



Trade Practices Legislation Amendment Bill 2008

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Law and Bills Digest Section

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Trade Practices Legislation Amendment Bill 2008

Date introduced: 26 June 2008

House: House of Representatives

Portfolio: Treasury

Commencement: On the day after the day of Royal Assent.

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

Purpose

The primary purpose of the Bill is to amend the *Trade Practices Act 1974* (TPA) to clarify the meaning of the term ‘take advantage’ and address problems in relation to ‘predatory pricing’ in the context of the prohibition on misuse of market power in section 46. In addition the Bill will extend the jurisdiction for section 46 cases to the Federal Magistrates Court.

Background

The provisions of Part IV of the TPA, which includes section 46, prohibit various trade practices that tend to prevent or lessen competition in an Australian market for goods and services. These provisions are at the heart of the TPA. Since 1974, they have been instrumental in shaping the Australian economy. They lay down rules which, as interpreted by the courts from time to time, restrain anti-competitive behaviour and promote competition in the market place.¹

The original form of section 46 of the TPA reflected provisions of the *Sherman Act 1890* in the United States² and the *Australian Industries Preservation Act 1906*³. It was

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1. Committee of Inquiry, ‘*Review of the Competition Provisions of the Trade Practices Act*’, Canberra, January 2003, p. 29.
 2. The Sherman Antitrust Act was enacted in 1890. It outlaws all contracts, combinations and conspiracies that unreasonably restrain interstate and foreign trade. This includes agreements among competitors to fix prices, rig bids and allocate customers. The Sherman Antitrust Act makes it a crime to monopolize any part of interstate commerce.

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directed at a corporation operating independently using its market power against a competitor.⁴

Since that time section 46 has been the subject a number of formal inquiries and resultant amendments. Today, subsection 46(1) provides that a corporation that has a '*substantial degree of power*' '*in a market*' shall not '*take advantage*' of that power in that, or any other, market for the following 'proscribed' purposes:

- eliminating or substantially damaging a competitor of the corporation or of a body corporate that is related to the corporation in that or any other market
- preventing the entry of a person into that or any other market or
- deterring, or preventing, a person from engaging in competitive conduct in that or any other market.

Despite the amendments to section 46 over the years, there remain concerns that the section does not achieve its purpose of prohibiting the misuse of market power.

Review by the Dawson Committee

The *Review of Competition Provisions of the Trade Practices Act* (known as [the Dawson report](#)) was released in April 2003. Its terms of reference were broadly cast as there had not been a comprehensive review of the competition provisions in Part IV of the TPA since the Independent Committee of Inquiry into National Competition Policy in Australia reported in 1993. After the Dawson Committee had completed its consultations, but before the report was actually completed, a number of decisions about section 46 of the TPA were handed down by the Full Court of the Federal Court and the High Court. Of these, *Boral Besser Masonry Ltd v ACCC*⁵ (the *Boral* case) in particular, raised a number of issues. The Dawson Committee did not make any recommendations for change to section 46 at that time.⁶

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3. Australian anti-trust laws began with the *Australian Industries Preservation Act 1906* designed to protect a local manufacturer against the International Harvester Company.
 4. Graeme Samuel, Chairman, Australian Competition and Consumer Commission, 'Recent and foreshadowed reforms of the Trade Practices Act', [Speech](#), Competition law conference, Sydney, 24 May 2008.
 5. [2003] HCA 5.
 6. Committee of Inquiry, '*Review of the Competition Provisions of the Trade Practices Act*', p. 88.

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2004 Review by the Senate Economics References Committee

The following year the Senate Economics References Committee (the 2004 Senate Committee) conducted a review entitled '[The effectiveness of the Trade Practices Act 1974 in protecting small business](#)' which detailed a number of concerns about the effectiveness of section 46 at that time, specifically:

- whether the TPA gives sufficient guidance as to what constitutes 'substantial power in a market'
- whether the TPA provides sufficient guidance as to what constitutes 'taking advantage of' market power
- whether the TPA provides sufficient protection against 'predatory pricing'
- whether a 'financial power' test should be introduced
- whether the TPA should proscribe the misuse of market power in a second market
- whether the TPA provides sufficient protection against the use of co-ordinated market power and
- whether an 'effects test' should be included as an addition to, or substitute for, the current 'purpose test'.

