently exist—that is, a lack of definition of unconscionable conduct in the section itself—removing the cap will not be of any practical assistance. In any event an amount of \$10 million as a cap would, I submit, cover the vast majority of small business transactions anyway, but the real problem with 51AC is not the cap but the lack of definition and a narrow interpretation of the concept of unconscionable conduct.

Moving to the ACCC small business deputy chairman, the appointment of a small business deputy chairman will add nothing to the current administration or enforcement of the Trade Practices Act on behalf of small business. The appointment will not do anything to remedy or make up for the clear weaknesses that exist in section 46 as proposed in relation to market power and take advantage in particular given that those concepts are going to be reinstated in the Birdsville amendment—those clear weaknesses will still be in section 46. It will not do anything to make up for the weaknesses in section 51AC of the Trade Practices Act.

It is important to note that there has been a small business commissioner since 1998. The concerns expressed by small business have grown during that time; they have not diminished. The fact that that small business commissioner now will be upsized to a deputy will not change the fundamental problem with those key sections which prevent small business getting their cases heard in relation to abuses of market power and unconscionable conduct. Sadly, it smells like a political gimmick to appoint persons to specific responsibilities such as petrol commissioner and commissioner for small business. The most disappointing part of giving labels to commissioners is that it does have the danger of acting to fracture the ACCC. The ACCC is a regulatory body. It has a chairperson. Now it is going to have two deputies. I query why we need two deputies. I query why we need to give labels to those deputies—one for small business and one for consumers.

What needs to be remembered is that the ACCC has one responsibility and one responsibility only, and that is to protect the consumer interest. The interest of consumers is paramount. The interest of consumers may obviously overlap with small businesses and what have you, but at the end of the day it is the consumer interest that is paramount. The ACCC is there to protect the consumer interest and all commissioners are first and foremost protectors of that consumer interest. Any other label or other labels are just a distraction from that paramount responsibility of commissioners to consumers. So I would strongly discourage labelling particular commissioners. It creates false expectations in the same way it has done with the petrol commissioner. I remember when the small business deputy was appointed there were also expectations in relation to that. Those expectations have not been met; so giving labels to me is a distraction from the key issue of protecting the consumer interest.

I will make some very quick comments in relation to creeping acquisitions. Dealing effectively with the issue of creeping acquisitions is essential to having a world's best competition law. Failure to deal effectively with creeping acquisitions undermines competition to the detriment of consumers. Unless the Trade Practices Act effectively prevents creeping acquisitions, there will be a considerable gap in the act allowing large businesses to acquire competitors in a piecemeal manner that gets around the existing prohibition against mergers found in section 50.

It is important to understand how section 50 operates. Section 50 talks about acquisitions; the acquisition has the effect or likely effect of substantially lessening competition. The way section 50 is drafted is to refer to an acquisition in the singular—'the acquisition has the effect or likely effect'. So each and every acquisition needs to be looked at separately.

When you have big acquisitions, there is obviously more likelihood that that will substantially lessen competition. But, even when you have big acquisitions, it is unlikely that section 50 will stop it because I believe section 50 is very permissive in allowing 96 per cent of mergers before the ACCC to be approved. If my students got 96 out of 100 they would be very, very happy. Those seeking a merger clearance from the ACCC are very, very happy with 96 per cent of mergers getting through.

So, firstly, dealing with creeping acquisitions involves dealing with the permissive nature of section 50, which is leading us to have one of the most concentrated markets in the OECD world. Second, because section 50 refers to 'the acquisition'—it is singular—each acquisition is dealt with separately and, when you have small scale or piecemeal acquisitions or acquisitions one store at a time, particularly in the retail grocery sector, it is very hard for that to be found to be a substantial lessening of competition. It is not impossible, because you need to assess the substantial lessening of competition in a market and you need to define the market, but with one exception that appeared a couple of weeks ago creeping acquisitions—individual acquisitions of individual retail grocery outlets—has not been stopped under the Trade Practices Act. And

there are other industries such as child care where individual centres may be acquired. Individually they will not substantially lessen competition. The issue of creeping acquisitions is not just about the retail sector; it is about every other sector in the economy where you have one player—a large player taking over market share bit by bit to a point where they become dominant, a near monopolist or even a monopolist.

Section 50 has been circumvented by various large players that have been acquiring individual stores one by one, particularly in retail grocery but in other sectors as well. In some countries they call it ‘acquisition by stealth’. Bit by bit, other competition is bought out, to the point where there is a substantial lessening of competition. It creeps up on you. It is by stealth. These acquisitions fly under the radar, and by the time you find out that there is a substantial lessening in competition it is too late. The acquisitions have occurred and there is no mechanism in the Trade Practices Act, such as a divestiture power, to break up these players when they get too big and misbehave.

So there are two dimensions to creeping acquisitions. One is the piecemeal acquisition of individual small-scale competitors. But there is another meaning of creeping acquisitions, and that is creeping acquisitions of market share, whereby, over time and through different practices, you acquire a substantial market share. You may get to a point where you have 100 per cent of the market. You may have undertaken these acquisitions on a small scale, bit by bit, and not been caught by section 50. You might not have been caught under section 50 even if you did a big acquisition, because 96 per cent of mergers get through under section 50. So the creeping acquisition market share is the more fundamental issue there. At that point we really do need a mechanism in the Trade Practices Act, such as a divestiture power, when a corporation does get too big and its conduct does have the effect or likely effect of substantially lessening competition. There needs to be some mechanism like a divestiture power to break up of that entity.

In relation to Senator Fielding’s proposed amendment, I would respectfully submit that it does not go far enough. There may be some suggestion that the six-year period provides some certainty, but six years may be too short a period. I can understand that may be a start, but at the end of the day it is probably better to consider whether the acquisition of market share by the entity, over a period of time, of individual small-scale competitors collectively has the effect of substantially lessening competition—and, if it does, there should be a broader divestiture power to deal with that. I will leave it at that.

CHAIR—I can understand, since you were involved with writing about the change from market power to market share, that you would have a great interest in retaining that form. But I do not think that you addressed the problem outlined in the explanation of the bill. In a market like Australia, where you sometimes have quite a small market and very few people involved in the competition, market share does not necessarily mean that you have a great market power and that the use of the term ‘market share’ might result in a lessening of competition.

Prof. Zumbo—In drafting that section, the Birdsville amendment, I was mindful that market power and taking advantage were two concepts that had been very narrowly interpreted by the High Court. One could tinker with and try to change the High Court’s interpretation. I preferred a concept that was generally understood.

In relation to market share, yes, more than one player can have a substantial market share. That was the original intention of the lowering of the threshold. We have to remember that section 46 has had a couple of manifestations. Originally it dealt with dominance, and that was considered a very high threshold. In 1986 the threshold was lowered to ‘substantial market power’ with the clear intention of lowering that threshold to cover situations, such as in Australia, where there are concentrated markets with three or four players with large market share that, therefore, may not be caught under the dominance test.

So market share covering more than one corporation in a market is totally consistent with the original intention of the 1986 amendments to section 46. Market share is a concept understood by the economists and the competition lawyers. It is your starting point and for a very long time it was your ending point. Over time other things like barriers to entry have crept in. Sadly, they tend to get manipulated. In Australia, more importantly, the key test has become the ability to raise prices without losing business. That test is far too high. To substitute ‘market share’ for ‘market power’ deals with a situation where very few entities have market power under that High Court definition—

CHAIR—Yes, but I asked you about the competition aspect of it.

Prof. Zumbo—I do not believe it substantially lessens competition. For example, Canada recently issued some predatory-pricing guidelines whereby they see a threshold of 35 per cent or more as a central element of

determining market power. So it does not substantially lessen competition by reference to the fact that 75 cases have come before the ACCC. There are sufficient hurdles—there are a number of hurdles in the Birdsville amendment—that prevent it from dampening competition.

CHAIR—And what are they?

Prof. Zumbo—Substantial market share is one. But you need to price below your cost, so below cost. Is pricing below cost rational? It depends on the circumstance. There is a further hurdle: that it has to be for a sustained period of time, so short-term discounts are not covered. For example, Christmas sales, clearance sales and moving the bread at five o'clock in the afternoon are not sustained patterns of below-cost pricing. Then there is the anticompetitive purpose. Why are you pricing below cost? If you are pricing below cost to meet competition or for a temporary sale, there is nothing wrong with that. But if you engage in a pattern of sustained low-cost pricing for 2½ years, as happened in the Boral case, and there is clear evidence you are trying to drive out a smaller manufacturer because that manufacturer has a more efficient machine that produces bricks cheaper than you and is making life difficult for you—and Boral had the ability to cross subsidise from its operations around Australia and that small brick manufacturer did not—then that would be caught by the Birdsville amendment. So the Birdsville amendment is balanced carefully to target below-cost pricing when it is anticompetitive in a known way but allow legitimate discounting to occur.

In some states in the United States there is outright prohibition of below-cost pricing, and that has been demonstrated through research to lead to lower prices for consumers.

CHAIR—You do not accept the argument that Australia is a different market from the United States in that it is a smaller market with often fewer players?

Prof. Zumbo—And, therefore, you need a test to cover those fewer players in a way that the High Court's definition in Boral did not.

CHAIR—How do you feel about the argument that in section 46 the different use of 'share' and 'market power' creates some confusion?

Prof. Zumbo—The so-called dual track—that betrays a misunderstanding of part IV of the Trade Practices Act. There are other sections of part IV of the Trade Practices Act where there are different tests. In section 45 some conduct is per se illegal—that is, automatically illegal—and some conduct is only illegal if it substantially lessens competition. So having two tests within the one provision is an argument easily dismissed as misinformed, given other sections of part IV of the Trade Practices Act do have different approaches.

CHAIR—So, in short, you do not like anything about this bill?

Prof. Zumbo—No.

Senator JOYCE—I put on the record that I know Professor Zumbo obviously pretty well. Professor Zumbo, people have the delusion that all you have to prove is market share and therefore you win the case. There is far more than that. This is just the door that gets you into the court. Once you get into the court, you have to prove your case—that is the issue, isn't it?

Prof. Zumbo—Absolutely. That is the inbuilt safeguard that I mentioned. This focus on substantial market share is misplaced. You are quite right in saying that gets you in the door but you still then have to prove that it is below your cost, that it is for a sustained period and that it is for an anticompetitive purpose.

Senator JOYCE—Going back to what Senator Hurley was talking about, I am trying to recall section 46(1), which illustrates these so-called problems with a dual approach involving market share and market power. Why can't we just change the other sections to market share as well and solve the problem?

Prof. Zumbo—Absolutely—there is nothing wrong whatsoever with using substantial market share across part IV of the Trade Practices Act. That would bring about consistency. If we are concerned about this, let us look at it the other way—let us see whether perhaps substantial market share is a more appropriate test in a highly concentrated market such as Australia, which is allowing large corporations to get off the hook through reference to market power because the High Court has defined that so narrowly to mean an ability to raise prices without losing business.

Senator JOYCE—Do you believe that we are living in a modern economy which is basically a global type of economy, where cash flows back and forth with splendid ease and the investment of capital can flow back and forth with splendid ease? If that is the case, what is peculiar about Australia that we have the most concentrated retail market in the Western world? How does that come about?

Prof. Zumbo—Because you have permissive laws that allow it to happen. You have section 50, which allows 96 per cent of mergers to go through. It does not take long before you are left with two players in the market. We talk about national champions and economies of scale; let us have a look at that for a moment. Yes, let us have economies of scale; let us reduce costs. But who gets the benefit of those economies of scale? Are they a windfall for the corporations or are they passed on to consumers? What we need to remember is that any savings of a merger, for example, are only passed on to consumers if there is sufficient competition in the market to allow that. If there is not sufficient competition in the market, those benefits from increased economies and efficiency savings are just pocketed by the entity. It is a windfall. So, yes, let's have economies of scale but let's make sure that those economies of scale are passed on fully to consumers.

Senator JOYCE—Under the previous section 46 market power test—from before the coalition government brought about the Birdsville amendment, supported by Peter Costello; in fact brought in by Peter Costello; he was the one who brought it into the parliament and got it through—was Australia's market—

Senator Cameron interjecting—

Senator JOYCE—This is an important issue, Senator Cameron, if you want to reduce grocery prices. Was Australia's market getting more concentrated or less concentrated? Was the margin that the farmer was receiving getting greater or smaller? Was the price that the consumer was paying getting higher or lower?

Prof. Zumbo—Yes, clearly market concentration has grown considerably in the last 10 to 20 years. What happens in the case of retail grocery is that farmers get less for their product because there are only two buyers in the market, essentially—Coles and Woolies control about 80 per cent of that market. If farmers have only two customers, they just drive the price down to uneconomic levels—and farmers have left the land. But, on the other side, are those savings that we are taking off the farmers being passed on to consumers? No. Milk prices, for example, and other produce prices are going up. We have record levels of food inflation as compared to other OECD countries. I have seen one statistic where we have the highest level of food inflation in the OECD community. To me, that is a clear reflection of two players controlling 80 per cent. Farmers are getting screwed down on price. Where are those efficiency savings going? Are they are going to the consumers? No, because the retail price is going up. Food inflation is going up, so when you have concentrated markets there is a real danger that those margins—those EBITs; earnings before interest and tax—grow. Supermarkets in Australia have record levels of EBITs as compared to the rest of the world. As a result of a permissive section 50, and as a result of an ineffective section 46 pre-Birdsville, with no cases since 2003, it does not take long before the competition is destroyed and we end up paying higher prices and having record food inflation.

Senator JOYCE—There would be tremendous commercial weight going behind trying to repeal the Birdsville amendment because they would see this as the mechanism which has allowed a peculiar market called Australia to be completely different to markets such as United States and England, which have far stronger trade practices legislation that has managed to limit or inhibit predatory pricing and excessive market share, market power and so on. Do you believe that there is a clear example of there being stronger trade practices laws overseas that mimic what we are trying to provide here through the Birdsville amendment? If we get rid of the Birdsville amendment, will we go back to that peculiarity of Australia having the weakest trade practices laws in the world?

Prof. Zumbo—Firstly, consumers suffer from weak trade practices laws. Higher inflation can be attributed to weak competition laws. In Canada, their approach to the issue is stronger than ours. In the United States, they attack the issue more strongly than we do. The US market may be bigger than ours is, but Canada's market is comparable to ours. Canada has laws against things called geographic price discrimination, where one store, a Coles or Woolies, might charge different prices in different locations because they can get away with doing that. They have laws against price discrimination, where in some cases small businesses may be buying comparable quantities but may not be getting the same deals as a bigger player who is dominant in the marketplace. So there are other countries where the laws are better, they are tougher, and they have lower food inflation and lower inflation than we have. Consumers miss out when there is a weak Trade Practices Act. Consumers are missing out by having a weak Trade Practices Act. Reinstating concepts like 'market power' and 'take advantage', which are very narrowly defined, will mean that 46 will fall into disuse and these big players will be given a green light to use these predatory practices without fear of section 46.

Senator JOYCE—You brought up—and I think it has gone far beyond this now—the ACCC having had brought before it 75 cases of predatory pricing and people trying to use the Birdsville amendment. One side of the argument would say that, because no-one yet has succeeded with a case, it proves completely that there has

been no inhibiting of competition. But do you think it is a little peculiar that the ACCC has not been a little more proactive in trying to grab hold of this new piece of law which they have at their disposal, which clearly gives them an avenue to get around the complete inadequacies of the market power test that existed formerly of having to prove that someone can raise prices without losing competition? Only a monopolist could do that. But now that it has greater access that enables it to bring more people into the room where they can get a successful case pursued, is it a little peculiar that the ACCC has not been more proactive in pursuing such a case or cases?

Prof. Zumbo—I do discern a change in the views of the ACCC chairman on this, as I discern a change in the ACCC chairman's views on Fuelwatch. Pre-November, Fuelwatch was an option; now it is the best thing since sliced bread. Last year, when the Birdsville amendment was going through, there was very little commentary from the chairman. After November, there has been a lot of hysterical reaction from some quarters and the chairman, Graham Samuel, has chimed in on that, suggesting that it will dampen competition and it is ill-conceived. Where is the evidence? The 75 cases have come up and there is no evidence that it is dampening competition. Coles itself has agreed that it has not changed its pricing practices. It should be enforced in appropriate cases. If there is an appropriate case, of course it should be enforced.

But Birdsville only deals with predatory pricing. Other predatory practices not covered by Birdsville still get covered under the pre-Birdsville section 46, with market power, take advantage and all the problems that go with those two concepts. In that case, in the instances of other types of predatory conduct, you cannot use the pre-Birdsville 46. Yes, it should be enforced. There have been some hysterical reactions to the Birdsville amendment, but there is no evidence to support those hysterical reactions. I would submit that Birdsville is working perfectly.

Senator FIELDING—Thank you, Professor Zumbo. I want to turn your attention to the issue of creeping acquisitions. Some submissions say that we do not have a problem with creeping acquisitions. I am trying to put that into perspective, given that we have one of the most highly concentrated markets in quite a few areas. Quite clearly, we have a significant problem with the Trade Practices Act and we are trying to strengthen it. Frankly, I think around this table there needs to be acknowledgement that we are giving a complete leg-up to big business and we need to create a level playing field for the smaller guys. What do you say about those submissions that say we do not have a problem with creeping acquisitions?

Prof. Zumbo—I reject them outright. We do have a problem with creeping acquisitions. It is a big gap in section 50. It allows those intent on getting around section 50 to do so. It gives a green light to the removal of individual competitors on a small scale to a point where you are building such a substantial market share that you do have the effect of substantially lessening competition. Those that say there is no problem with keeping acquisitions, I would respectfully submit, have a vested interest in allowing those creeping acquisitions to occur. As I have said, people say, 'Well, we should have mergers to gain efficiencies and economies of scale.' I have no problem with that, as long as gains are passed on to consumers and do not become a windfall for the merged entity.

Senator FIELDING—The recent case in Queanbeyan has been touted as saying that there is no need to change section 50. What are your thoughts on that?

Prof. Zumbo—I am a little cynical. I think section 50 sometimes could be used more effectively to stop these. In the past there has been a point-blank refusal by the ACCC to get involved. Coincidentally, one individual merger or acquisition seems to have been stopped at a very convenient time. How can I not be cynical? I have been on about this beef for 10, 15 years, trying so often to get the ACCC to intervene and stop individual acquisitions because they destroy competition in that market and I get a blank look from the ACCC. Suddenly one appears mysteriously out of the blue. I am encouraged that there may be more, but I also am very cynical.

Senator FIELDING—So the creeping acquisitions bill would not hinder the Queanbeyan case; it may actually see there being more of those types of knock backs of acquisitions, I suppose. Would you see changes in the creeping acquisitions bill as hindering those sorts of moves by the ACCC?