These have been the recurring themes in calls for an update to section 46. However, only 'taking advantage' of market power and protection against 'predatory pricing' are relevant to the current Bill.

'Taking advantage' of market power

There have been a number of cases in which the courts have commented on the meaning of 'taking advantage' in the context of section 46 of the TPA. In 2003, two cases were heard which considered this issue. The first was [ACCC v Safeway Stores](#)⁷ in which the Federal Court decided that the business rationale of the conduct is important to the question of whether the corporation has taken advantage of its market power.

However, [Rural Press Ltd v ACCC](#),⁸ (the *Rural Press* case) was determined by the High Court. It defined 'take advantage' very narrowly, suggesting that one test of whether a company had taken advantage of its market power was whether it **could** have acted in that way in the absence of the market power.

This 'could' test is about physical or business capacity, rather than rationale or intent. It appears to result in a situation where corporations may use their market power to engage

7. [2003] FCAFC 149 (30 June 2003).

8. [2003] HCA 75.

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in proscribed conduct with impunity, as long as they could also undertake that conduct in the absence of such power.

Recommendation by the 2004 Senate Committee

The 2004 Senate Committee recommended that the TPA be amended to include a provision which clearly outlined the elements of ‘take advantage’ for the purposes of subsection 46(1).⁹

However, the Howard Government did not accept the recommendation on the grounds that it did not accept that the interpretation of ‘take advantage’ required any statutory clarification. The Howard Government relied on the interpretation of the High Court in *Queensland Wire Industries Pty Ltd v Broken Hill Proprietary Co Ltd* (1989) 167 CLR 77 that ‘take advantage’ merely means ‘use’.¹⁰ As a result the question of what it means for a corporation that has a substantial degree of power in a market to ‘take advantage’ of that power (as required by section 46 of the TPA) is still unresolved.

‘Predatory pricing’

Predatory pricing occurs where:

- a corporation prices a product below some measure of cost and
- it does so with the intention of driving a competitor out of the market and
- the corporation raises the price again in an attempt to recoup the losses they incurred as a result of their below cost conduct. This is referred to as ‘*recoupment*’.

In effect, ‘predatory pricing’ is an exclusionary tactic because the corporation is seeking, in its pricing, to exclude competitors from the market for the product. This can be done in one of two ways:

- for an existing competitor, the corporation excludes them from the market for the product because the competitor cannot match the below cost price that has been set
- for a new competitor, the corporation sets the price so low that it deters anyone else from entering the market.

The difficulty with ‘predatory pricing’ is that in some instances, it looks like legitimate competitive behaviour, because the existence of price wars is often an indicator of competition. This happened in the *Boral* case.

9. Senate Economics References Committee, ‘*The effectiveness of the Trade Practices Act 1974 in protecting small business*’, Canberra, March 2004, p. 15.

10. [Australian Government Response](#) to the Senate Inquiry into the Effectiveness of the *Trade Practices Act 1974* in protecting small business, p. 5.

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The *Boral* case

Boral Besser Masonry Limited (Boral) manufactured concrete masonry products such as concrete blocks, bricks and pavers. Boral, Pioneer, C&M, Rocla and Budget all supplied these products into the Melbourne market. In the 1990's a price war broke out between the manufacturers of these masonry products for the supply of the products into Melbourne.

The price war that took place between 1993 and 1996 primarily involved Boral and Pioneer who were competing with each other to supply concrete products to block layers working on major construction sites in Melbourne. The price war took place during a time when the Victorian economy was in recession which had an adverse effect upon the commercial building industry and the level of demand for concrete masonry products. Boral and Pioneer cut the prices charged for concrete masonry products significantly and on many occasions during the price war, Boral's prices were lower than their variable costs. In 1996, Boral also expanded its production capacity for concrete masonry products.

In 1995, Rocla closed down all its Victorian masonry operations. In June 1996, Budget stopped manufacturing concrete masonry products.

The Australian Competition and Consumer Commission (ACCC) alleged that between 1994 and 1996 Boral engaged in conduct that contravened section 46 of the TPA. In particular the ACCC alleged that Boral reduced the prices at which it offered to supply concrete masonry products in Melbourne to levels at, or below, the cost of manufacture and supply of the products and that it increased the production capacity of concrete masonry products. The ACCC alleged that the conduct of Boral was designed to eliminate or substantially damage C & M and other competitors including Rocla and Budget.

The majority of the High Court (with Justice Kirby in dissent) decided Boral had not breached section 46 of the TPA.

Section 46 does not contain the words 'predatory pricing'. In the *Boral* case, the High Court considered, amongst other things, whether 'recoupment' was needed to establish predatory pricing in the context of section 46 of the TPA. It concluded that:

- recoupment is a useful tool for analysis in cases where pricing behaviour is alleged to contravene section 46 and
- evidence that there was no prospect of recoupment would point away from predatory pricing.

Recommendation by the 2004 Senate Committee

The 2004 Senate Committee recommended that the TPA be amended as follows:

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- to provide that in determining whether a corporation has breached section 46, the courts may have regard to the capacity of the corporation to sell a good or service below its variable cost and
- where the form of proscribed behaviour alleged under section 46(1) is predatory pricing, it is not necessary to demonstrate a capacity to subsequently recoup the losses experienced as a result of that predatory pricing strategy.¹¹

The Howard Government accepted this recommendation¹² and the TPA was amended by the *Trade Practices Legislation Amendment Act (No. 1) 2007*.

Trade Practices Legislation Amendment Bill (No. 1) 2007

The breadth of submissions to, and the nature of the recommendations by the 2004 Senate Committee, reflected a level of frustration experienced by both business and the ACCC with the manner in which section 46 had been interpreted by the courts. As a consequence of those interpretations, the ACCC had not been able to successfully prosecute a number of corporations which it considered had engaged in a misuse of market power.¹³

The Trade Practices Legislation Amendment Bill (No. 1) 2007 was introduced into the Senate on 20 June 2007. The following day, the Senate Selection of Bills Committee referred the provisions of the Bill to the Standing Committee on Economics (the 2007 Senate Committee) for enquiry. The 2007 Senate Committee [reported](#) on 1 August 2007.¹⁴

Relevant amendments

The *Trade Practices Legislation Amendment Act (No. 1) 2007* inserted new subsections 46(1AA) and (1AB) as follows:

- (1AA) A corporation that has a **substantial share of a market** must not supply, or offer to supply, goods or services for a **sustained period** at a price that is less than the **relevant cost** to the corporation of supplying such goods or services, for the purpose of:

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11. Senate Economics References Committee, op. cit., p.19.
 12. Australian Government Response, op. cit., p. 6.
 13. Graeme Samuels has been reported as stating that the ACCC has only had one success in 45 years: Alan Moran, 'Hidden dangers in altered Trade Practices Act', *The Age*, 29 April 2008, p.10.
 14. Senate Standing Committee on Economics, '*Trade Practices Legislation Amendment Bill (No. 1) 2007 [Provisions]*', Canberra, 1 August 2007.

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- (a) eliminating or substantially damaging a competitor of the corporation or of a body corporate that is related to the corporation in that or any other market; or
- (b) preventing the entry of a person into that or any other market; or
- (c) deterring or preventing a person from engaging in competitive conduct in that or any other market.

(1AB) For the purposes of subsection (1AA), without limiting the matters to which the Court may have regard for the purpose of determining whether a corporation has a substantial share of a market, the Court may have regard to the number and size of the competitors of the corporation in the market.

These two subsections became known as the ‘Birdsville amendment’.¹⁵ The subsections were significantly different from subsection 46(1) which provides that a corporation that has a ‘*substantial degree of power*’ ‘*in a market*’ shall not ‘*take advantage*’ of that power.