Prof. Zumbo—An issue is raised here, which was also raised by Senator Joyce. You may have a law that tries to do the right thing. But, if that law is not enforced by the ACCC, it is meaningless, particularly in mergers. In mergers, only the ACCC have the power to get an injunction. So in mergers, because the ACCC are the only party able to get that injunction, it gives them a unique position. If the ACCC choose not to enforce a law that makes a genuine attempt to deal with the issue, that law will not go anywhere.

Senator FIELDING—Another issue raised by some of the submissions was that there is some thought that creeping acquisition should be limited to highly concentrated markets. What are your thoughts on that?

Prof. Zumbo—Because they happen through stealth, they could turn up in any industry at any time. Ideally, you would like the expert regulator, the ACCC, to have the ability to make a judgement call on whether there is a danger that some stealth activity is occurring in an industry and to enforce that law across the economy where it is relevant and appropriate.

Senator FIELDING—I would like to get back to the market power versus market share issue. Do you think there is a need to look at financial power—in other words, you may not have the market share and market power may not be defined as financial power, say, with someone coming in with huge financial power? Do you think there is scope for looking at financial power regarding lessening competition substantially?

Prof. Zumbo—The original draft of the Birdsville amendment did have reference to substantial financial power, but that reference did not find its way into the final form. There is a need to deal with substantial financial power because there may be instances where some overseas entity with deep pockets comes in, not having market power or substantial market share, and just uses their deep pockets to destroy a local operation.

Interestingly, that was an issue picked up by the now minister, Craig Emerson, in his speeches in the House of Representatives, when this legislation came up. He said, ‘Well, if you have someone coming in from outside, the Birdsville amendment won’t deal with this’—nor will market power, because they do not have market power. That point was made in the Boral case by, I think, Justice McHugh. The particular reference is paragraph 269 of the High Court judgement in Boral. The justice there indicated that section 46 was ill-drawn in dealing with some issues, for example—and I am paraphrasing here—where an entity that does not have market power enters a market and, through very concerted anti-competitive type conduct, destroys competition. By the time it does have substantial market power, it is too late, because section 46 does not apply. So there is authority in the High Court itself. It acknowledges that section 46, even under market power and perhaps even market share, cannot deal with those instances where you have an entity with deep pockets, particularly from overseas, coming into Australia and destroying a local competitor, because they will not have either market power or substantial market share. So you need another concept like substantial financial power.

Senator FIELDING—Back when the predatory pricing amendments came up, Family First believed that financial power was important. I know that your original component did have that in there. I just thought that, while changes to the Trade Practices Act are on the table, it would be good to raise the issue of financial power, and it is something that the committee should look at as well.

Prof. Zumbo—In fact, we should be considering strengthening the Birdsville amendment, not undermining it.

Senator BUSHBY—In view of the time, I will ask only one question, although there are a number of questions I would not have minded asking. In terms of predatory pricing, ignoring the definitions as interpreted by the courts, do you believe that predatory power within the understanding of the layman is now being used by larger corporations or corporations with a substantial degree of market power in Australia to the ultimate detriment of consumers?

Prof. Zumbo—Yes. I firmly believe that the layperson, farmers and many others would believe that large corporations with substantial market share are behaving in a way that is detrimental to competition—detrimental to the ability of small businesses to compete and to provide a better deal for small businesses. Yes, the layperson would believe passionately that there is untoward behaviour with the throwing around of market power, to use that concept in a generic sense and not as interpreted legally by the High Court. Where companies like Boral and Coles get off with breaching the Trade Practices Act because they do not have market power, there is a disconnect with the layperson thinking, ‘Well, has the High Court got this right or is it missing the point?’ If you go into the marketplace, it is a huge gorilla; you have huge gorillas out there. You cannot say that they do not have any significant influence over the market, because of some narrowly defined concept of the ability to raise prices without losing business. That just brings the law into disrepute.

Senator BUSHBY—What is the ultimate consequence for consumers?

Prof. Zumbo—They pay higher prices. We have a record food inflation as a result; it is the highest in the OECD, according to one statistic I have seen.

Senator CAMERON—Good morning, Professor Zumbo. Are you aware of legislation in any other area that deals with predatory pricing?

Prof. Zumbo—Yes, Canada—

Senator CAMERON—No, I mean domestically, within Australia.

Prof. Zumbo—Domestically, no. Basically, the Trade Practices Act has the key section. There may be some industry-specific law in some deep recess of legislation but, before the Birdsville amendment, it has never been defined in the Trade Practices Act. The Birdsville amendment was an attempt to define and specifically identify that conduct for the first time in the Trade Practices Act.

Senator CAMERON—I am thinking about antidumping measures.

Prof. Zumbo—Yes, I am aware of those.

Senator CAMERON—How does that line up with the Birdsville amendment? Are there similarities?

Prof. Zumbo—I am not clear on the point of your question. I am an expert on the Trade Practices Act.

Senator CAMERON—There is no hidden—

Prof. Zumbo—No, I am just—

Senator CAMERON—I am aware that, for a long time, there has been legislation that deals with predatory pricing, below-cost pricing for imports.

Prof. Zumbo—Yes, you are right.

Senator CAMERON—Where does that stack up with this debate here? Do you say that is a better legislative framework than the one that applies here?

Prof. Zumbo—Obviously, that only deals with it on an international plain. I was very mindful in drafting the Birdsville amendment—with the way it fits into the part IV regime, the competition law regime, of the Trade Practices Act—to use concepts that are understood and not to provide a prescriptive framework but rather an environment where people with substantial market share were put on notice that certain conduct could be caught by the Birdsville amendment. I am always open to alternatives. As I have said, there are alternatives in Canada and the US. It was just a law that we drafted at one point in time to deal with a particular issue, being the very narrow interpretation of ‘market power’ and ‘take advantage’, to build in sufficient hurdles and safeguards to ensure that competition was not dampened and to have an appropriate balance between competition and trying to draw a line between legitimate and anticompetitive conduct.

Senator CAMERON—With ‘market power’ and ‘take advantage’, the fundamental issue that you raise is the interpretation by the High Court. Is there anything in the minister’s speeches to parliament that could provide some guidance to the High Court on this issue? Would that be a beneficial situation? Do you think that would be strong enough?

Prof. Zumbo—No. Comments in explanatory memoranda or second reading speeches are just there to be used in appropriate circumstances particularly, and the courts do not rely on those. If you want something to have a particular meaning, it is best to put it in the legislation and make that legislation as clear as possible to make clear to the court what you are trying to achieve. With section 46, you are leaving it to the court to define what the conduct is; that is pre Birdsville. Birdsville is an attempt to define predatory pricing in a way that the layperson can understand; whereas, if you throw the words ‘market power’ to the layperson, they may think what market power is in the same way as Senator Bushby but the High Court thinks it is something else. There is a parallel in terms of unconscionable conduct. I talk to a lot of people and some say, ‘Well, it is unconscionable,’ but they mean that it is unethical. However, the courts take a different view of unconscionable that may not cover all forms of unethical conduct.

Senator CAMERON—I have looked quickly at the schedule 3 amendment. That sets out that, in appointing a member of the commission:

... the Minister must consider whether a person has knowledge of, or experience in, small business matters ...

What is the problem with having someone at the ACCC who understands small business? What is the important issue? Is it who would be appointed and what their view of small business is, or is it fundamentally that there is a problem in saying that someone should have that experience?

Prof. Zumbo—There has been a small business commissioner. In 1998 the Trade Practices Act was amended to provide that experience in small business matters would be one of the attributes of a person being appointed to the commission. With the amendment in this proposal, the government is saying that one deputy chairperson must be a small business deputy chairperson. The next thing we will have is the consumer

movement saying—which they have been saying—‘We want one of the deputy chairmen to definitely be a consumer.’ Where does it stop? Big business will want a deputy chairman for big business.

Senator CAMERON—Some people would argue that big business is well represented.

Prof. Zumbo—Yes, some people would. But giving these people a label detracts from the fundamental role of the ACCC to defend the consumer interest. Giving labels is superfluous. It is important that you have the right people understanding and serving the consumer interest.

Senator CAMERON—But this is not a label. There is no small business commissioner.

Prof. Zumbo—But there is.

Senator CAMERON—What is being asked for is someone who has experience in that area. They may have experience in other areas. I just thought you were too strong in your interpretation of this and putting forward that there will be a small business commissioner. That is not correct.

Prof. Zumbo—I respectfully disagree. It has been labelled a small business commissioner since 1998. It is being labelled a small business deputy. If we are going to get into semantics, we have to have the debate. If you are going to say it is a commissioner with responsibility for small business or a deputy with responsibility for small business—

Senator CAMERON—I just want you to be accurate.

Prof. Zumbo—I am being accurate. Respectfully, Senator, giving labels detracts from what the ACCC is there to do.

CHAIR—Thank you, Professor Zumbo.

[9.36 am]

BOWD, Mr Matthew, Analyst, Competition Policy Framework Unit, Competition and Consumer Policy Division, Treasury

ROGERS, Mr Scott, Senior Advisor, Competition Policy Framework Unit, Competition and Consumer Policy Division, Treasury

CHAIR—Welcome to the hearing this morning. Do you have an opening statement you wish to make?

Mr Rogers—No, I do not.

Senator JOYCE—There have been a range of debates. We are probably going to go through a range of issues a number of times. I want to start with the first one. This bill deals with the outlawing of recoupment. I noticed that in the Trade Practices Legislation Amendment Act (No. 1) 2007, which went through at the end of last year, there was an issue that was dealt with in the explanatory memorandum, which specifically talked about the removal of the need to prove recoupment. My question is: is there actually anything in the legislation currently that says that recoupment is an issue—is it part of the legislation as it currently stands? If it is not part of the legislation as it currently stands, do we need to have it in legislation—that is, as an issue that needs to be removed—or can we rely on the fact that it is already in the explanatory memorandum of a trade practices amendment act that has been through, which should suffice for an interpretation by the courts that recoupment is no longer something that is essential in a predatory pricing case?

Mr Rogers—In relation to your first question, on the face of the legislation there is no reference in the Trade Practices Act at the moment to recoupment—neither in section 46 nor anywhere else, I believe. In relation to the second part of your question, the amendments last year were carried out by a previous government, and as part of those amendments some subsequent amendments were made in the Senate—as you are aware—which included some changes to the explanatory memorandum covering the issue of recoupment. I think the issue there and more broadly is that, coming out of some interpretations and judicial statements by the High Court in relation to recoupment, there is no fixed position on recoupment. There were a number of judicial statements, for example, in relation to the Boral case, where we had varying positions, if you like, from the members of the High Court at the time. The amendment that is in this bill is essentially an attempt to clarify the position to take it out of the hands, I guess, of the interpretation of those judicial statements and to put it on the face of the law that there is no need to find recoupment to find a breach of section 46, although it might be relevant.

Senator JOYCE—Some people are putting up the argument of what they believe to be the confusion of a dual path—that is, market share and the market power test both being in section 46. Correct me if I am wrong; one is in 46(1) and the other one is in section 46(1AA). Why can't we, instead of removing the market share test, just incorporate the market share test in other areas of the act? If people had an issue with duplication, wouldn't it remove the duplication to have the market share test in other parts of the act?

Mr Rogers—That is really a matter for the government, whether or not it would want to introduce new tests into the remainder of the act. Section 46 has historically, I guess even when it related to market dominance, been a provision about market power and the amendments in the government's bill recast the prohibition that is the new 46(1AA) to remove the reference to market share and put instead a need to take advantage of market power in relation to below cost pricing.

Senator JOYCE—Can you tell me the last success we had using the market power test on predatory pricing?

Mr Rogers—I guess there have been a number of cases over the years in relation to it. I do have a list somewhere.

Senator JOYCE—The last time a small business got somewhere using the market power test?

Mr Rogers—Are you talking about private action or action by the ACCC?

Senator JOYCE—Whichever one you wish to use. Try action by the ACCC.

Mr Rogers—In reverse order, there has been a number of cases. Some of those have been contested, some of them have not.

Senator JOYCE—The last one where the small business won.

Mr Rogers—If we are talking about ACCC matters, small business is not the applicant in that case; it is action by the ACCC.

Senator JOYCE—Okay, last time the ACCC won.

Mr Rogers—The ACCC took action against Baxter Healthcare, which was before the Federal Court. It is still before the Federal Court; the ACCC has appealed on a number of points in relation to section 46. It had a successful finding on 46. It also took action—I can give you some citations—against a gentleman called Knight; there was a settlement there in relation to 46.

Senator JOYCE—What year was that?

Mr Rogers—I believe that was concluded in the last financial year.

Senator JOYCE—So in Australian corporate law there was a case by a bloke called Knight and Knight won. Then there was Baxter, but that is under appeal. It is not sounding like a very successful—

Mr Rogers—There is a case against a Fila Sports Oceania, where again orders were made under section 46—that was 2006-07. There was a case in 2005-06, two cases there, the ACCC against Eurong Beach Resort—again consent orders relate there in relation to a breach of section 46 for predatory pricing. I think the prior one to that where it was concluded was the Safeway stores case by the ACCC where I think there were a number of breaches of section 46 and other provisions of part IV.

Senator JOYCE—So in protecting Australian small businesses from predatory pricing, you could hardly say there is a wealth of—looking at the form, they would hardly go out thinking that there is a great sense of ownership of protecting the market from predatory pricing so as to create a more centralised market. Obviously a more centralised market brings about market power, market power increases the price, price increases inflation, inflation brings about recession and on we go. Have we ever won a case against Coles or Woolworths? Has there ever been a case against Coles or Woolworths?

Mr Rogers—As named? No, I do not believe there has been. I understand Safeway is a subsidiary of one of those companies, I am not sure exactly which.

Senator JOYCE—Safeway is a subsidiary of Woolworths.

Mr Rogers—So, in that respect, yes, there has been action against Safeway.

Senator JOYCE—When was the case against Safeway?

Mr Rogers—I think that was concluded in 2005.

Senator JOYCE—And what was the outcome?

Mr Rogers—Substantial fines and a number of orders by the ACCC against Safeway. It was \$8.5 million worth of fines.

Senator JOYCE—The issue is the person has to get in the door to prove their case at law. Just proving market share does not mean you win. For that matter, proving market power does not mean you win. Market share or market power is no more than the door that gets you into the court. Once you are in the court you then have to prove your case, don't you?

Mr Rogers—Under the main prohibition in 46(1) there are a few elements: there is the need to show market power, there is taking advantage—

Senator JOYCE—Can you explain to me market power?

Mr Rogers—I guess market power is basically the ability of any corporation or any person in a particular market to operate in a way that is not constrained by the activities of its competitors.

Senator JOYCE—What is the test of market power?

Mr Rogers—The test is I guess as I have stated, but the evidence in relation to it would vary depending on the body involved or the market involved.

Senator JOYCE—If someone were saying, 'I think someone has market power under the old provisions in section 46 prior to the Birdsville amendment,' what would you be asking them to prove? What is an on the field explanation of 'market power'?

Mr Rogers—It is going to vary from market to market, but market share is an indicator of market power. It is not necessarily a definitive indicator of market power in all cases. Regulators or private parties in an attempt to prove their case would point to other matters such as the profitability or profit margins of a company

involved. You would look at its behaviour, its conduct. You would also look at the behaviour of its customers—the particular elasticities of demand involved depending upon the behaviour of the corporation, so the changes in demand for its product, depending on the price changes or its other behaviour. So there are a range of things that could be pointed to as a way of showing market power.

Senator JOYCE—I am in a bottle shop and a big supermarket sets up across the road from me and sells cases of beer at \$15 a pop over an extended period of time to put me out of business. I have to do almost a tertiary degree before I can work out whether I am going to have a predatory-pricing case. It is a lot more convenient to think about market share before I need think about predatory pricing, the elasticity of demand, how the person across the road is acting towards me, the attitudes of his customers and how he is altering his pricing. This is going to be for most small business a very good reason not to go any further. It looks like from the paucity of cases that have been taken forward on predatory pricing that that is the obvious attitude of small business. They think that this is just too hard.

Mr Rogers—I guess the route there for small business is to bring those matters to the attention of the ACCC. They take all allegations of misuse of market power very seriously I understand, will conduct an examination of the complaint and indeed will elevate that complaint immediately to their legal area.

Senator JOYCE—There is obviously a lot of pressure coming in from big business to get rid of the Birdsville amendment because they see it as a step forward for small business. They see the market conditions in Australia as the reason why they have ended up with such a concentration. This concentration cannot be compared to anywhere else in the world; we are out there by ourselves. They have every reason to protect their market share, which they are doing legally through trying to make sure that the Birdsville amendment gets knocked off before it grows. Have other trade practices acts throughout the world had more success in dealing with predatory pricing than us?

Mr Rogers—I guess the focus has been on the Australian experience. The formulation of the various market dominance or market power provisions around the world does vary but it is widely recognised as being part of an effective competition law regime dealing with market dominance. The focus I think for most countries is very much on the Australian model of a market power test, a market power that is durable and focuses very much on the purpose of the corporations or entities involved to ensure that there is not any dissuading of pro-competitive conduct, which I guess would be the alternative problem.

Senator JOYCE—That is where I am sort of heading—competitive conduct. Why do economies—I am trying to structure it around treasury issues—want competitive conduct?

Mr Rogers—Competition is generally seen as providing the kind of outcomes that are desirable for economies and, more generally, for policymakers. They lead to better outcomes for consumers for the most part, whether it be through lower prices, better choice or innovation. The Trade Practices Act, through its competition and restrictive trade practices provisions, is one way of assisting in providing better outcomes for consumers.

Senator JOYCE—You brought up some interesting issues there: better choice and better prices. Do you think an economy that has about 80 per cent of its market controlled by two retail outlets is giving you better choice and better prices? If you think it is, can you give an example of what has happened to food inflation in Australia compared to food inflation in other OECD countries?

Mr Rogers—Market concentration, whilst it can be an indication of market power, is not necessarily indicative of it or definitive in relation to it. A concentrated market can still result in high competition between the parties involved. The provisions of the Trade Practices Act relating to both unilateral misuse of market power and anticompetitive agreements—cartel behaviour—are addressed at ensuring the competition between all market participants, whether it be in a concentrated market or a more dispersed one, remains free of any anti-competitive influence.

Senator JOYCE—In the pressures that have happened in our retail industry of late, who has been the winner? Has it been the farmers? Have they received better terms of trade for the product they sell? If we use some rough analogies—sometimes I use steers and Toyota LandCruisers to compare the return they are getting in real form for what they are selling—has it been the consumers who have benefited in how many roast dinners they could afford on the family budget in a week? What portion of their salary equals a litre of milk? Or has it been the people in between the farmers and the consumers—the major retailers? Whose proportionate take of the market has got bigger over the last 10 to 15 years? Is it the farmers' take of the market, the consumers' take of the market or the retailers' take of the market?