Subsection 46(4A) was also inserted into the TPA by the Trade Practices Legislation Amendment Bill (No. 1) 2007. The [Bills Digest](#) provides useful background and information about that subsection stating that subsection 46(4A) deals with whether a company has taken advantage of its market power for one or more of the prohibited purposes in section 46(1). Under subsection 46(4A), the Court may to have regard in making that decision to:

- the conduct of the corporation in selling goods or services for a sustained period at a price that is below cost. and
- the corporation’s reasons for such below-cost selling.¹⁶

Both of those amendments are relevant to the current Bill.

It has been argued that the ‘Birdsville amendment’ introduced considerable uncertainty into the law by introducing the concepts of ‘*substantial market share*’ ‘*sustained period*’ and ‘*relevant cost*’ - terms which had not been determined by the courts.¹⁷ This

15. This is reportedly because the amendment was drafted by Senator Barnaby Joyce whilst in Birdsville. Dave Poddar, ‘Birdsville law change is off track’, *Australian Financial Review*, 17 September 2007, p. 71.

16. Angus Martyn and Jonathon Chowns, ‘Trade Practices Legislation Amendment Bill (No. 1) 2007’, *Bills Digest* No. 13, Parliamentary Library, Canberra, 2007-08, p. 11.

17. Arlen Duke, ‘The need to close the ‘take advantage’ gap in the regulation of unilateral anti-competitive conduct’, *Competition and Consumer Journal*, Volume 15, 2008, pp. 284-301.

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uncertainty had the potential to discourage discounting for fear of being caught by the provision.¹⁸

In addition, the predatory pricing prohibition introduced by the ‘Birdsville amendment’ was thought to apply more broadly than other parts of section 46 because it applied to firms with a substantial share of the market rather than firms with substantial market power.¹⁹

Finally Duke opines that the ‘Birdsville amendment’ rendered the newly-introduced subsection 46(4A) redundant. A party seeking to challenge predatory pricing would be foolish to attempt to prove that the alleged predator has taken advantage of its market power when they could avoid the difficulties associated with establishing ‘market power’ and ‘taking advantage’ of that power by bringing their claim under the provisions introduced by the ‘Birdsville amendment’.²⁰

Further criticism of the ‘Birdsville amendment’ was made by the [Law Council of Australia](#) which stated:

The fundamental difficulty with the Birdsville Amendments is that they prohibit price discounting below cost for a substantial period when undertaken for a proscribed purpose. However, as almost all price discounting is undertaken to secure more custom for the discounter, it follows that it must also be undertaken for the purpose of taking custom away from the discounter’s competitors, thereby exposing the discounter to having a proscribed purpose of damaging those competitors, preventing their market entry or deterring or preventing them from engaging in competitive conduct. The practical consequence of the Birdsville Amendments ... would be to deter any corporation with a substantial market share from discounting to low prices, for fear of prosecution by the Australian Competition and Consumer Commission or attack by competitors.²¹

18. *ibid.*, p. 288.

19. *ibid.*, p. 289.

20. *ibid.*

21. Law Council of Australia, ‘Trade Practices Legislation Amendment Bill (No. 1) 2007: “Birdsville” Predatory Pricing Changes to the Trade Practices Act’, Letter to the Treasurer, Canberra, 19 September, 2007.

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Position of significant interest groups

Peak bodies

The Motor Trades Association of Australia welcomed the introduction of this Bill on the grounds that the proposed clarification of aspects of section 46 will assist small business operators in seeking redress against predatory behaviour.²²

The Australian Retailers Association supported the Bill stating that:

The proposed amendments distinguish predatory pricing from legitimate competitive discounting, which was previously unclear. This allows retailers to get on with business and provide benefits to consumers without being concerned they are breaching the TPA under recent amendments.²³

The Council of Small Business in Australia²⁴ has given similar support to the proposed amendments in this Bill.

Australian Competition and Consumer Commission

The ACCC has also responded positively stating that:

The reforms announced recently by the government to section 46 ... continue the process of providing the regulator with the tools it needs to vigorously protect competition, while not falling into the trap of protecting competitors from the impact of that competition.²⁵

And further:

... moves by the Federal Government to clarify predatory pricing provisions of the law should be welcomed by all consumers who enjoy the benefits of competition – lower prices and better products...