Mr Rogers—I do not have exact figures in relation to that. That is a very complicated and detailed question. I would make a couple of points, though. As part of the National Competition Policy reforms that took place in the late nineties and early 2000s, the Productivity Commission undertook a study of the benefits of that program and found that Australian consumers as a whole had benefited from the National Competition Policy to the tune of about \$5,000 or \$7,000 per household per annum. So, overall, there was a benefit for every Australian as a result of the competition policy reforms that have taken place both generally and in relation to specific sectors. I do not have figures for which particular consumers have benefited from that. Regarding the retail grocery question, I am not able to say too much about that. You would be aware the ACCC has given its retail grocery report to government and that it is to be released shortly, and it may well cover a number of issues that you have raised about pricing and the supply chain in the retail grocery market in Australia.

Senator FIELDING—To get back to the inflationary issues here: Australia's markets—you could take groceries, child care and quite a few others—are very highly concentrated. Would you agree with that?

Mr Rogers—I do not have figures on particular markets. I think there is a tendency for people to conflate the issues of industry concentration and market concentration. I think what is a market for the purposes of the Trade Practices Act varies greatly, depending on the particular good or service involved. The market for child care is necessarily one that is very geographically defined, and I think the ACCC takes a similar approach in relation to, for example, retail groceries. So, whilst there may be particular industry figures or industry concentrations across the whole of the country, the particular levels of market share or other indications of power in relation to particular markets is very much specific to the market involved.

Senator FIELDING—I remember seeing a statement from the UK grocery inquiry that they had a very highly concentrated market. That was their statement: 'highly concentrated'. I think they had five large players and we have two. How much do you reckon this has contributed to higher inflation over the last couple of years in Australia?

Mr Rogers—I think that is something that may be covered by the ACCC's grocery inquiry into the impact of any particular factor on grocery prices, so I am not able to comment on that.

Senator FIELDING—Have you seen that report yet yourselves?

Mr Rogers—I have seen parts of it, but it is for the minister to release.

Senator FIELDING—I think it is a huge concern to Australians having a market so highly concentrated. I will be interested to see what that report actually says on this matter of inflation, because I think the way that Australia has allowed its markets to be positioned is inflationary. I want to ask about creeping acquisitions, which are about acquiring one-offs over a period of time. You wake up one day and you have, say, grocery markets highly concentrated; child care as well. It is not a major concern in itself, as you are buying one at a time over the years, but, over a long period of time, you can substantially lessen competition through one-off acquisitions. What has the Treasury been doing on the issue of creeping acquisitions over the last couple of years?

Mr Rogers—I guess it has been an issue that has been before parliament on a number of occasions under both governments. Again, I make the point that there is a distinction between industry concentration and market concentration. Part IV of the TPA deals with competitors within a market, acquisitions that substantially lessen competition within a market and even misuse of market power within a particular market. A particular organisation buying up or, indeed, opening businesses across Australia and resulting in an overall industry concentration at a particular level does not really give you an indication, necessarily, of competition in relation to particular markets. That is very much what needs to be looked at from the consumer's perspective because obviously, for the large part, a consumer is interested in the degree to which they can substitute their choice between particular firms within that market. The government has made some statements about creeping acquisitions in relation to its intention to look at that, but there are no details of that and it would be a matter for the government to announce how it intends to consider creeping acquisitions.

Senator FIELDING—Can you just outline what specific work you have done on creeping acquisitions as far as looking at it? Can you give me an indication? Obviously, you—

Mr Rogers—We have briefed the government in relation to issues on creeping acquisitions that have arisen from time to time from either examinations by this committee or legislation that has been put before parliament.

Senator FIELDING—Have Treasury made their view clear on what they think in that regard?

Mr Rogers—The advice we provide the government is, I guess, a matter for the government to announce or otherwise.

Senator FIELDING—Getting back onto predatory pricing, what harm can you see in actually keeping the test for market share there and adding market power and financial share of the market? In other words, if you were looking at a test, why would you take one way and add another one?

Mr Rogers—In relation to section 46?

Senator FIELDING—Yes.

Mr Rogers—I guess the issue that government has raised is that, by focusing on any particular aspect of a market, the essential potential for harm there is from the so-called false positive, where you deter pro-competitive conduct which would be to the detriment of consumers. Preventing a corporation or dissuading a person from discounting or otherwise providing a benefit to a consumer simply through an examination of their share in that market does not necessarily give an indication of how anti-competitive that may be. In fact, what you may end up doing is dissuading pro-competitive conduct which would otherwise benefit consumers in that market.

Senator JOYCE—Have you got an example? Are you aware of whether the Birdsville amendment has ever dissuaded pro-competitive conduct?

Mr Rogers—We do not enforce the provisions, so we are not privy to complaints that are brought forward to the ACCC.

Senator JOYCE—So you are not aware of any.

Mr Rogers—I am aware that they have been raised with the ACCC and that the ACCC have examined them, but I am not privy to the—

Senator JOYCE—So you are aware of it.

Mr Rogers—I am aware that the ACCC have had complaints in relation to section 46.

Senator JOYCE—From whom?

Mr Rogers—I am not privy to those details. They are an independent statutory organisation.

Senator CAMERON—Mr Rogers, do you see competition policy as a defined science or is it still being developed—this link between market power, market share and competition policy? How does Treasury see this? Is this something that you can say delivers so unequivocally? How do you work this through?

Mr Rogers—The Trade Practices Act is a law of general application, so it is there to lay down, I guess, the economy-wide provisions relating to what is and what is not acceptable in relation to conduct within a market. Where there is a need for industry specific or other treatment, that is handled through other legislation or other provisions. So, for the most part, Treasury's responsibility is for overall competition policy within the Commonwealth government. We also have a role in relation to negotiating and dealing with the states on the particular regulation of their markets as well.

Senator CAMERON—You said that the estimate is that consumers are between \$5,000 and \$7,000 a year—that is, \$140 a week—better off because of competition policy. What econometric modelling are you using to determine that?

Mr Rogers—Those were the results of a Productivity Commission report that came out in relation to an assessment of the overall benefits of the National Competition Policy—10 years of those reforms.

Senator CAMERON—Was that an assessment or specific modelling?

Mr Rogers—It would have been as a result of modelling. I do not have the report before me, but it is publicly available. It is a Productivity Commission report.

Senator CAMERON—But you are giving evidence on it here. You are the one who raised it. I am interested in what modelling was used. Treasury must be aware of what modelling was used for such a big figure.

Mr Rogers—Yes. I do not have the details on it with me.

Senator CAMERON—Can you get that for me?

Mr Rogers—Yes, I can take that on notice.

Senator CAMERON—You argue that competition delivers innovation. My experience is that undue competition can diminish innovation. I am interested in your comment. For instance, in the vehicle-manufacturing industry, competition amongst the majors is not something that the major companies actually absorb in their profitability or costs; they pass it down the line, and they pass it to the component manufacturers. They say, ‘Our competition will be driven by you cutting costs.’ So one of the first things that the component sector in Australia does is to cut expenditure on research and development, innovation, education and training. How do you deal with that in the context of simply saying that competition policy is delivering all these benefits when it is not delivering benefits for that major part of an industry?

Mr Rogers—There are a number of benefits of competition policy that can be delivered, but it is a matter for governments to consider whether or not overall the public benefit outweighs any of the costs that may be associated with it. So, whilst competition policy is important, the government has the overall role and responsibility of ensuring that there is, if you like, a net public benefit as a result of those policies. It would include things such as you have mentioned in relation to the development of a particular industry, safety standards or any other outcome that the government may see as desirable and weighing those up against the benefits that increased competition could provide.

Senator CAMERON—I am not really sure what that all means. Treasury prides itself on providing fearless economic advice to government so you cannot come here and say that that is the government’s responsibility; you have a role to provide advice. I am wondering whether you have ever provided advice on the costs of competition policy to important areas of the economy. This happens in the vehicle industry and I know it happens in the grocery industry as well where manufacturing firms are forced to cut costs, cut innovation, cut training and cut the workforce and you get to a situation where we do not have an effective manufacturing base and then we are all eyeing China. I would say, for that \$5,000 to \$7,000, a lot of that competition is driven out of workers who are being screwed mercilessly in South-East Asian countries. Have you done any modelling on that? Can you advise us how much that affects grocery prices?

Mr Rogers—I have not done any modelling on that but, in relation to grocery prices, that supply chain issue is being looked at by the ACCC.

CHAIR—I do not know that that is exactly in our reference, but it is a good question.

Senator CAMERON—It is all part of it.

Mr Rogers—The Trade Practices Act does take account of the overall public benefit. The ACCC is able to consider public benefit in relation certain of its activities and indeed the Australian Competition Tribunal has a role in relation to that where a strict application of the competition laws may result in detriment or no net benefit to the public. There is scope for that public benefit to be examined.

Senator FIELDING—Just on that issue, if I can—

CHAIR—Senator Fielding, I have just said that we are not exactly on the reference here.

Senator FIELDING—The issue that was raised by the senator is in part related to creeping acquisitions. It is related to what happens once you have less competition or overly concentrated markets because you have that power to screw people down the line, which is what you are basically getting at. So what we are trying to do here is strengthen the competition laws to avoid those situations happening.

CHAIR—We are debating across the table now.

Senator JOYCE—Can you take a question on notice. I am going to take one example: a litre of milk. Tell us what the price was at the farm gate 40 years ago, 20 years ago, 10 years ago and five years ago. I want you to compare those to the prices on the shop shelves and tell us whether the fraction has got larger, smaller or stayed the same. I think you will find that the people who are making the most money out of market concentration are the retailers.

Mr Rogers—I will see what I can find for you on that, but I am not able to do that research out of Treasury going back in time in relation to the price of milk. If there have been studies—

Senator JOYCE—Just as a house staple—a litre of milk.

Mr Rogers—I will see what I can find.

Senator BUSHBY—You mentioned earlier that one of the potential problems with the current legislation on predatory pricing is that you could see consumers miss out on a company with market share that is discounting because it could be caught up by the provisions. Simply because a company has market share and

is offering products at below cost is not sufficient to make out a case under section 46; there are other hurdles for that, aren't there? What are the other hurdles?

Mr Rogers—Do you mean at the moment or following the amendment?

Senator BUSHBY—At the moment, under the current legislation.

Mr Rogers—As it stands at the moment, I guess in relation to any examination of section 46 the first step, or the zero step, is to define the market.

Senator BUSHBY—Yes, which, as Senator Joyce says, is the door into the court, effectively.

Mr Rogers—I do not want to put words in Senator Joyce's mouth. I think he was more concerned about the next step, which is determining whether or not the market power exists. The current 46(1AA) does not address that issue. Rather, it does it by proxy or other mechanism in relation to market share. So at the moment 46(1AA) basically requires market definition, some degree of substantial share of a market. It is not clear on the face of the legislation what that is, and it would presumably vary from market to market. Once that has essentially taken place, if there is a sustained pricing below cost, which is the next step, the court would need to consider the purposes for which the corporation engaged in that. There are a number of set proscribed purposes in the section which—

Senator BUSHBY—That aspect of it is reasonably clear?

Mr Rogers—That aspect, as I understand it, is duplicated from the current section 46(1) prohibition. I believe that issue is not one that has necessarily caused any undue difficulty or concern either for the courts or for the ACCC.

Senator BUSHBY—If I could explore that a little bit further, you said earlier that the negative consequence of the legislation as currently written that you are trying to avoid, or that this proposed legislation would overcome, is where a company, merely because it has market share and is selling below price to the benefit of consumers, may be caught up with this. But it is not that simple; you would have to prove that relatively clear and well set out purpose test before they would be caught.

Mr Rogers—You would need to prove purpose as well.

Senator BUSHBY—That is right. But in that case, whether they have market power in the broader definition or just market share, if they are going into it with that purpose and are discounting for that purpose then, surely, they should be caught?

Mr Rogers—In which circumstance, sorry?

Senator BUSHBY—In the circumstance where they have market share which would be caught up under the current legislation—however, that might be worked through in the particular instance—and they are discounting and a court accepts that it is for one of the negative purposes set out in the act, then they should be caught, whether they have market share or market power in the wider perspective.

Mr Rogers—I would not agree with that. The crux of this provision is the need for market power. Merely having market share of some undefined level—

Senator BUSHBY—Is not the crux of the provision protection of consumers, in the end?

Mr Rogers—That is right, and to ensure—

Senator BUSHBY—Whether they have market power or market share, if they are doing it for nefarious purposes then the consumer is wearing it at the end.

Mr Rogers—If you have a purpose but you do not have market power, it is not anticompetitive.

CHAIR—Thank you, Treasury officials.

Proceedings suspended from 10.13 am to 10.23 am

MAHER, Mr Graham, Partner, Addisons Lawyers

CHAIR—Welcome. Do you have any comments to make on the capacity in which you appear?

Mr Maher—I am here as a private practitioner, as a partner of the law firm Addisons. I am not appearing here on behalf of any client. By way of explanation, my partner Kathryn Edghill and I appeared before a similar committee in 2007 on a similar bill, and Dr Grant invited us last week to come along and talk about this one.

CHAIR—Thank you; we appreciate your time. Would you like to make an opening statement?

Mr Maher—Yes, if I may. I would like to begin by thanking the committee for the opportunity to address it on this topic. As I said, I do have an interest as a practitioner in this area. I appeared with my colleague Kathryn—who was, unfortunately, unable to be here today—before the committee in 2007. I would like to begin with an apology. I have been unable, due to time constraints, to present the committee with a written statement or submission on the government bill. However, if the committee would like to ask any questions on particular issues or would like elaboration on any points I would be more than happy to address those promptly in writing subsequent to today. I would also like to apologise to Senator Fielding. I have not come here today prepared to address the creeping acquisitions amendment. I am happy to discuss it in general terms, if you would like, but I have not specifically prepared on that subject.

My comments today, other than on a couple of particular issues that I will come to later, are generally supportive of the proposed amendments to the Trade Practices Act contained in this bill. Heaven forbid that I be seen as agreeing with the Chairman of the ACCC on too many occasions because it is probably not good for my practice. However, I note that a number of his recent public comments refer to the need to obtain a balance between exposing firms to legitimate competitive behaviour through the mechanism of competition so as to enhance the welfare of consumers and to protect firms from anticompetitive conduct, including specifically predatory pricing behaviour, by others who have market strength or market power in a particular market. I consider the proposed amendments to both section 46 and 46(1AA) contained in this bill, in concert with a number, but not all, of the amendments made to section 46 in September 2007 appropriately reflect this balance. As stated by the Senate Economics References Committee in its report on *The effectiveness of the Trade Practices Act in protecting small business* in March 2004:

... the Act should protect businesses (large or small) against anticompetitive conduct, and it should not be amended to protect competitors against competitive conduct.

That appears in the introduction to that report.

I will now go to the specifics in section 46(1AA), the removal of the market share criteria and the reinsertion of the concepts of market power and the taking advantage of that power. With respect to the proponents of the current section 46(1AA), I believe that the provision did not achieve the necessary balance that I referred to earlier. I also believe there are two major criticisms, accepting there may be differences of opinion which may be levelled at this provision as it currently stands. Firstly, it has been my experience that it gives rise to significant uncertainty of the import of the concepts of substantial market share and when a market share can be said to be substantial in any given circumstance. For example, there may be situations in which there are eight firms with 10 per cent each—these are examples which have been given by the ACCC—or a situation where one firm has 60 per cent, one firm has 30 per cent and one firm has 10 per cent. Does the firm that has 30 per cent market share in that scenario have a substantial market share in those circumstances? I think it is recognised that the market share concept can vary over time.

Relevant cost is another concept which is new to the bill. I think that is perhaps not so much a difficulty as something that will necessarily have to be looked at. I suppose the High Court has looked at average variable cost to avoidable cost and conflated the two concepts, but given an indication that that is probably where it would look so that is probably not so difficult. Also, there is the concept of a sustained period—and we have had some guidance from the Chairman of the ACCC as to what he considers to be a sustained period in terms of short-term discounting and I note Professor Zumbo referred to this earlier—as opposed to a six-month or 12-month period of conduct in pricing by someone who is seeking to compete with a new market entrant or with an existing market player. They are concepts that, while they have some degree of uncertainty, can be worked around. In this regard, while the ACCC sought to give some guidance on the likely interpretation of these provisions, what concerned me as we went along—since their introduction—was the central tenet of its comments. It seemed to be that the import of the provisions would have to be sorted out by the courts on a

case-by-case basis over time. Necessarily, that involves uncertainty, cost and a period of time in which businesses big and small do not know what the law is. It can be worked out—jurisprudence develops over time, I am not saying it does not—but it is a factor to be considered given that we have some jurisprudence heavily criticised in some quarters going back on the current section 46 and the concepts which lie therein.

Secondly—I heard a question from Senator Bushby earlier addressing this issue, but I will go on—other than the need to establish the requisite anticompetitive purpose:

... the absence of a requirement to establish a nexus between the existence of the relevant market share and the conduct—as a taking advantage of test exists in section 46(1)—

and the lack of any requirement to establish market power—

may in one view result in provisions being effectively one of ‘strict liability’. That is at chapter 14, page 236 of the *Petrol prices and Australian consumers: report of the ACCC inquiry into the price of unleaded petrol* in December 2007.

I will come back to what I understood your question to be, Senator, and please correct me if I am wrong: doesn’t the need to establish an anticompetitive purpose provide a hurdle which any prosecution, plaintiff or anybody else needs to get over? I think the answer to that in the situation of predatory pricing is potentially no, or at least not a significant hurdle. The reason is simply this. Why does anybody engage in competitive behaviour in a marketplace? I have had experience as an internal, in-house lawyer. I have seen some things that marketing people say about their competitors. These are big boys going at big boys, and they will say what they are going to do to their competitors, how they are going to do it and over what period of time they are going to do it. The problem with the predatory pricing provisions, as has been recognised around the world, is distinguishing between procompetitive behaviour resulting in lower pricing, which is of benefit to consumers, and anticompetitive behaviour by persons who have particular market strength or power leveraging that power to the detriment of someone else. I will come to recoupment later on. I think that is the challenge.

Senator, you asked about systems around the world which have been potentially more successful. It is true that in the States, for example, in some jurisdictions, pricing below your actual cost is prima facie evidence of predatory pricing. I do not think it takes you 100 per cent there; I may be wrong about certain jurisdictions.

Senator JOYCE—Some states.

Mr Maher—Some states, yes. On the other hand, pricing above your average total cost or your total cost is pretty much an example that you are not engaging in predatory behaviour and it goes by the wayside. In Canada, as I understand it—and, again, I may be wrong because I have not looked at this specifically for some time—they do not necessarily have safe harbours but they look to say: ‘Okay, if you have a market share of a certain percentage—

Senator JOYCE—Thirty-five per cent.

Mr Maher—30 per cent or whatever it may be, then we’ll look at you again. You’re not in trouble but we’ll look at you again and then we’ll take the next steps.’

That is all I wanted to say about the concept of having the purpose of being the gatekeeper. In that report on unleaded petrol, the ACCC suggested the courts go back and have another long, hard look at purpose because that seemed to be the provision which could prevent otherwise competitive behaviour from unintentionally falling foul of the provisions of the Birdsville amendment. Obviously insofar as procompetitive behaviour is being discouraged, potentially consumers are being disadvantaged because they are not being given the benefit of lower prices in terms of particular products or services.

I had the benefit of hearing earlier in the discussion, and I will not dwell on this, that there have been a number of complaints—the number mentioned was 75; I cannot confirm that or otherwise—from people since the introduction in September 2007 of the current amendments. To my knowledge—and, again, I am willing to be corrected—those have not resulted in the ACCC bringing on any prosecution. I would hazard a guess that part of the intention of simplifying the provisions in section 46 is to do with a misunderstanding as to what the provisions can actually achieve. I note that in a number of recent publications the Chairman of the ACCC has alluded to the fact that some people seem to suggest that, merely because a competitor is pricing lower than they are capable of pricing, that is predatory behaviour. He said that there is a misunderstanding amongst the business community in that regard, and that that suggestion is not necessarily the case. He referred to:

... calls for greater action by the ACCC to protect firms that are struggling to compete with more efficient rivals – whether those rivals' greater efficiency comes from economies of scale or the ability to be nimble and innovate quicker.

I think that is an allusion to those recent complaints.

As to the remainder of the provisions of section 46 and 46(1AA), which are dealt with in the proposed bill, to a large degree—and I know a number of people will disagree with this—they are reflected in the proper state of the law as interpreted by the High Court. As I say, others will think differently. There are statements made in a number of those decisions which lead to uncertainties which the current proposals, I believe, in concert with the proposals dealt with in September last year, which addressed what was a substantial degree of market power in a particular market. They were subsections 46(3A), (3B), (3C) and (3D). They are also very helpful in these circumstances.

I would, however, query subsection 46(6A)(d) of the proposed amendments—that is, the need for the remaining catch-all provision that exists there. This is a provision that addresses the now reintroduced concept of the taking advantage of market power as a requirement. I must say that 46(6A)(c) is a wonderful departure from what the High Court actually said in *Boral v Rural Press* as to when market power can be taken advantage of. I think that the High Court got it wrong in that instance. I am not supporting that. I think the Wood test, which the ACCC has been touting for quite a while, is the right test—that is, is it commercially rational for a competitor to behave in this way in a particular market at this time? That is very helpful in determining whether or not they would have not engaged in that conduct but for, if you like, the fact that they had market power and assumed that at some time they would reap commercial benefits, whether through recoupment or increased market share or otherwise. I only raise it; I just query whether subsection 46(6A)(d) is actually necessary or whether it is going to lead to distraction from the other provisions which I think have root in some of the jurisprudence in the previous cases.

Basically, that is all I want to say about the misuse of market power provisions. I would, however, like to make some comments which I believe need to be made about the extension of the ACCC's powers under section 155. Having said that, in a past life having lived through being issued with a 155, not personally but as an advisor to the company—thank god not personally—I can say that depending on the issues in question, how big you are and how long they go back, it is quite a significant burden to comply with those requirements, particularly where, with the 155 notice, the courts have been lenient in terms of the degree to which they are required to be specific as to the issues that need to be addressed. So there is both a cost and a time burden there.

I think one of the particular issues that arises as a result of the proposed amendment is the potential, as I see it, for conflict between the power of the court to control its own procedures, including the production of documents in any circumstance, and the ongoing power of the ACCC to call for such production under its section 155 powers. For example, notwithstanding the court's general powers, I ask the question: could a court intervene to order the ACCC to expedite its investigation or make available to a defendant documents seized by the ACCC under exercise of its compulsory powers which may be needed by a respondent to respond to an injunction application. I think there is a conflict there. On the one hand, I would say yes, because inherently a court can control its own procedures but, on the other hand, I would say no, because the 155 powers exist outside those court procedures although they have been used in respect of a proceeding which is brought before the court.

I would further say that the essence of such powers would be open to abuse even if unintentionally where the ACCC obtains an interim injunction yet its investigations continue for years thereafter with the ongoing substantial cost and burden of compliance with the respondent while the respondent is also addressing the injunction proceedings at the same time. I know that the ACCC says that it does not have resource issues. Based on my experience in dealing with certain matters with the ACCC and the way they prioritise issues, I would beg to differ, but that is a matter for them. But it can result in substantial delay, particularly where there was already an injunction in place, and substantial costs over a period of time.

I respectfully suggest—and I do not suggest an amendment at this point in time—that the committee give consideration to whether it be made clear in the relevant provisions of the bill that nothing therein is intended to derogate from a court's power to control the procedures before it so that the court is aware that there is no conflict and the court is aware of its power to be able to ask the ACCC or direct the ACCC to expedite its investigations, to move the matter forward in a manner which is in the fair interest of everybody concerned. I think that this is particularly the case where you cannot recover your costs on a 155 notice, nor does the ACCC

have to give any undertaking on costs as a normal litigant would in the context of an injunction proceeding. Thank you.

CHAIR—Thank you. We have heard some views that courts tend to take a narrow view of the act and also that Australia's protections of small business or the Trade Practices Act generally is not as high as in some other countries. Can I have your views on those two opinions?

Mr Maher—I am sorry, Madam Chair. I have probably not looked at the second one in as much detail as may be helpful. Personally, I think there is obviously an issue that the ACCC will no doubt be coming to talk to Treasury about. They have issues now with the interpretation of section 45, which deals with an arrangement or understanding regarding price between competitors. That has arisen as a result of some of the recent petrol cases. I think there was one down in Geelong. I keep thinking Opco because I am involved in a merger. It is not Opco; it something else.

Senator JOYCE—The independent fuel station.

Mr Maher—Yes, the independent fuel station. Basically, the court held that there had to effectively be a meeting of the minds, and the ACCC thought that that has now taken that a little bit far. I think with section 46 the courts have tended to be a little bit conservative—and not just in Australia—because of the competing concerns. On the one hand, the act is intended to promote competitive behaviour to enhance the welfare of consumers—that exists in section 1 or 2 or thereabouts. On the other hand, predatory pricing and other anti-competitive behaviours clearly apply, to the detriment of the consumers—at least in the long term—if efficient competitors are driven out of the market, which then leaves remaining competitors to seek monopoly profits or something else at a later period of time. And the question has always been: where do you draw the balance between those two competing interests? That is why I began with the question about balance. I do not think on the whole that courts have adopted deliberately narrow interpretations. I do however think that, in the context of section 46, they have been very cognisant of the need to strike that balance and at times they have gone over it. I think Rural Press was wrong. But, having said that, I think that Boral was right, and under the provisions in this bill Boral will be decided the same way as it was at the relevant time.

Ultimately I would like to ask those people who disagree with Boral this simple question: if you were to have a choice between going out of business, which effectively was the choice which faced Boral—notwithstanding all the hyperbole that existed within their internal documents about damaging competitors and other things; I recognise that and do not resile from it—if your choice is to continue to manufacture below the measure of relevant cost, or below actual cost in these circumstances, for a period of time either in anticipation that others will not stomach that and will leave or that you will then be able to bring online greater capacity and greater efficiency through a new plant that you hope to arrange somewhere else, would you chuck out your workforce and just pack your bags and go home or would you, at least for a period of time, stick it out?

I think in the explanatory memorandum to the bill of last year someone recognised that the High Court had in fact said, 'It is commercially rational.' That is why I come back to the test. It may be commercially rational to behave in that fashion in these particular circumstances. The explanatory memorandum to the bill last year—I cannot remember which bill, Senator, but it talked about relevant cost—recognised that the High Court had said that in certain circumstances going below no measure of cost may not, to use a double negative, be commercially advisable because it is just economically and commercially rational at that time. It may not be for a long period, it may not be forever, but that is the choice that is facing business. And the reason for including relevant cost as opposed to average avoidable cost or average variable cost was stated in the explanatory memorandum to be just that, because we do not want to pitch the bar too high and have people who do have a rational explanation fully blow it and then fall foul of the test. So, as I have described in a longwinded way, there is an element of concern in section 46 about balancing those two immediately-competing interests, and that has been reflected in decisions of the court. Insofar as that may be seen as being conservative, I accept that that is conservative.

As to the other provisions of the act, I do not necessarily agree, particularly with the consumer protection provisions and leaving aside the competition provisions. I think the courts have been relatively expansive in dealing with those. As to other jurisdictions, I discussed briefly with Senator Joyce that there are differences but on the whole everybody is struggling with the same concerns. In Ireland, as I understand it, some two years ago they had in the grocery industry exactly the same concerns as we have here about consolidation and arising issues. They took the view that they would effectively legislate floor prices and they introduced legislation which did that for a period of time. About 14 months later they zipped it out; it was just not working, and consumers were not getting the benefit of it. So I do not think the amendments ought to be seen

by the community as generating floor prices and protecting just small business. They need to strike that balance between giving the ACCC the tools they need to identify genuine predatory behaviour which falls foul of the provision and not discouraging pro-competitive pricing activity.

Senator JOYCE—Mr Maher, do you know a person by the name of Michael Hodge, barrister at law?

Mr Maher—No. I have heard of Michael but I do not know him personally.

Senator JOYCE—I can see a submission there from him. I just wanted to know if you were associated with him. We do not want to bore people to death with specific sections of trade practices law, but what seems peculiar to me is that, if this bill were to be passed, what you would have to prove in a court of law would remain the same as what you have to prove now; that once you got through the market power gate what you would have to prove in a court of law would be the same as what you have to prove now. All we are doing is discussing the gate at which people get access to the court to pursue their case, yet it seems that certain sections—and I may be part of it; I am on the other side of the debate—have worked themselves into a lather in trying to make this door smaller than it currently is by going back to the market power test. That obviously raises a suspicion as to why people would want to make it more convoluted to get into a court. Once you get yourself into a court, you have to prove your case. If you cannot prove there was a sustained period of time for the purpose of reducing or stopping competition then all you are doing is wasting your own money and you would not do it. The argument is that there is a sense of uncertainty. I do not see that uncertainty in the market. If there is uncertainty in the market, it is easily fixed by just making the market share test the test for other sections within the act.

Mr Maher—I think there is one difference between the provisions as they currently stand in 46(1AA) and the proposed amendment, leaving aside for the moment market share or market power. I accept that the difference between the concepts essentially are that market share is an indicia of market power but not necessarily sufficient to establish it, but I will park that to one side. The other difference is taking advantage of that market share or market power that currently exists in section 46(1AA), and that requires that there be some relevant nexus between the two. We have looked at what is being proposed in the new amendment in terms of the test for taking advantage. I think that clarifies somewhat where the High Court had gone in terms of taking advantage and does provide that level of clarity, which I welcome.

I suppose there is a concern with market share, whether it is reasonably based or otherwise—and I think there is some validity to it. Let us assume that if you have anything over 20 or 30 per cent in the market and you put up your hand as being an orange or a red for substantial market share then you have to price below relevant cost. How do you go about determining relevant cost in lots of industries? What measure of cost is appropriate? This is where all the uncertainties build on uncertainties. The ACCC has said that the concern is that, without purpose, the Birdsville amendment, intended or unintended, may ultimately result in there being almost a provision of strict liability.

Senator JOYCE—I see it as a mechanism that gives more people access to the law of the nation to protect their position. Mr Maher, you are obviously a very competent lawyer, a very competent solicitor. Have you ever been involved with a predatory pricing case where you have tried to prosecute a case for a client under the market power test and succeeded?

Mr Maher—No, I have not.

Senator JOYCE—Do you know if any of your colleagues ever have?

Mr Maher—No, Senator.

Senator JOYCE—Wouldn't that suggest to you that there is a problem with the law there?

Mr Maher—Firstly, it would probably be more accurate to say that I act for the other side more often than I act for smaller businesses with regard to predatory pricing. I put up my hand for that.

Senator JOYCE—And that was to be my next question, so we are getting there.

Mr Maher—Secondly, as you pointed out earlier in discussions, in terms of private prosecutions, predatory pricing cases are not exactly thick on the ground, and I accept that.

Senator JOYCE—Mr Maher, have you ever been a defendant in a predatory pricing case?

Mr Maher—No, I have not acted personally in one.

Senator JOYCE—Have you been involved in one?

Mr Maher—I have been involved in one.

Senator JOYCE—Did you win?

Mr Maher—It did not get to trial.

Senator JOYCE—So they threw it out.

Mr Maher—No, it was just resolved before trial.

Senator JOYCE—They resolved it because it looked as though you were on the winning side?

Mr Maher—A win is a win, Senator.

Senator JOYCE—Yes. Thank you, very much. If this legislation goes through it is going to put you back in the box seat, isn't it?

Mr Maher—I do not necessarily think in terms of 'you' or 'big business' or 'other business'. I appreciate the objectives behind the amendments that you championed and I have no problem with those whatsoever.

Senator JOYCE—Just for the record, and this is important: it is not just me. This thing gets attached to me but it is a result of a range of small businesses over years and years pushing for these amendments. Just for the record, because I have seen this in other places: people say that I wrote them in the Birdsville Hotel. If only I was that smart! After about two years of work, the last draft was faxed from the Birdsville Hotel and because we had to call it something we called it the Birdsville amendment. If we had been in Betoota it would have been the Betoota amendment and if we had been going through Quilpie I imagine it would have been the Quilpie amendment. It just so happens that that is where the last one was faxed from. I do not generally go to the pub, get smashed and write trade practices laws amendments. That is just for the record.

Mr Maher—My view is that there are issues of uncertainty and there are issues arising from those amendments which may dissuade some firms from engaging in legitimate competitive behaviour. They are the two consequences I raised earlier. These amendments remove those concerns; they also address some of the concerns that have been raised by commentators about decisions of the High Court and where the High Court has got it wrong. I come back to my earlier point: I think they have the balance right.

Senator JOYCE—I was talking to a gentleman down the back before about Congressman Patman and the Robertson-Patman Act 1938. These sorts of laws are prevalent in the United States—the Sherman act and the Clayton act. America as an economy has gone pretty well for the last 100 years yet they have been able to avail themselves of far more stringent and prescriptive laws on what they think is deemed as necessary to keep a diversified market. I now see that the People's Republic of China has stronger trade practices laws than Australia in a lot of areas. The UK laws are stronger than ours. You would have to say that Australia has the most centralised market in the Western world. Something that those other countries did brought about more competition because they have more players than what we have. What we have been doing has brought about the most centralised market in the OECD. I am not saying that the Birdsville amendment is a panacea but it is a step in a direction that is not unique; it is actually walking us towards where other countries have been, in some cases for 106 years.

Mr Maher—I cannot comment on that history; I accept everything you have said for that purpose. I would not have any objection to the government, as a matter of policy fully informed and debated, legislating more prescriptively in certain areas, indeed with regard to predatory pricing—subject of course to the issues that we have talked about, that is, the need not to dissuade firms from engaging in legitimate competitive behaviour to ensure the benefit of consumers. The other aspect is this: let us get it clear. Let us make it clear to everybody that this is the end game. As a matter of policy what we are saying is this: 'If you have this particular market share you shall not price at or below X amount compared with your competitors during this period of time.' Everybody then knows the game they are playing. I totally agree with you; if that is the way the parliament wants to go to achieve that purpose, then I have no problem with it at all.

Senator BUSHBY—Coming back to your opening statement regarding the strict liability proposal that was put by a submitter to a previous inquiry, as you said that was something that was in a submission rather than your view. Do you believe that, if a market share is proven and that below-cost pricing is also proven, it would lead to a situation of strict liability regardless of purpose?

Mr Maher—I think there is a very grave—and I use 'grave' in the sense of above significant—risk that that would occur in a particular circumstances only because we all know of the lovely smoking gun document which you receive from your marketing director who says, 'We're going to go out and cream Joe this week. We're offering these discounts and we want to get X per cent in this sector and increase our market share.' It happens all the time, Senator. You look at those things in isolation in the bright light of the court room and

they look horrendous. They would probably go to establish a purpose because one of the purposes prescribed by section 46 is damaging a competitor. That is the concern. There are others but one of the threshold purposes is damaging a competitor. If I take market share off a competitor I am damaging that competitor—but that is the nature of competition.

Senator BUSHBY—So what is the difference then in a purpose like that—damaging a competitor, which could be a commercially rational decision, as you mentioned, and one which I think you are suggesting could be quite legitimate—between a firm that has substantial market share and a firm that has substantial market power, particularly given that, as you mentioned, there is no nexus between the share or power and the taking advantage, if there is no requirement for them to be using that to take advantage?

Mr Maher—Assuming no nexus—so we will leave aside the take advantage for the purposes of answering the question—it really boils down to market share and market power and the relationship between the two concepts. If you look at section 50, which is your mergers and acquisitions type arrangements and whether there is going to be a substantial lessening of competition, one of the things the ACCC does, and will continue to do until it changes its merger guidelines, is to look at what the merged firm will have in terms of percentage of market share and what other firms in the market will have in terms of percentages of market share. They will say, ‘Unless you get to a certain threshold we are not going to look at you; we think that in the context of mergers you are not going to cause a competition issue. So that is fine; we will give you the tick there.’ They do not do that all the time; they may say there are other issues involved that they need to look at. That is really the relationship between the two. Market share is a rough approximation of what market power might mean.

For example, I could be a monopolist. I could have 100 per cent share in the manufacture of widgets in Australia. I hate economists and they use the term widgets all the time—but let us go with widgets. There are no import restrictions for the purpose of the analogy. Indonesia produces widgets and there is no restriction on the wood or whatever they use to do it. If I raise my price in Australia above a certain threshold price I am going to face import competition and they are going to come in and flood the market and force my price down. So notwithstanding that I have 100 per cent market share in the manufacture of widgets in Australia, I do not have market power in that market. I am constrained by how my competitors will behave. If I were to increase my price by a small but not insignificant amount, whack, in come people from outside. So there are various dynamics which flow. It is not just barriers to entry; there are all sorts of other issues which constrain how I might behave in certain ways, whether it be regulatory or otherwise. What I am saying is that market share is a good start but it just does not get you there because market share does not tell you whether or not my behaviour is constrained by my competitors.

Senator BUSHBY—I understand your analogy there. You are saying that market share does not necessarily guarantee monopoly power—ultimately if a firm uses predatory pricing to push out its domestic competitors, local or regional or whatever, that does not necessarily mean they can then rack their prices up to recoup the losses, with the consumers suffering, which is ultimately what predatory pricing provisions are trying to avoid. Will market power provisions as they will be if this bill is passed provide sufficient protection to small business and consumers to ensure that ultimately that cannot happen? You talk about the balance. Is the definition of market power sufficiently clear to ensure that a firm that is undertaking predatory pricing for the purposes of knocking out competitors cannot ultimately then screw the consumers down and charge them whatever they like?

Mr Maher—Raise prices afterwards—yes.

Senator BUSHBY—That is right.

Mr Maher—I probably had a more sanguine view of the High Court’s decisions than a lot of other commentators before the amendments last year, but I would think that—in concert with the existing jurisprudence and what has been said in section 46(3A), (3B), (3C) and (3D) regarding what market power is and the fact that it is not the dominance test anymore—a lot of things are now being clarified that I think some people may not have misread but on which they may have looked at some very terse statements in some of the judgements of the High Court and said, ‘You’re getting it wrong; it’s too hard for us to prove.’ I will just be guided by what Graham Samuel says. If he says he now has the tools to be able to do the job, I would expect that he has the tools to be able to do the job. I think he has. My criticism of the ACCC has sometimes been that they get it wrong and instead of lifting their game they want to change the game, but I think this is a good basis for defining market power going forward.

Senator FURNER—You spoke earlier about section 46 cases, and I am wondering about your notion of the proposal to have these matters handled in the Federal Magistrates Court and, given your experience on

previous cases, about how that would possibly reflect on those matters going down that path and using that as a vehicle rather than what we currently have.

Mr Maher—I think the intent is good. This was debated before the committee last year in terms of making it available. Part of what is attractive about the Federal Magistrates Court is that its approach is, on the whole, conciliatory. It looks to use mediation in other sorts of processes, and it has a certain range of matters and a current jurisdiction where those processes particularly fit. I am a wee bit concerned that you whack a big argument in about section 46. With whoever it may be going toe to toe on these issues, you may swamp the jurisdiction. So by all means try, but I think you should think about resourcing, how that is going to fit within the jurisdiction and who is going to handle it. Maybe you need dedicated judges with a particular background in these issues. I do not think you are necessarily going to get the expedition you think you are, because I think that court is specifically suited to matters currently within its jurisdiction. I think it has the talent on the bench and in its other people to be able to deal with the matters, but these cases, by their nature, are pretty hard fought given the fines and other penalties which are going to be imposed.

Senator CAMERON—Do you see the jurisprudence on this building to anything substantially different from the existing jurisprudence that is with these new amendments?

Mr Maher—I can see the future jurisprudence clarifying where the court was in previous cases. As I said, I disagreed with the Rural Press decision—I thought that got it wrong—but I thought the amendment last year about leveraging power from one market into another was entirely appropriate and, indeed, is what the High Court had said previously. So I thought the Rural Press decision was wrong. As I said, I thought the Boral decision was right. So there is a mix.

I actually think it is going to provide an opportunity for the court and the ACCC, going forward, to put a bit of a stamp in the ground and to unify all these. The court has to be aware of the concerns being expressed by lots of people about where its decisions are taking it and how hard it is to prove, and I think these amendments will give it the opportunity to come down and say, ‘Thank you for the direction; here’s where we’re going on this.’ It is never going to be the same in any instance because you are always going to have to look at each of the factual circumstances in a different way, and that is why you have a variety of tests regarding taking advantage and a variety of indications in terms of market power. So I see it as an opportunity, if the ACCC is on its game and appropriate circumstances come along, to actually clarify some of the issues that have arisen and not codify, necessarily, but provide some clear direction.

Senator CAMERON—Thanks. The submission from Michael Hodge says that the new law may turn predators into prey. I assume it was the Birdsville amendment that he was talking about. What is your view on that from a practical and legal perspective?

Mr Maher—I would describe the language as florid and not necessarily helpful. I do not think the word ‘prey’ is accurate. I do not think the ACCC ever intended to, on the back of these new laws, go out and particularly target any sort of business or business activity or any area or otherwise. What I would say is that it did not turn them into prey; it may turn them into sheep, so they may have been a bit more scared to do certain things. I know, Senator, that you mentioned that Professor Zumbo said that they said they had not changed their pricing behaviour, but I think there generally was a feeling of, ‘Hang on; we need to just sit back a little bit about what we are doing here and wait for a bit more clarity.’ That is all that I would have thought has happened as a consequence of the amendment so far.

Senator FIELDING—On the issue of changing the words from ‘market share’ to ‘market power’, why couldn’t you just have both there and have an ‘or’ between them? Why can’t you just have an ‘or’?

Mr Maher—I understand. I will be positive first and then come back to that, because I think that financial power is indeed something that may—by way of clarification, I do not know whether it is now or just during the decisions—certainly be an indicium of market power itself. The fact that someone may not have market share does not mean, in that instance, that they may not have market power, because financial power may mean market power. Anyway, if you preach it then it is circular logic.

Senator FIELDING—I am saying ‘or’. I am saying all of them.

Mr Maher—I understand what you are saying.

Senator FIELDING—I am saying all three: market power, all market share and all financial power.

Mr Maher—I think you have market power up here, then financial power below it and, below that, market share. Both financial power and market share are indicators of market power going up. I do not think market

share gets you there, for the reasons I have talked about. It does not necessarily establish the requisite ability to act unconstrained and to utilise—

Senator FIELDING—Sorry to interrupt. I got that, but I could get someone else in here and they would say, ‘No, they are different.’ So I am saying: what is the problem with having them as ‘or’? If you agree that one is a subset of the other, it cannot hurt if you put ‘or’.

Mr Maher—I think market share is a lower threshold, and that is it.

Senator FIELDING—But what damage can it do?

Mr Maher—It depends on whether you are adding or taking away. You have market share, market power or financial power. What is the next step in the chain? Is it taking advantage of any one or more of those or not? Or does that go? I just come back to the idea that if it is market share, with no taking advantage of a relevant cost or a sustained period purpose—purpose being, I think, relatively easily established—you are getting dangerously close to discouraging genuine competitive pricing behaviour. That would be my criticism.

CHAIR—Mr Maher, thank you for your evidence here this morning. I might just restate Senator Joyce’s comment about the Birdsville amendment. It was part of the background information in Michael Hodge’s written submission to this inquiry. He gave it as historical background. Senator Joyce was correcting that version of events.

[11.06 am]

STEWART, Mr Ian Barton, Member, Trade Practices Committee, Law Council of Australia

CHAIR—Welcome. Would you like to make an opening statement?

Mr Stewart—Yes, I would. The existing section 46(1AA) prohibits below cost pricing by a firm with a substantial share of the market for a prescribed purpose. In the Law Council's view, such a test is unsatisfactory because it does not inquire into whether or not such conduct takes advantage of market power or indeed whether there is market power. The proposed section 46(1AA) also has problems with it, in the Law Council's view, because it appears to equate sustained below cost pricing by a corporation with substantial market power with the taking advantage of that power.

There are two distinct situations which need to be dealt with in what is a very complicated area of law. One is below cost pricing which is independent of or does not reflect the forces of market supply and demand. Such pricing, where the firm or corporation has the ability to choose the price level which it sets, can indicate the existence of market power and it may also indicate a taking advantage of market power. However, that needs to be distinguished from the situation where a firm is setting prices below its costs because it is responding to the market. It may not have the choice. In my opinion, the Boral case was an example of the latter situation. I am happy to discuss that further.

Our view is that a provision which is aimed at preventing predatory pricing needs to inquire further into the circumstances of the below cost pricing. Was it caused by market conditions or was it independent of market conditions? If the test fails to distinguish between those situations then it is not likely to be a successful test. In this respect, section 46 is a complicated section, but predatory pricing is perhaps the most difficult practice of all to deal with because ordinarily price cuts are competitive behaviour. All firms cut their prices in order to win business from their competitors. A necessary consequence of that is that competitors are going to be damaged because they lose sales to the firm which has cut its prices. That aspect is inherent in the competitive process.

In summary, in relation to 46(1AA), the Law Council's view is that that section should simply be repealed rather than amended and that the courts should simply rely upon the jurisprudence developed in relation to the existing section 46(1). Although it has proven to be a difficult section, there is now quite a developed body of law in relation to it, and no doubt it will develop further. But we believe that most of the cases considering it, at the High Court level at least, have got the facts and the law correct.

In relation to section 46(1AB), which is the recoupment provision, the Law Council thinks that the High Court and the Boral Besser Masonry case got that area of law correct and, specifically, Chief Justice Gleeson and Justice Callinan held that, while the possibility of recoupment is not legally essential for a finding of pricing behaviour in contravention of section 46, it may be of factual importance. In other words, the existing law is that one does not need to establish recoupment but it may be relevant in a given case. The Law Council's view is that that is a quite satisfactory position. It is different from the position in the United States, for example, and, I believe, different from the position in the United Kingdom as well.

Proposed section 46(6A) introduces a number of criteria to which the court may have regard in determining whether a corporation has taken advantage of its market power. The first of those elements is whether the conduct was materially facilitated by the corporation's substantial degree of power. The Law Council agrees that that is a relevant criterion. However, it says that that does no more than restate the existing law. That is very clear from the Rural Press decision, amongst others.

In relation to proposed section 46(6A)(b), which asks whether the corporation engaged in the conduct in reliance on its substantial degree of power, the Law Council's view is that 'reliance' is a rather ambiguous term and has the potential for confusion. It may reflect a taking advantage of market power, but it also may reflect subjective considerations which have no part to play in determining whether or not there has been a taking advantage of market power. One can rely upon something without necessarily taking advantage of it, we would say.

The criterion in proposed section 46(6A)(c) is the counterfactual criterion: whether it is likely that the corporation would have engaged in the conduct if it did not have a substantial degree of power in the market. The High Court has repeatedly employed a counterfactual test, starting with the Queensland Wire decision. It has appeared in cases since that time, and such a test is clearly relevant because it seeks to look at the position which might have obtained had the corporation been operating in a market in which it lacked substantial

market power. So it tries to isolate the market power element and to determine whether the market power explains the conduct of the corporation. So that proposed subsection does no more than restate the law. But we are concerned that it uses the expression 'would' rather than 'could', because we believe that, if one examines the High Court decisions employing the counterfactual criterion, those two terms are used interchangeably. The law tends to be put in terms of, 'Could the corporation have afforded, in a commercial sense, to have engaged in certain conduct without a substantial degree of market power, or would it be likely to have engaged in that conduct if it lacked a substantial degree of market power?' So we would recommend that if there is to be a criterion in those terms it include 'would' and 'could' in the terms we have put in our submission.

In relation to proposed section 46(6A)(d), where the conduct is 'otherwise related' to market power, the Law Council's view is that that is quite a dangerous proposal because it does not necessarily imply there has been a taking advantage of market power. We have given an example of a corporation with substantial market power which, in order to protect its market power, introduces a new and innovative product. That might be said to be related to its market power because it aims to protect it. However, it does not involve a taking advantage of market power.

The Law Council considers there is much to be said for the view that, for conduct to take advantage of market power, a causal relationship is needed. Preferably, the 'otherwise related' criterion would not be included. But, if an otherwise related criterion is to be included, it should be made clear that there must be a causal relationship between the market power and the conduct.

Finally, in relation to the proposal for section 46 cases to be heard in the Federal Magistrates Court, whilst it is a laudable proposal to try to reduce the costs of section 46, which is an expensive provision to litigate, there are difficulties relating to the lack of experience which the Federal Magistrates Court has in these matters. It may be that, to some extent, they could be dealt with over time, but the fact is that the Federal Court itself has a substantial body of experience in this area.

Another matter is that section 46 cases usually go on appeal. This reflects the complexity of the law. So, if one starts off at the Federal Magistrates Court, there is going to be one extra layer of appeals to be dealt with. That is going to increase costs and delay. The final matter is that, as we understand it, there is no proposal to give the Federal Magistrates Court accrued jurisdiction in relation to section 45 or 47, for example. Section 46 cases often also allege that there is some sort of price fixing element or third-line forcing element, so only cases which exclusively allege contravention of section 46 could be dealt with in the Federal Magistrates Court. We did make the submission, however, that what we describe as 'coat tail damages' could perhaps be dealt with in the Federal Magistrates Court. That refers to section 83 of the Trade Practices Act, which provides that, where there has been a contravention and a finding of fact by a court, that finding of fact can be relied upon in a subsequent civil proceeding. That concludes my opening statement.

CHAIR—We have just heard evidence about the ACCC having increased powers to require documents to be made available. Does the Law Council have a view on that?

Mr Stewart—I do not believe that we have put in a submission specifically on that. We believe that the existing law is adequate in that respect. But, if we were requested to provide a specific written submission, we could do so.

Senator JOYCE—How many members does the Law Council of Australia have?

Mr Stewart—I could not tell you off the top of my head. There would be, I think, several hundred.

Senator JOYCE—Obviously, within the Law Council, you have had strong discussions regarding section 46(1AA), known as the Birdsville amendment.

Mr Stewart—Yes.

Senator JOYCE—Have you workshopped the idea?

Mr Stewart—The process was that the exposure draft was discussed and then a draft submission was prepared. That was circulated amongst the members of the Law Council. The various state bodies in their law council meetings effectively discussed what the position was. Ultimately, what was submitted represents, if you like, a majority view.

Senator JOYCE—You say that you widely represent or are a very good sample of the legal fraternity in Australia.

Mr Stewart—The legal fraternity which practises in the area of trade practices law, yes.

Senator JOYCE—From amongst those hundreds of members, did anybody stand up and give you a dissertation on or an explanation of a predatory pricing case that they had successfully prosecuted?

Mr Stewart—No.

Senator JOYCE—Do you know of anyone who has ever successfully prosecuted a predatory pricing case?

Mr Stewart—In Australia, not specifically. The Victorian Egg Marketing Board case, which only went to an interlocutory stage, had some—

Senator JOYCE—I am not talking about settling out of court; I am talking about going all the way and getting there.

Mr Stewart—No. The Boral case is the only one that has reached the High Court and, in my opinion, that is a bad example to make good a point that the law needs amending.

Senator JOYCE—We have a problem. The Australian public would believe that one of the purposes of the law is people's access to justice. If you do not know of anyone in a very wide-ranging organisation who has successfully managed to take a predatory pricing case to court and win, one would have to say that the law is insufficient. The only other scenario is that predatory pricing, as a concept, is something that you do not acknowledge as being relevant—which ipso facto has happened—and, therefore, you put predatory pricing aside. If you believe predatory pricing is egregious, you have to give the Australian people the capacity to mount a case.

Mr Stewart—Yes, you do. But I think implicit in what you are saying is that there have been attempts to run such cases with the appropriate circumstances in which the contravention of predatory pricing ought to have been found. That is where I am afraid I cannot agree with you. Boral, for example, is a case that did attract some public attention and some media attention. But it needs to be understood that essentially there were undisputed findings of fact that this was an intensely competitive market, a number of firms were pricing below their costs and, yes, Boral had a purpose of damaging competitors, but it did not have a substantial degree of market power. There is a tendency to focus on comments in business documents—for example, 'Well, we'd like to drive out our competitors from business.' However, one really needs to go through the elements of section 46 first and to ask whether the corporation has a substantial degree of market power. Ordinarily, market power is the ability to raise prices, not to reduce them.

Senator JOYCE—Yes, to raise prices without losing customers. Who can prove that? The one thing we do not want in law is a case where I feel that I do not have the wealth necessary and, therefore, I do not have the access to the law that others have; therefore, we discriminate against the weak. I am speaking of a situation where I do not feel I have the power to take on somebody who is specifically working against my interest, not for the sake of competition but to destroy and remove me from the market in such a way that they get a greater share, enabling them to exploit the market. Surely there is a higher principle of making sure that the Australian people have a door through which they can walk to get access to a day in court. No matter what you might think about trade practices law, to say, 'We feel that door is too big, so now we're going to make it narrower so that fewer people can get through it,' works against the principle of simple justice.

Mr Stewart—It is a laudable aim to make justice more accessible; there is no denying that. Unfortunately, however, you have to accept that at present the Trade Practices Act has an objective of promoting competition rather than of protecting the interests of competitors, and you are dealing with behaviour that cuts prices. I would not say it is a unanimous point of view, but there is certainly a significant body of opinion, with a number of decisions and evidence from a number of economists, that, when a firm cuts prices, it is going to damage its competitors. Most firms cut prices, gleefully knowing that they are inflicting damage upon their competitors.

Senator JOYCE—You would realise that, regardless of whether 46(1AA), the Birdsville amendment, is repealed or not, the basic principle will remain that you will still have to go through a door and prove your case in court. It is not a case where, if you prove market share, you win. It is a case where, if you prove market share, you have the possibility of pursuing your case further. This debate has been structured in such a way that market share is a *fait accompli*. Market share is no more a *fait accompli* than market power is a *fait accompli*.

Mr Stewart—No.

Senator JOYCE—We are talking about competition. The ACCC is there to promote competition, I understand, and not to protect competitors. However, it stands to reason, therefore, that you must look at the

act and how it has worked under the market power test and ask yourself a very simple question: has competition in significant sections, such as fuel and groceries, increased or decreased to the detriment or to the benefit of the Australian consumer? It is quite obvious that, with grocery prices rising at the highest levels in OECD countries, our mechanism for providing competition in the market is inadequate compared to the mechanisms of other countries.

Mr Stewart—My only comment would be that in the United States—I was there recently—people have been complaining of fuel prices being too high there also. I am not sure whether you are commenting that it is a worldwide phenomenon. One has to balance, on the one hand, the freedom to compete. If one takes a policy view that even a corporation with a substantial degree of market power ought to be able to compete on the merits, the area becomes a little greyer than just taking a black and white view that, because there is a corporation with a substantial share of the market, it ought not to be allowed to reduce its prices. In that respect, I would simply comment that a substantial share of the market is not necessarily the same thing as a substantial degree of market power. One needs barriers to entry in order to have a substantial degree of market power; otherwise, if you have a substantial degree of the market and you put your prices up, if there are no barriers to entry or low barriers to entry, the new entry will come in and erode the supra-competitive profits.

Senator JOYCE—Yes. That is where, with the market power test, you have to be more than a monopoly; you have to be almost a monopsonist. You agree with the Boral case, and I can understand that. Obviously, I am very much in disagreement with you. I think the Boral case was the inception of all the legislation that is currently before us. But, to put up prices without losing customers, you have to be more than a monopoly because you have to have the capacity to restrict other people coming into the market, which means you have to be a monopsonist. Therefore, we have under the market power test basically a door so small that no-one can go through it. The law has proved that because the ACCC, which, under the market power test, now lauds the move back to the market power test, did not bring one case to conclusion under the market power test. That is correct, isn't it?

Mr Stewart—I am not quite sure what you mean by conclusion. It did bring cases to conclusion.

Senator JOYCE—It never got a conviction. People might have settled out of court or pulled up stumps, but they never went all the way. It would be unusual that, in any process of law, a case never gets to conclusion.

Mr Stewart—I would rather not speculate about that. I do not have all the cases here at my fingertips to enable me to tick them off and tell you whether that is correct. But one has to ask: what is the purpose of the legislation and how easy does one want to make it to impinge upon the right to compete?

Senator JOYCE—I suppose, to add to your question, you are saying that you have to agree that predatory pricing is either right or wrong. You agree that it is wrong because it takes away competition and centralises the market. If you agree it is wrong, you have to have some mechanism to stop it, and that is the purpose of the thing. I think that trying to talk to someone about the counterfactual criterion of the Queensland Wire case, when they are being put out of business by Coles and Woolworths selling stuff for a sustained period below cost, is just not going to run with the Australian people. They want the right to be a member of the merchant class and go into business and, from evidence, that has been reduced over time. My question to you is: does the Law Council feel that it is good for our nation to have a market centralising all the way back to a monopoly?

Mr Stewart—No, it is not; but the council does not believe that is the case.

Senator JOYCE—So, with your knowledge of the law, what piece of law are you now going to use to stop it?

Mr Stewart—One uses section 46 and the other provisions of part IV of the act.

Senator JOYCE—If this goes through, on what premise would you stop a monopoly?

Mr Stewart—I am sorry; when you say 'if this goes through'—

Senator JOYCE—If this goes through, I want to know how you would prevent a monopoly coming into existence.

Mr Stewart—It depends on what your aim is. The United States has a test of monopoly—

Senator JOYCE—But that is not us.

Mr Stewart—We do not. If your point is that you want to prevent monopolies coming into existence, then section 46 is not going to stop that.

Senator JOYCE—Do we have a divestiture power in Australia, if that does happen?

Mr Stewart—There are powers, if there is an abuse of market power, for divestiture orders to be made. And likewise, under section 50, ‘Mergers and acquisitions’—

Senator JOYCE—I grant you there are limited divestiture orders, under ‘Mergers and acquisitions’, for a very short period of time.

CHAIR—Senator Joyce, I think Senator Cameron has some questions.

Senator CAMERON—I am interested in your analysis that the ACCC is about promoting competition, not about protecting competitors. If competitors are unfairly dealt with under the law, how does the ACCC then meet its prime function of promoting competition? Aren’t both these issues fundamental to a competitive market—that is, promoting competition and protecting a competitive base in the market? I am not quite sure where you are coming from.

Mr Stewart—It has been said in a number of cases—and we are not alone in this approach; it is the same approach as in the United States—that competition laws, or antitrust laws as they are called in the United States, exist to promote competition and the competitive process. The premise of that, as contained in section 2 of the Trade Practices Act, is that competition will enhance consumer welfare. In this instance, for example, ordinarily consumers benefit from lower prices because they pay less. That has to be distinguished from the situation where lower prices are set at a level which drives out competitors and where price-setting behaviour is actually making use of a corporation’s market power. Part of the problem here is the need to distinguish between those two situations. Do you put restrictions on the extent to which a corporation can compete and engage in vigorous price competition? You might have a blanket provision, such as the one proposed, which effectively equates taking advantage of market power with the setting of price below a relevant measure of costs. Do you have a black-and-white provision like that? Or do you have a provision which relies upon the law as developed, which focuses upon whether the price cuts are above or below cost and are independent of market conditions or in fact are responding to market conditions? Say you have two firms competing in a market, one of which has a lower cost structure than the other—for example, it might have more modern equipment and its cost of production might be lower than the other. In order for the second firm, with a higher cost structure, to meet the price of the first firm it might have to set its prices below its costs. Do you want to penalise such conduct? It is a little bit more complicated than that.

The United States have an additional requirement of recoupment. I think the reasoning is that, in the absence of recoupment, consumer welfare is enhanced by below cost pricing because consumers benefit. There is a recoupment element—that is, the corporation intends to and has a reasonable prospect of putting its prices up again once the victim of its predation has left the market. It has a reasonable prospect, again, of putting its prices up above a competitive level. That is what will damage the competitive process and also consumer welfare. So one has to decide what the policy is here. We are commenting upon the law as it stands and on the premise that part IV of the act exists to promote competition, not necessarily to protect competitors from the competitive process. It is very difficult, we would submit, to introduce reasonably arbitrary, black-and-white rules which will tell corporations when they can and cannot compete.

Going back to the Boral example—and this is part of the problem with the substantial market share test—during the period of alleged predation it had a market share of, I think, between 25 and 30 per cent. In some instances that might be regarded as a substantial share of the market. But it was found as a fact—and evidence was given at trial of this by people in and outside the industry—that the below cost pricing did not reflect its market share; rather, it reflected the fact that all producers were struggling in conditions of an economic recession. It was one of the worst downturns in the building market for a long period, and also very powerful customers existed who were able to drive down prices. It was significant in that instance that, in many cases, Boral’s first price offered to the market was actually undercut by other competitors. So, yes, we agree predatory pricing is an issue which needs to be dealt with. But we do not believe that the Boral case is a good example, because it was found as a fact that it lacked substantial market power. It might have had a substantial market share, but that certainly did not give it a substantial degree of market power.

We felt that the High Court actually got it right in its analysis there. It accepted the fact that it is rather difficult to be black and white about it. I will just comment on something. I have here the Commonwealth Law

Report of the Boral case, and at page 424 Chief Justice Gleeson and Justice Callinan said that market power is usually:

... the ability to put prices up, not down. But if a market is not competitive, and a firm puts prices down, seeking to eliminate a potential rival, in the expectation that it will thereafter be in a position to raise prices without competitive constraint, its ability to act in that manner may reflect the existence of market power.

The point was also made that the ability to cut prices is not market power—any firm can do that—and that even a firm which lacks market power but which nevertheless cuts its prices will have the effect of damaging its competitors, so one might be dealing with a problem at a higher level than simply focusing on predatory pricing here. To what extent does the government wish to restrain the competitive process? If the conduct involves a use of market power and truly involves predation, then yes; there is justification for penalising such conduct. The difficulty, however, is to decide when we have predation as opposed to pricing which is simply responsive to market conditions. I will note that in the United States the Robinson-Patman Act has what I think is called the ‘meeting the competition’ defence, so that in the case of predatory pricing allegations it is a defence if a corporation, in good faith, tries to meet the lower price of a competitor. That is one way of addressing the issue; it obviously introduces other factual inquiries.

I think the difficulty is that part of the problem with the proposed amendment is that there will be a tendency, I believe, to find that, where a price is below a relevant measure of cost, that will indicate a taking advantage of market power, and whether the corporation has substantial market power will tend to be overlooked. One will tend to look at it and say, ‘There is below-cost pricing; therefore, the corporation must have taken advantage of market power and therefore it must have had market power.’ I believe that the first question needs to be whether the corporation in fact had substantial market power and that one needs to inquire as to why it was that it set its price below its costs in a situation. Did it have a choice in doing that? Very basic economic theory would tell you that a firm will shut down if price falls below a relevant measure of cost, but in the real world you might have a corporation which has a price war in one state. It might be a national corporation. What does it do? Does it shut down in the one state in which there is a price war? It might perceive there to be other advantages to it in being a national corporation, or it might believe that the situation is temporary or that pricing below cost might be necessary to retain customers in the short term to meet the market, or it might be an instance of predation. But, in each case, one has to go through that process to determine whether or not the pricing below cost is competitive or simply predation.

Senator CAMERON—Do you think the ACCC has enough resources to support a small business which believes that it has been the subject of predation?

Mr Stewart—I am not really qualified to comment upon the resources of the ACCC. It is not something that I have specifically discussed with other members of the Law Council. It might be better to speak to the ACCC itself on that.

Senator FIELDING—I am interested in your thoughts on the creeping acquisitions laws. Did you look at those at all, by any chance?

Mr Stewart—We have not looked at those—at least, I have not looked at those—so I really cannot comment upon that. Certainly, as a general proposition, one might need to limit the cases in which market power can be acquired by acquiring shares of your competitors. I think that, if the committee wanted a particular submission on that topic, I would prefer to go away and confer with other members of the Law Council. It is not part of our submission.

Senator FIELDING—Obviously it is a topic that comes up from time to time. You would be across it generally from that. I have a general comment made by Freehills:

As a general proposition the ACCC is not currently able to prevent the impact of such creeping acquisitions on competition in the relevant markets notwithstanding that individually the small scale acquisitions may not substantially lessen competition, but taken collectively, they may have such an effect.

What do you think of those sorts of comments—not the ones from that particular firm but generally about that issue of substantially lessening competition? Obviously buying a small firm may not trigger any great thing to look at, but what about over a period of time, say, of six years or so?

Mr Stewart—One has to decide whether a concentration of economic power is a good thing or a bad thing. One starts off with the proposition that the greater the concentration of economic power, the greater the potential for its abuse. Consumers benefit the most when there are a range of strong competitors who are competing on the merits. So, if acquisitions of competitors have the effect that there is less competition, then

one would think that it is going to also have the result that the corporation which has engaged in the creeping acquisitions may—not necessarily will, but may—increase its market power in the process. That will carry with it the potential for a taking advantage of that market power.

Monopoly, in theory, is a bad thing because monopolists raise prices; they restrict output. Anything which restricts output is not a good thing, one would say. But, on the other hand, you have the other extreme of perfect competition, where no firm has any market power and you have myriad sellers. One of the criticisms of the perfectly competitive market is that there is no incentive to innovate. One needs to reap some rewards from innovation if one is going to think it worthwhile to invest in developing new technology and new processes. Patents are an example of that. I do not want to discuss the merits of patents, but that is a traditional example of one of the reasons why patents do exist.

At a general level there is a concern with the concentration of economic power because of the potential dangers it can bring with it, absolutely.

Senator FIELDING—Thank you.

CHAIR—Thank you, Mr Stewart. I think you have taken us through the complexities of section 46 well.

[11.46 am]

HENRICK, Mr Kenneth Michael, Chief Executive Officer, National Association of Retail Grocers of Australia

van RIJSWIJK, Mr Gerard Anthony, Senior Policy Adviser, National Association of Retail Grocers of Australia

CHAIR—Welcome. Would you like to make an opening statement?

Mr Henrick—Yes. I should start by saying that, when the Birdsville amendment went through, we strongly supported that as a statement of principle by the government that predatory conduct was unacceptable and would not be tolerated. We have recognised, however, that there were concepts within the bill which probably would have required definition by the courts—‘market power’, ‘sustained period’, ‘for the purpose of’ and so on. We note that, in relation to this bill, some of those issues remain unchanged. There are still no redefinitions of ‘relevant cost’ or ‘sustained period’ or ‘for the purpose of’. We take ‘for the purpose of’ to be a smoking-gun definition that would require some sort of substantiation by perhaps a document.

In the changes that are being proposed in this bill, we are not entirely comfortable with the return to the concept of market power. It may be that we are simply not expert enough to appreciate the nuances—neither of us are lawyers as such—but it seemed to us to be a lot easier to define ‘a substantial share of a market’. If we go back to ‘market power’, presumably we are going back to the definition of market power set by the High Court in the Boral case, which led to quite a number of difficulties, in our view. The information that was given to us was that ‘take advantage’ would be defined in a way which strengthened the bill. That may be the case, but, on our reading of it, at this point anyway, we are not convinced that going back to ‘market power’, in itself, would improve the situation of ‘a substantial share of a market’.

CHAIR—Thank you, Mr Henrick. That is all at this stage?

Mr Henrick—Yes, thank you.

CHAIR—Thank you. We have heard a view that ‘market share’ is not a good definition in the Australian environment across all industries, perhaps not so much the grocery industry, but that market share in a small market like Australia may not constitute necessarily a non-competitive situation where you have, say, two or three people in a small market. Are you just talking about the grocery industry, or do you believe that that has a wider application in terms of market share versus market power?

Mr Henrick—I think it does have a wider application. I was aware of some of the hypothetical examples that the ACCC put forward in recommending these changes, but some of them were really abstruse, to be honest. The idea that a company may have a large local market share but be constrained by the threat of imports, for example—if a company were in that situation then presumably it would not be doing what would draw attention to it and invoke the law.

CHAIR—You mention predatory pricing in particular in your submission and mention that it is difficult to define it. I think that would certainly be the case in the grocery industry, where you are dealing not with a few products but with many products and it is quite a complicated process. Can you say what your preferred approach would be?

Mr van Rijswijk—The difficulty in the grocery industry, as you say, is that supermarkets have 25,000 lines, but they only need to drop the price on a few lines in order to attract business away from a competitor. The difficulty in the grocery industry is that, because of its high concentration, it is impossible for a small competitor to understand what may be the relevant cost for one of the majors. We used to have a price discrimination clause in the act, which was deleted at the recommendation of Professor Hilmer. In the absence of price discrimination legislation, there is no floor underneath the pricing of goods, and a small trader would not know what possibly could be the relevant cost for a competitor. They would not even know whether the action being taken by a competitor was in fact predatory under the definition in the act. Further, we have had the experience with the ACCC that whenever we have talked predatory pricing with the ACCC they have continually said to us: ‘No, you don’t even know whether it’s predatory or not because you don’t know what costs your competitors have. You may think the price is below their cost, but we don’t think that is the case.’ And the rest of the time they never even bother to investigate. It has always been a cop-out by the ACCC in terms of their investigation of predatory activity: ‘You’re not as big as the other guy, and you don’t know what their costs are, so why even bother complaining?’

Mr Henrick—I will add to that. That leads us to another issue in all of this area of the law, and that is: it may be that the Trade Practices Act is deficient in some way, it may be that the interpretation of the legislation by the regulator is deficient in some way, or it may be some of both. The difficulty is that the ACCC's statements over the past several years have been along the lines that they expect the complainant to bring all of the evidence to them. In this area of predatory pricing and particularly in relation to relevant cost, it is impossible for a small business to know what a large business's relevant costs are. The only people with the power to investigate are the ACCC, and they do not.

CHAIR—In terms of the ACCC not investigating predatory pricing, are you saying that they are not taking up any cases—or not to your satisfaction?

Mr Henrick—I do not think they have taken up any cases. In fact, we drew one possible example of predatory pricing to their attention just before the formal hearings of the grocery price inquiry began. They gave us all sorts of reasons on the spot why that would not be predatory pricing. The example that we gave them was the case of an independently owned IGA supermarket in Cootamundra, New South Wales, where the local Woolworths store was advertising weekly specials in that town which were considerably below Woolworths statewide weekly specials that week. That behaviour went on for about eight weeks. About two months after we had raised that with the ACCC, they still had not begun any inquiry. It was only when I raised that matter in a letter to the minister—two days after I sent the letter I had an email from the ACCC asking for the contact details of the independent in Cootamundra, and we have heard nothing since.

CHAIR—So you are not aware of the ACCC having taken up any complaints about predatory pricing?

Mr Henrick—No, we are not.

Senator FURNER—I just want to get, firstly, an understanding of who you represent. We have in your submission several dot points—IGA, which I am familiar with, being Metcash, on which there is a summary in our brief. Could you just explain some of those other associations that you represent as an organisation, please.

Mr Henrick—Okay. I should start by saying that IGA is a banner owned by Metcash, but the individual businesses which comprise that banner are privately owned businesses. They are owned by a person or a company or a partnership; they are not Metcash. The other—

CHAIR—I am sorry; we are not hearing you very well. I am not sure why.

Mr Henrick—Is that clearer?

CHAIR—Yes, it is a bit.

Mr Henrick—Okay, I will explain again. Have you heard enough about the IGA-Metcash link?

Senator FURNER—Not really.

Mr Henrick—Okay; I will start again. IGA is a banner owned by Metcash, but the individual IGA stores are owned by families and small business partnerships and so on. There are individual stores, or small groups of stores, or substantial groups of stores such as the Ritchies IGA group in Victoria. We are effectively a federation of state based small retailer organisations. Those member organisations have retailers as their direct members. We do not have individual retailers as direct members of NARGA.

Senator FURNER—Thank you for that. Can I take it that you have a copy of the Metcash submission handy or that you are familiar with it?

Mr Henrick—No, I cannot say that I am.

Senator FURNER—So you are not familiar with it and nor do you have a copy in front of you?

Mr Henrick—No.

Senator FURNER—I will just briefly explain one of the graphics in it, which shows an example of the acquisitions by Coles group, purchasing IGA Wyong; Action Supermarket, Busselton; and Hallam Supermarket. Then, over in the next column, headed 'Acquisitions by Woolworths', there are several acquisitions by that company. I am just hoping to get some understanding, because, apparently, the ACCC was successful in blocking one particular acquisition, which was the Karabar Supabarn supermarket by Woolworths. My question is: to your knowledge, why is there a difference between acquisitions by Coles and Woolworths—given, I guess, that they are large organisations that have a thirst for acquiring small businesses? To your knowledge, is there any reason why you have something like eight or nine listed for recent acquisitions since 2005 by Woolworths compared with only three by Coles?

Mr Henrick—I am not sure what the difference is in the numbers of acquisitions by each of those companies, but the issue is quite an important one. Last year, the ACCC allowed the acquisition by Woolworths of an independent retailer in Jindabyne in New South Wales. That was the only substantial grocery store in that town. And it took the regional market share of Woolworths—because it had both of the existing supermarkets in the next biggest town, Cooma—from 70-something per cent to 90-something per cent. In effect, it eliminated competition. The ACCC allowed that, but then, after the government changed, the ACCC suddenly decided that it should block the Karabar takeover. That is a change in practice—the law did not change in the meantime; that was the ACCC’s change of approach.

Senator FURNER—So that has only occurred since there has been a change in government, you are suggesting, with the block of the Karabar takeover?

Mr Henrick—Yes, it has.

Senator FURNER—So surely that is an advantage to your members, in that it is a demonstration of the ACCC—

Mr Henrick—We welcomed it, Senator, yes.

Mr van Rijswijk—But you need to understand that, since the Trade Practices Act was passed in the mid-seventies, these major changes have gone on unabated and under the eyes of the ACCC, and that, since that time, market share for the majors has gone from 35 per cent to close to 80 per cent. Yet every time the small business sector has raised the issue of creeping acquisitions, the response from the ACCC has been that each acquisition was not a substantial increase in market share and so has allowed the acquisition to take place. We find it surprising that, now that there has been a change in government and a signal from the new government to the effect that it intends to tackle the creeping acquisition issue, all of a sudden the ACCC finds it to be within its capacity under the act to block the Woolworths takeover in Queanbeyan.

Senator FURNER—Thank you for that.

Senator CAMERON—We have had evidence here today about the difficulty for small business to access the legal processes required to prove disadvantage in terms of the competitive position. Do you feel that the ACCC provides sufficient access and support for small business on these issues? I get the feeling from your opening submission that you are questioning that. Could you give me some idea about that, and could you expand on the problems that you feel exist in access to legal recourse.

Mr Henrick—The issue is this: 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, particularly since the Boral case. I do not believe that there has been a section 46 case taken since the Boral decision was handed down.

Senator CAMERON—Another decision we heard this morning was very critical of the appointment of a deputy commissioner with small business experience to the ACCC. What is your organisation’s view about that appointment?

Mr Henrick—We have no problem with that at all. In fact, Professor Michael Schaper has a very strong background in small business matters and I think that he will make a valuable contribution.

Senator JOYCE—We have heard the clear evidence that there has been a paucity of cases that have progressed through and that there has been a feeling that your members do not have access to a day in court because the mechanism of market power is too narrow a definition to allow you to take your case forward. What ‘market share’ did was not to give you a carte blanche but just to give you access to a process of law that was impossible for you to access before under the market power test. Is that a fair or unfair statement? Is it right or wrong?

Mr Henrick—That is a fair statement and we would agree with that. This whole question of market share and market power is complex, and anything that helps a small business to have a chance to be heard fairly in court is an advantage. Unfortunately, the law is so complex, and the definition of market power, as set in the Boral precedent, makes it very, very difficult for an individual or small business to take on a much larger competitor. In that context, you might remember the Safeway bread case from Victoria. By the time that was decided and Woolworths penalised, the small businesses who were all involved in that case were all out of business.

Senator JOYCE—Does predatory pricing exist? The gentleman before us today from the Law Council said the Boral decision was right, that sometimes people have to put other people out of business and that that is just the way the market works. It is not there to protect competitors; it is there to protect competition. My belief, obviously, is that, once the competitors are gone, there is no competition. Do you believe that predatory pricing from your membership exists? Do you have examples where other organisations or major retailers have tried not so much to compete with you as to force you out of the market?

Mr Henrick—There is some anecdotal evidence to that effect. There have been for many years examples of attempts by the major chains to acquire local small businesses, small grocery retailers, and when the offer to purchase is declined they have effectively opened right across the street and destroyed them by low prices. That may or may not be predatory pricing according to the law. We believe we can substantiate that in the Cootamundra example that I gave you before. We have another example in another industry which would be a very interesting case in relation to selling below relevant cost. The cost at which the larger competitor in one industry has been targeting the small business is zero; the large competitor has been providing services free of charge to clients to eliminate the smaller competitor.

Senator JOYCE—Oh, my gosh.

Mr Henrick—If that is not below relevant cost, I do not know what is.

Senator JOYCE—Free is definitely below relevant cost. With the changes we had under the Birdsville amendment section 46(1AA), are you surprised that the ACCC have not really been more proactive in using the law that was available to them to pursue some of the 75-plus cases that have been brought before them?

Mr Henrick—I was not aware of the 75-plus cases. One of the difficulties we have with the ACCC is in relation to transparency. We brought to their attention another case relating to Woolworths and liquor retailing and they said: ‘Thank you very much for that information. Now we can’t talk to you anymore because it is a matter between us and Woolworths.’ We are a little surprised that with 75 cases there was not one valid case that they could have taken to court.

Senator JOYCE—I find that surprising as well. With your knowledge of the marketplace, after the competition is taken out of the market by predatory pricing, do the prices for the consumers who are left in that market generally go up, down or stay where they are?

Mr Henrick—I could not answer that; I am not sure. There have been again anecdotal reports that prices have gone up, but I am not aware of which prices or which cases that related to. Having said that, the idea of recoupment in this area is really quite superfluous. We do not believe that showing recoupment is essential at all. The large predator company can recoup simply by increasing its market share in the local market.

Senator JOYCE—Yes, obviously once there is no competition he does not have to worry about recoupment. It is just a natural course of events and it can do what it wants.

Mr Henrick—Within the grocery chains because there are so many products on the shelf—25,000 in a typical supermarket—predators can recoup on the spot because all they need to do is reduce the prices of a few items and compensate by raising the prices of a few others. Once the shopper gets the idea that the prices are lower on those few items, the damage is done. The other option is to recoup through other stores not in that particular area. If you have 700-plus stores at your disposal, that is quite easy to do. 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.

Senator JOYCE—Obviously, this legislation would water down your people’s capacity to prosecute a predatory pricing case, but if predatory pricing is not dealt with strongly, what would be the inference for your supermarkets, for any independents that we need in the market to keep competition in place? If a scheme was to come into place which actually gave transparency, like a grocery watch scheme, so that those items which are price leaders for predatory pricing, such as bread, milk and butter are available then big supermarkets could actually use that grocery watch scheme to advertise their predatory pricing process to make it even harder for you.

Mr Henrick—That is true. We have a number of problems with the grocery watch scheme. I should say that we have had no briefing or discussion of the methodology of that system, so it is difficult to know just what is being proposed. But there have been suggestions to us that prices would be average for stores in a region or that the cheapest store in a region would be nominated. That opens up the whole system to manipulation. You could have one chain store in a region that is selling everything at a very low price or,

worse, at a higher price. Yet the impression left with consumers could be that that particular chain is the cheapest.

Senator JOYCE—This is probably to Mr Henrick. It has been put up that the Birdsville amendment was something that I concocted purely in a hotel one Friday afternoon. All the detractors have come out with the most spurious allegations. But just to get this on the record, this is also something that NARGA and all small businesses have been pursuing together over a number of years. It does not belong to any one person in particular but to a whole range of people who, over a long period of time, have tried to bring about this change.

Mr Henrick—I would have to agree with that. I think that it is a matter of record that the major small business organisations, not only in the grocery sector but also the Council of Small Business Organisations of Australia and others, have all been campaigning for strengthened provisions in relation to predatory pricing and they all supported that amendment when it went through.

Senator JOYCE—That is exactly right. That is why I always try to get it on the record. It was after two years work. People such as NARGA, the Southern Sydney Retailers Association and the Warringah group have all been vigilant participants, and although one person may have written it and another person may have advocated it, it was a communal belief of a whole range of people trying to get an outcome.

Mr Henrick—That is correct.

Senator JOYCE—Thank you.

Senator FIELDING—I notice that NARGA supports the bill with regard to creeping acquisitions. I am just trying to do a bit of background here. There was one submission that said that the bill should be limited to highly concentrated markets. Do you have any thoughts on that at all? This is with regard to the creeping acquisitions and limiting that bill's effect to highly concentrated markets.

Mr Henrick—Yes, the legislation—I forget the section number—refers to assessing market concentration at local, state, regional and national levels. The difficulty we have had in this area is that Australia has the most concentrated grocery industry in the world. That is beyond dispute. Although, having said that, the ACCC seems to have had difficulty in coming to grips with it. In our experience, the ACCC has used either a local market assessment, a state market assessment or a national market assessment to come to the conclusion that nothing needed to be done. That has been the historical situation. The reality is that, in our view, the commission ought to be looking at all three levels of the market and, as my colleague said earlier, the difficulty that we have had is that they do not do that. They simply pick out one. Mr Samuel is on the record on many occasions saying that his role is to protect competition, not competitors. But he has never gone on to explain how you enhance competition while requiring the number of competitors to be reduced.

Mr van Rijswijk—Could I just add to those comments. Under section 50 of the legislation you have the ability of the regulator to look at the market nationally, or by territory or region. We suggest that that all should be part of the creeping acquisitions amendment. You commented that it should only be based on local competition.

The other worry is that with the concentrated market as we have in the grocery sector, the additional market share that the majors have comes from the independent sector. If that trend is allowed to continue with the majors acquiring stores in areas where there is no so-called concentration, then the market share of the majors will gradually increase. The market share of the independents will gradually decrease to a point where it is no longer viable to supply the independents as they will not have the purchasing power and they will not have the ability to support a distribution network or a distribution centre. The total market share is also an important factor to take into account. The independents cannot stand any further erosion of their market share and therefore it is important to stop creeping acquisitions wherever it occurs, not just in locally concentrated markets.

Senator FIELDING—Thank you; that makes sense. There has been some dispute about market shares and some of the big players dispute that up to 80 per cent is controlled by a couple of players. Do you have any figures that you have looked at recently, or do you have any comparisons about who has the share in groceries or have you done any market sizing?

Mr Henrick—We have, Senator. We supplied figures in our submission to the grocery inquiry and I understand that that report is to be released this afternoon. We actually put in a supplementary submission which dealt with that. The figures that we were able to supply related to total food sales in Australia. Food is a very large category in supermarkets and is a proxy for all supermarket sales. Within that total food sales,

supermarket grocery stores were 62 per cent and of that 62 per cent, 50 of those 62 per cent points were held by Woolworths and Coles. In other words, within the supermarkets and grocery stores sector, 50 per cent is 80 per cent of the 62 per cent. There is no doubt in our minds that that is a valid market share measure. The other way that it could have been tested by the ACCC—and I do not believe they took up the suggestion—is that they could have asked the major national suppliers, say Kellogg's, Arnott's or any of the major national suppliers, what percentage of their total sales at wholesale level went to Woolworths and Coles versus the rest of the market. There was some indication in some of the submissions to the grocery inquiry that the chains had 73 per cent of food sales, and there was another figure which was 78 per cent but I cannot remember the category off the top of my head. There were other submissions to the inquiry which supported the general proposition that they were approaching 80 per cent of the market.

Senator FIELDING—I think it is really important for that not to be camouflaged too much, otherwise if you do not think you have a problem, then you do not look for a solution. To me it is really important that that one gets out there because I keep on hearing that we don't have that much, we only have this much. What is happening on the ground does not sound real to me when you talk to the mums and dads where people shop. When talking about the creeping acquisitions, a number of submissions had referenced a charter for the acquisition of independent supermarkets—

Mr Henrick—That is correct.

Senator FIELDING—which was agreed to by Woolworths, Coles and Metcash. Does that charter mean that we do not have a problem with creeping acquisitions? Some people are saying we do not need anything on creeping acquisitions because that does something.

Mr Henrick—It does not help much at all. I should say at the beginning that it is a voluntary code. In relation to the purchase of the store in Jindabyne, the ACCC were unaware of it until I rang them and told them that it was happening. Woolworths had not bothered to notify the ACCC that they were in any sort of negotiation with that independent. The idea of that charter was that the independent should be able to get the best price available for his business if he wished to sell, but that the independent sector as a whole ought to be able to have an opportunity to match that best price and retain that store and that business within the independent sector to avoid the creeping acquisitions.

Senator FIELDING—Is there any doubt in your mind that there is a great need for creeping acquisitions legislation? We are dealing with two issues here. One is the predatory pricing issue, which was dealt with a bit last year and there are some changes coming through. But I think what has been forgotten here is that there is also another part, which is the creeping acquisitions and how important that is. Have you got any thoughts generally on the creeping acquisitions and how important that particular change would be for the Trade Practices Act?

Mr Henrick—The creeping acquisitions situation as it was applied by the ACCC all the way up until the Karabar example this year, and that is only one example in many, would indicate that the way that the creeping acquisitions legislation has worked in the past has been inadequate. There is a very great need to strengthen these provisions. I guess one might debate that there are various ways to strengthen them, but they certainly need to be strengthened.

Senator FIELDING—Thank you.

CHAIR—Thank you, Mr Henrick and Mr Rijswijk, for participating.

Mr Henrick—Thank you very much.

Mr van Rijswijk—Thank you.

Proceedings suspended from 12.28 pm to 12.39 pm

LOWE, Ms Catriona, Co-Chief Executive Officer, Consumer Action Law Centre

RICH, Ms Nicole, Director, Policy and Campaigns, Consumer Action Law Centre

CHAIR—Welcome. Do you have an opening statement you wish to make?

Ms Lowe—We have made a submission to you. I was not proposing to recanvass much of what we have submitted. In our submission you will observe that we are extremely supportive of the amendments proposed, with a couple of notable exceptions. We certainly agree with the desire of the committee and the government to address what has proved to be a rather intractable problem in rendering section 46 enforceable without overreaching the impact of the section. We are very happy to take questions in relation to those issues but we were basically proposing to focus on two issues in our presentation today.

Firstly, we want to talk a little more about what we see as an important ongoing monitoring exercise in ensuring the effectiveness of the amendments and ensuring that what is desired to occur does in fact transpire with the amendments. We also want to talk for a moment around the issue of the Small Business Commissioner specifically but more generally about the commission and the blend of skills that may be appropriate in relation to the ACCC commissioners. Turning first to the monitoring exercise, we have reflected on the difficulties that there have been in reinforcing this section, recognising that there has only ever been one successful prosecution under the section, despite views by a range of people that there were other instances of conduct that ought to be captured by that section.

We were encouraged that there is to be a forum for detailed and practical ongoing dialogue with the ACCC—assuming that these amendments are carried—around practical issues that they may be experiencing in undertaking investigations under the new section, whether they be keeping a handle on practical difficulties or encountering evidentiary difficulties. So we are able to keep a timely handle on how those amendments are taking effect, bearing in mind that it can take many years to get a case into court. We do not necessarily want to have to wait three, four or five more years to know whether the amendments are having the effect that we hope them to have. Obviously, a court decision is the ultimate determinant of that; however, I think the ACCC are highly likely to have practical information to bring forward in terms of their experience even prior to that point. That was the first issue in our submission that we wanted to highlight to you.

The second item is in relation to the proposal regarding the requirement to appoint a deputy chairperson to the ACCC who has small business expertise. I think the first very important thing to say is that we absolutely agree that there should be expertise at the commission table around small business issues and, indeed, a range of other issues. I guess that is where our concerns regarding the proposed amendments arise because it does appear to be a somewhat isolated treatment. If you look at what the act already says around expertise, qualifications and so forth, whilst we can see that in practice, for example, a tendency has arisen to appoint to the deputy chair position someone with consumer experience, that is not in fact enshrined in the legislation in the way that the amendment now proposes to enshrine in relation to the small business role.

Our point is that we certainly think it is a very worthwhile and healthy exercise to consider the necessary blend of skills around the ACCC table and an issue worth revisiting over time as our markets and the skills that our regulators need change, but we are concerned that this does not appear to be a fulsome consideration of that issue. Rather, it appears to pick up one particular skill set without looking more broadly at the other skill sets and stakeholdings that obviously have a very key interest in the role of the ACCC. We also come back to the fundamental principle that, at the end of the day, the overarching objective of the Trade Practices Act is to serve the long-term interests of consumers, and any other work that the ACCC does, whether that be in relation to competition, small business issues or indeed consumer protection, is all intended to be done with that end objective in mind.

CHAIR—I want to address your first issue first. You were talking about the ACCC and the way their practices work and their consultation process. I do not recall whether it was specifically on this issue, but the ACCC did say at a budget estimates hearing that, more recently, they tended not to take cases to court but rather tried to reach an arrangement with the company on the basis that it is clearly much cheaper to do it that way and it is a better use of their resources. They felt they got a reasonable outcome. Can you give your view of that and whether you think that is a good approach?

Ms Lowe—‘Sometimes’ is the short answer we would give to that question. Certainly, in cases where there may be a clear breach of legislation or perhaps an inadvertent breach, where there may be little question that it is a breach of the law—and the desire really is to get it dealt with quickly and to perhaps get some redress for

consumers that may otherwise be unavailable—then, yes, the enforceable undertaking can be a useful mechanism. That comment in and of itself, however, raises a couple of other issues, some of which we have also touched on in our submission.

Part of the reason that the ACCC have needed to rely more heavily on enforceable undertakings, in addition to the efficiency benefits that they can deliver, is that they are in fact significantly constrained by the sorts of remedies they are able to obtain at present through a court action—in particular, remedies around consumers who may have suffered detriment who are not named parties to the legislation. That is a problem that arose as a result of the decision by the High Court in both the Danoz and Medibank cases. The response in relation to the undertakings is, to some degree, not entirely, a function of the fact that the ACCC are constrained in other ways, due to court decisions. We think those problems need to be fixed. They are problems that have been in the public arena for some considerable period. As we have commented to the committee in our submission, there have been a number of instances where amendments to the Trade Practices Act have been made and, time and time again, to our great disappointment, one of the amendments that has not been made is to that framework that enables the ACCC to do that very important work of obtaining redress for consumers who have suffered loss as a result of either anticompetitive behaviour or breaches of parts IVA or part V of the act.

Going back to the enforceable undertakings, we certainly also think that there is a very clear and important role for regulators in appropriate cases to take the case to court. We are certainly very sympathetic to the desire to be careful in the expenditure of public resources but nevertheless regulators are one of the very few parties that are in a position to see a piece of litigation through to the end from a resourcing perspective and it is important in certain cases, and certainly, for example, will be in relation to section 46, to establish where the boundaries of the law are. You cannot do that with an enforceable undertaking. You need the court to make that final determination. We would add that it requires that regulators be prepared, and are enabled, to take cases that they may lose for the purposes of establishing where a boundary is. If you always take a dead-set winner, no-one is in any doubt that it is within the established boundaries of the section. We think that a very important public policy aspect of the role of the regulator is to clearly establish where the boundaries of the law are, otherwise in discussions about whether we need further regulation in an area, for example, we are missing a very fundamental piece of information—that is, does the law we already have respond to this problem?

Senator JOYCE—Thank you very much, Ms Lowe. I would want to refer to your submission where on the second page you say:

Given the other proposed amendments to section 46 contained in the TPA Bill, we consider that it is reasonable to amend subsection 46(1AA)—

which for the purposes of the discussion today is referred to as the Birdsville amendment—

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).

With the argument of consistency, couldn't it also be made consistent by just making the market share test the test of 46(1)? That would also bring about consistency.

Ms Rich—You are right. When they first amended the act to put in the Birdsville amendment, as you refer to it, the reason for changing the test, as you would obviously be aware, was that there were significant problems in the past with successfully prosecuting predatory pricing or an alleged predatory pricing case. One of the reasons for that was proving substantial market power. Another problem is proving the taking advantage of power, and that is addressed in the bill. So you are right.

If the only argument for amending it that way is consistency, then possibly you could amend section 46 the other way instead. We would probably concede that using a substantial market power test is probably closer to the economic concept that the act is trying to put into practice. The law is not there because we decided that we did not like this conduct. Essentially, the reason for these provisions is that there is an economic concept of competition that we want to foster for various reasons—because it is in the public interest and it does enhance the welfare of Australians in total. The Trade Practices Act is attempting to ensure that those competitive principles are engaged in in practice and that anticompetitive conduct is stopped. So if you are looking at what we are trying to do with the act, then I think that the things we are concerned with are the taking advantage of the situation. It is not about saying that the people who are big in the market cannot act in a particular way. It is about saying that you cannot misuse substantial market power.

Senator JOYCE—Taking this point in isolation, what is easier to prove: a person has substantial market share or a person has substantial market power? On a basis of proof which is easier to prove?

Ms Rich—I think that we would see substantial share of the market as a relevant factor in determining whether a party has substantial market power. That given, by its nature it probably would be easier in many cases to just prove that somebody is big or somebody has a substantial share of the market—although even that can be difficult. But just because it is easier to prove does not necessarily mean that it is correctly reflecting the test for that sort of conduct that we are trying to stop.

Senator JOYCE—Nor do we want it to be. I understand exactly what you are saying there. If there are doors for people to travel through to get the recourse of law available to them, the market share door is a far bigger door than the market power door. Once you get through that door you have to prove your case. The door you have to go through is going to be either the market share door, which gets you into a process of recourse of law to deal with an issue, or the market power test. Your knowledge of the history of the market power test is that this was an exceedingly small door which no-one got through.

Ms Rich—I agree with you. That is why our submission is not totally conclusive on whether we could say for certain that this is an appropriate amendment. We are saying other aspects of the bill would perhaps address some or all of the problems with proving predatory pricing cases, but we certainly do not say, ‘Yes, change it, then leave it and do not worry about it any further.’ That is one of the reasons why Ms Lowe said in her opening statements that we encourage you to monitor this issue on an ongoing basis. Changing it back may prove that it becomes impossible to take these cases. If that is the case, it will need to be reconsidered. But it is hard to say because the amendments that take away the recoupment of loss as an element that must be proved in predatory pricing are also very important, as are the amendments that will make it easier to prove that someone took advantage of market power. I take your point that you have to prove all three limbs of the test to prove that someone is engaged in predatory pricing or in abuse of market power, and that includes proving market power and taking advantage of that for a purpose that is not allowed.

Senator JOYCE—Whereas currently, if it is market share, then you have to have sold for a sustained period below cost for the purpose of reducing or removing competition from the market. Of course, ‘for the purpose of’ is the role of the court. It is not saying someone’s Christmas sales are for the purpose of removing competition; Christmas sales are for the purpose of Christmas sales. Removing dud stock is for the purpose of removing dud stock. It is when you do it for the purpose of removing competition and you do it below cost for a sustained period that you currently get yourself into strife. The recoupment test was never actually an issue in legislation. It was an interpretation of the court in the Boral decision, wasn’t it?

Ms Lowe—That is essentially right. As we understand it, the basis on which the ACCC took the Boral case was that they could establish the requisite levels of market power and, in their view, they could establish the conduct. It was the interpretation then taken by the court of what was required for recouping those losses.

Senator JOYCE—Since this was never actually in legislation, the purpose of bringing up legislation to get rid of something that was never there in legislation does not stand to reason. You cannot remove something that was not there.

Ms Lowe—I would argue that courts, in coming to their decisions, do take account of what is there. We would seek to give a signal to the court.

Senator JOYCE—A signal—that is a very good point. As a signal in the last piece of legislation—that is, amendment 46(1AA), the ‘Birdsville amendment’—in the explanatory memorandum it was clearly spelled out as coming as a directive from the government and the minister that recoupment no longer needed to be proved. It had to be removed as a mechanism. It may be an issue but it does not have to be proved to be successful in a case. That has already been out in an explanatory memorandum. It has already been out as a discussion from the government. It has already been accepted. So, in removing the recoupment test, we are removing something that has already been removed.

Ms Rich—This is just a legal point: statements that are made in explanatory memoranda and so on are relevant to courts in interpreting legislation but are not necessarily conclusive. It obviously has more force if it is included in legislation. The other thing I would say is that it is actually not uncommon for legislation to address points of law that have been raised or enunciated by courts. On this particular matter I do not know but, certainly, it is not uncommon at all for legislation to address court raised points of law.

Senator JOYCE—And, at best, it is addressing something that has already been addressed again. If that gives more strength to it, so be it. I have no problems with that. The other thing is this. The argument is brought forward by you as regards trying to get a consistent test. There are other sections in the Trade

Practices Act that have duplicate approaches to certain issues. I think section 45 has them in it. It is not unusual for the act to have duplicate approaches to certain issues.

Ms Lowe—We can see in a range of sections in the Trade Practices Act that there is a range of approaches that are taken to different issues. I think the argument could be put that they are in fact targeting different types of conduct. In section 45 there are different sorts of arrangements or contracts or circumstances in which understandings are reached, for example, or prohibitions are made. In relation to section 46, it does appear that what is being attempted is a general prohibition and then a more specific iteration of that prohibition. In that sort of circumstance we can well see the desirability of consistency.

Senator JOYCE—About two years of work by small business and other people at a range of times has ended up making that door wider by reason of the market share test vis-a-vis the Birdsville amendment. That consistency takes us back to a smaller door. It takes us back to a smaller access by the Australian people to a form of recourse by law. The argument is put by those with a strong vested interest who have been here today. They have said that there has not been one successful case. When asked to put their hand on the hotplate and when asked about a successful predatory pricing case by small business they cannot nominate one. What they do want is consistency to go back to a form of access to recourse by law which will once more preclude those small businesses from availing themselves of what is now not a solution but at least an access to the solution. I will put it more succinctly. What of the argument of having a consistency mechanism, being that peddled by those with a vested interest to close the size of the door down again?

Ms Lowe—I cannot speak as to the motivations of other parties that have appeared here before you. It seems to us to go back to the point that Nicole was making before. This is a vexed issue and a vexed area of the Trade Practices Act. There is absolutely no question about that. We are of the view that other amendments that are proposed as part of this package may address some of the problems that have been experienced in the past. However, it is not clear and there have obviously been attempts in the past to address this issue that have not been successful historically. That is why we are also very keen to see ongoing and timely dialogue around the implementation of these provisions so that if it is proving to be impossible, from an evidentiary point of view or practically, for the ACCC to pursue the cases that they view as harming competition and harming the long-term interests of consumers, then we want to be hearing about that very soon. We do not want to have to wait for the next Boral to be run through the court system.

Senator JOYCE—I can help you here. Since the Boral decision in 2003, I think—and this is evidentiary—there has not been one successful case prosecuted using the market power test. That is a fact, isn't it?

Ms Lowe—This is the precise issue that we are here to address. We cannot look into the crystal ball and see—

Senator JOYCE—Unless we change the market power test to the market share test, I can imagine where we will end up. Obviously, if I were in the court and I said, 'Where have you gone back to?' and you said, 'We've gone back to the market power test,' I would say, 'Well, that's where we are back to,' and then you would have to prove that the person that you have a grievance against can raise prices without losing customers before we would need to go any further—and without any of the other glossary as to predatory pricing. You would have to prove that to me first. Because that is an impossible thing to prove, it is dead-letter law. You can go no further. A market power test leads you to an area of dead-letter law because to prove market power proves that you are out of a job. And if that is not the case, give me one example in Australian jurisprudence where market power has worked as a test.

Ms Rich—There have been minority High Court decisions that have found against the majority, so it is not—

Senator Joyce interjecting—

Ms Rich—Sorry, Senator, but I do not know if we can say much more. We agree with you that it is not necessarily—we are not just saying that this should be set in stone and we should walk away and assume it is going to work. We certainly want it to be monitored if it is going to prove very difficult in future and if there are legitimate predatory pricing cases that fall over in the court. Then obviously it needs to be looked at. Our views about changing it back for consistency, I would not say we are 100 per cent wedded to that; we are just saying that we can see some merits in consistency and we also see merits in the other changes proposed by this bill. So I do not know if we are in total disagreement on this point.

Senator JOYCE—I am sorry; I was probably a little bit too verbose about that. If the vested interests that have succeeded over a number of years in increasing their market share—I would suggest at the exploitation

of the Australian consumer—win on getting rid of the Birdsville amendment to the market share test then they have put out that light that we could have shone into other areas of the Trade Practices Act. That is their concern: the market share test will become something that applies to other parts of the act. That is why they are so fervent in their wish to extinguish it right here and now.

CHAIR—I do not think that is a question.

Senator BUSHBY—I would like to explore that same issue a little bit further. I note in your submission and in your responses to Senator Joyce that you appear lukewarm in your support for the changes. When talking about removing the Birdsville amendment, you think it is reasonable to amend—it is not something that is imperative; it is a reasonable thing—and you caveat in a number of places that we need to keep a very close eye on what will happen as a result of these amendments. You are commenting on the amendments, but, as an organisation, do you have any alternative suggestions as to how you would have liked to have seen the predatory pricing aspect of the act dealt with?

Ms Lowe—Part of the reason that we are not 100 per cent supportive of what is proposed is that it is very difficult to see a way through in this area. We are well aware that highly expert people have spent a long time thinking about what is the appropriate way to navigate through these difficult sets of issues. We do not hold ourselves out as highly expert competition drafts people. We absolutely acknowledge that there is a need to address this issue. We are very well aware that historically the balance has not been right, that those in positions of public policy—regulators and others—have clearly taken the view that that is going beyond what is competitive conduct in the marketplace, but the question is how you address that without picking up a whole lot of other conduct that is not anticompetitive because of other pressures that are at play in the market or because of other factors that are in play in the market. This is absolutely a highly complex question, we acknowledge that entirely. Nicole has referred to the fact that there is not a unanimous view about this in the highest court in our land. We are absolutely cognisant that it is complex and that it is very difficult to bring that complex set of economic factors together with what is complex legal terminology and interpretation and be sure that the solution that has been arrived at is the right one, because to a degree we are not going to know until we try it in practice. Again, we come back to this desire to keep a very close eye on how these are working in practice.

Senator BUSHBY—Which I think is a very good idea, and I think that not only consumer groups but others as well should be doing that. That comes back to the question that I think Senator Joyce was asking. You are keen to try it, but we have already tried it, so how do you see it will be different this time when it clearly did not meet the test for delivering the outcomes for consumers that it should have before? How will it be different this time?

Ms Lowe—For example, clearly one of the issues in the Boral matter was the question of recoupment. One of the major stumbling blocks was that it was not able to be proved that they were in position to recoup.

Senator BUSHBY—We had this morning the junior counsel for Boral give us evidence, although in a different hat. His evidence this morning was that the proposed legislation effectively will be only delivering what is currently the case. He quoted Chief Justice Gleeson as saying that the recoupment aspect of it is a relevant but not a decisive factor. His view, as somebody who was involved in the case and has read the Chief Justice's decision closely, is that the law is not going to be changed that much by what this bill will do.

Ms Lowe—If that is correct, that is clearly a matter for concern because this is an issue that needs to be fixed. When a judge says it is a factor but not the determinative factor there is an argument to say that they are leaving room for something that no-one has thought of yet that they do not want to count out. There are a number of ways, in our view, that that sort of statement can be interpreted. One of them is leaving wiggle room down the track in terms of other factors that may become relevant.

Senator BUSHBY—Does wiggle room give you as a consumer group any comfort?

Ms Lowe—As consumer advocates who are also lawyers, it is not a concept that is foreign to us. Courts do not like to close themselves off ultimately from options.

Senator BUSHBY—It is not that foreign to politicians either!

Ms Lowe—One could also note that we now have a new Chief Justice of the High Court. These are complex questions. There are a few new minds that may consider these questions when next they come before the court. There are so many factors that come into play in determining what ultimately a court's view of a particular provision will be that it is just not possible to tell. That is why we are talking about building in these other mechanisms to keep a very close eye on that.

Senator BUSHBY—I have one final question. You mentioned matters coming before the High Court in future. Do you think that the Trade Practices Act currently contains sufficient vehicles to enable consumers to take action, given the costs of action? Going to the High Court is obviously an expensive process. If consumers are being hard done by—you keep a close eye on it and you think it is not working—where do you go?

Ms Lowe—That is a very good question. This is certainly an issue that we have canvassed extensively with, for example, the Productivity Commission in their review of consumer protection. They have made some recommendations around enforcement powers and so forth that we think are helpful in this area. But we certainly are also of the view that there are more things that can and should be done to enable consumers to effect redress where harm is done to them. This again, to a degree, comes back to the point we were raising earlier around, for example, the ability of the ACCC to obtain refunds at large for consumers even though those consumers may not be named parties to an action. It is simply critical that the regulator has that capacity because it is manifestly the case that individual consumers who may have suffered what is a significant but relatively small loss, particularly once you start talking about going to the Federal Magistrates Court, are simply not going to pursue those losses and it would not be rational for them to do so.

Beyond even the consumer protection issue, there is a public policy and competition issue, in our view, because businesses that profit from misleading consumers or engaging in other breaches of the act ought not to profit from that exercise. There ought to be a mechanism whereby we can effectively cause those profits—those ill-gotten gains, if you like—to be effectively disgorged. For that reason, we also advocated a number of other amendments to the Trade Practices Act, including what we call ‘cy-pres’ mechanisms. If it is not administratively effective, if you like, to refund a million consumers \$20—and we can see that the costs may outweigh the actual refund—then a cy-pres mechanism allows that money to, on the one hand, be disgorged by the company that has profited and, on the other hand, be placed into a vehicle that will effectively benefit, in general, those consumers who have suffered some form of loss. That is certainly a mechanism which we would see as very appropriate, not only from a consumer protection point of view but also as sending that price signal to the marketplace: ‘You will not get to keep the profits from your actions just because it is too inefficient to expect 20 million people to actually come and try to get a refund through the court process.’

Senator FIELDING—Changing topics to the creeping acquisitions, I am very interested because—I have to say this—the coalition was dragged screaming on the predatory pricing bill. I was there at the time, actually, and I was after a financial power as well as market power. Anyway, it was quite an interesting debate. I am quite interested to see that the coalition now seem to be dead set against keeping this one when, at the time, they were actually not keen on keeping it at all.

Senator BUSHBY—I was not there.

Senator FIELDING—Anyway, on creeping acquisitions, you have made a statement here which I agree with. I thought that maybe you could help explain it a bit further:

Creeping acquisitions pose a long-term threat to competition and consumer welfare ...

Obviously I believe that. That is why I have put in the proposed changes to section 50 of the Trade Practices Act to add creeping acquisitions. Can you help us understand that a bit more? Is there anything specific you had in mind when you wrote that?

Ms Lowe—The long-term negative impact, you mean?

Senator FIELDING—Yes.

Ms Lowe—I will pass it over to Nicole to give you a little bit more detail on that, but I guess the key point—which would be well known to you, I think, Senator—is that with creeping acquisitions what we effectively see is a series of very little acquisitions that, if you added them all together and brought them to the commission as a bundle, if you like, would get some pretty serious attention in terms of the section 50 tests and the impact it would have in the marketplace. It simply seems to us to be unsatisfactory in the extreme that you can do it by little bites and get to the same result, and yet that does not throw up the flags that would be thrown up if that were done in toto as a bundle.

Ms Rich—I do not think I have too much to add to that. I guess it is, in some ways, a flaw in the drafting of the section, because you would be aware that the section—I have it here—basically prohibits acquisitions that would have the effect or are likely to have the effect of substantially lessening competition in the market. That means you have to consider that acquisition and the situation immediately prior to that acquisition. Of course, in many cases there will be acquisitions where, if you just compare it to the situation immediately prior to that

acquisition, there is not going to be a substantial lessening of competition, but if you compare that acquisition to the situation 10 acquisitions ago then you can see that there is a substantial difference. So in some ways it is correcting that problem.

Senator FIELDING—I appreciate your putting it so succinctly. It adds value when people say it, because that is what literally is happening out there, and we have a crazy situation where we end up with overconcentrated markets and people say, ‘How’d we get there?’ We got there a bite at a time. How do you eat an elephant? A bite at a time. That is what is happening at the moment; it is crazy.

Senator CAMERON—I think your evidence has been very helpful. I must say that we have been concentrating on the legal aspects. We have had evidence from big business and from small-business, and it is good to get a consumer point of view here. One of the arguments that has been put up is about the Birdsville amendment. Let me put this in context. Big business can be really rough, tough competitors and can act against the interests of the consumer, but equally, I am sure, small business are not all sweetness and light. You cannot just say, ‘Big business bad, small business good,’ in terms of the consumer. Would you agree with that?

Ms Lowe—Yes, that is absolutely correct.

Senator CAMERON—Some of the argument seems to be going down the path that if you simply make things easier for small business against some predation by big business then everything will be okay. But there was an article in the *Fin Review* back in September 2007 that said the Birdsville amendment would turn the predators into prey. I am not sure if you are aware of that article, but it was basically saying: ‘This basically gives small business immunity from proper competition.’ Getting the balance between immunity from proper competition, diminishing the benefits to the consumer and keeping a competitive market is really what we are talking about here, isn’t it?

Ms Lowe—That is exactly right. The comment that you have just made illustrates in some ways the complexity of what we are trying to do. There is no question that a viable small business sector and a diverse marketplace are very important elements in a competitive marketplace. But, equally—and unfortunately in some ways—it is not as simple as saying: ‘Once you are this big, you have market power.’ Unfortunately, it is not as simple as that. We think that is one of the reasons that this has proved to be such a difficult problem. We certainly do not take the view that small business ought to be protected from the competitive process, but we certainly would agree that they ought to be protected from anticompetitive conduct and also from conduct that is unfair to them as consumers. For that reason, we see the unconscionability type amendments that are being proposed as well. To go off on another area of our work, we have certainly seen some pretty significant limitations in the scope of the unconscionability provisions and how they have been interpreted by our courts.

Going back to some of the legal discussion we were having earlier, we think there is a very good case on the basis of the second reading speech, for example, to say that there ought to be a much more fulsome interpretation by our courts as to the operation of those provisions. But that is not the case. Again, that is a reason to perhaps give some attention to what may be done to render those provisions more effective. For that reason, we certainly support the very practical amendment that has been proposed in relation to 51AC. There are not really absolutes or black-and-whites in this discussion and that is one of the reasons that it is difficult. Small business is obviously an incredibly important part of our economy and provides many important services to consumers. But, equally, of course, there is any number of instances where a small business may be the source of a consumer protection problem. So, yes, we agree with you.

Senator CAMERON—Associate Professor Zumbo gave evidence this morning in his usual passionate and strong way, and he basically dismissed the appointment of an assistant commissioner based on some small business expertise as some kind of gimmick. Would you see that as a gimmick? What is your point of view on this appointment? Is it positive or negative or a gimmick from your perspective?

Ms Lowe—I guess we would go back to our original point that we certainly think that the blend of skills and experience on the commission is a very worthy issue for consideration. But we are concerned that what appears to be happening here is a very limited consideration of that issue. We are not looking at making similar enshrinements in relation to the consumer commissioner. Whilst we seem to have a tradition developing around some of the appointments that are made to the commission—and indeed we have just seen Peter Kell, who is quite clearly someone with excellent consumer experience, appointed to the deputy position—that is not a matter that is enshrined in the Trade Practices Act. We are concerned that by enshrining just this particular position in the legislation and by speaking to this particular constituency there does seem to be an argument that it could be perceived as a gimmick or something of that kind if it is not done in the context of a broader consideration of the skill set around the commission table.

The other point to make—and I think Nicole has something to say on this too—is that at the end of the day the commission operates as a board. It is not as though the small business commissioner gets to make all the decisions that come before the commission about small business issues. The commission, as a group of people, ought to make those decisions and does make those decisions, so that also needs to be borne in mind. It is not as though the small business commissioner will have the final say on the ACCC's approach to small business issues.

Senator CAMERON—I am not asking for a definitive legal view on this, but we have had a bit of discussion about jurisprudence and what could come out of this legislation. What is your organisation's view on the potential for changed jurisprudence out of these amendments?

Ms Lowe—I guess that is a key performance indicator, really, for them. The clear intent, certainly as we interpret it, is to change the jurisprudence around market power and to hopefully help to provide the courts with guidance as to what the thoughts of government are so that, in turn, the courts can provide more substantive guidance on the back of that to regulators and to the marketplace about where the lines are in relation to some of this conduct. That ought to be an outcome of these amendments.

Senator CAMERON—Thank you.

CHAIR—Thank you, Ms Lowe and Ms Rich, for coming in this afternoon. It has been very helpful.

Committee adjourned at 1.27 pm