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22. Michael Delaney, 'Trade Practices Act Reforms Offer Greater Competition', Media Release, Motor Trades Association of Australia, Canberra, 26 June 2008.
 23. Richard Evans, 'Retailers welcome changes to trade practices law – Trade Practices Act amendments pro-competition', Media Release, Australian Retailers Association, 27 June 2008.
 24. Tony Steven, 'TPA Changes Supported', Media Release, Council of Small Business of Australia, Canberra, undated.
 25. Graeme Samuel, 'Recent and foreshadowed reforms of the Trade Practices Act', op. cit.

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The Government is now proposing to streamline the predatory pricing provisions of the act, consistent with the broader misuse of market power provisions ... this is a sensible strategy.²⁶

Institute of Public Affairs

In contrast, Alan Moran, of the Institute of Public Affairs acknowledged that it is not uncommon for businesses large and small to involve themselves in price cutting in general, or to selected valued customers. He stated that:

... the amendments will provide further opportunities for the ACCC to flex its muscles and doubtless allow it to bid for a larger budget. Small businesses now have a permanent voice within the ACCC that can be recruited against a competitor offering lower prices and can make a determination without any tests of its merits of practicality.

... giving the ACCC more powers to pursue companies that are pricing goods and services too attractively for the consumer will put a brake on competition.²⁷

Opposition position

The Opposition small business spokesman, Steven Ciobo was reported as saying that the Coalition supported the amendments in principle but they would make little difference. The Government needed to improve industrial relations and boost small business confidence.²⁸

However, Shadow Minister for Finance, Competition Policy and Deregulation, the Hon Peter Dutton MP stated that the Government needed to show that the proposed changes to section 46 will increase competition, thereby benefiting businesses and consumers.²⁹

The comments by Shadow Attorney General, the Hon. George Brandis are discussed under the heading 'concluding comments' at the end of this digest.

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26. Graeme Samuel, 'Reforms should make predators simpler to hunt', *The Age*, 30 April 2008, p. 16.
 27. Alan Moran, 'Hidden dangers in altered Trade Practices Act', *The Age*, 29 April 2008, p. 10.
 28. Nicola Berkovic, 'Predatory pricing law 'open to abuse'', *Australian*, 29 April 2008, p. 2.
 29. Hon. Peter Dutton and Senator the Hon George Brandis SC, 'Trade Practices Act – Section 46 Cases', Joint Media Release, Canberra, 4 July 2008.

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Committee consideration

On 26 June 2008, the Senate referred the Trade Practices Legislation Amendment Bill 2008 to the [Senate Standing Committee on Economics](#) for report by 27 August 2008.

Financial implications

According to the Explanatory Memorandum, the measures outlined in the Bill will have no significant financial impact. Furthermore, there is no ongoing compliance cost impact and a minimal transitional impact.³⁰

Main provisions

The Bill contains three schedules of amendments.

Schedule 1 – Misuse of market power by corporations

Item 1 proposes to amend existing subsection 46(1AA) so that it will read:

- (1AA) A corporation that has a **substantial degree of power in a market must not take advantage of that power in that or any other market by supplying, or offering to supply** goods or services for a **sustained period** at a price that is less than the **relevant cost** to the corporation of supplying such goods or services, for the purpose of:
- (a) eliminating or substantially damaging a competitor of the corporation or of a body corporate that is related to the corporation in that or any other market; or
 - (b) preventing the entry of a person into that or any other market; or
 - (c) deterring or preventing a person from engaging in competitive conduct in that or any other market.

The term '*substantial market share*' has been replaced by '*substantial degree of power in a market*'. This is the same as term as is already used in section 46 of the TPA. The terms '*sustained period*' and '*relevant cost*' remain and courts will be required to take these factors into account when considering whether a corporation has engaged in predatory pricing.

30. Explanatory Memorandum, pp. 4 and 5.

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Item 2 repeals the existing subsection 46(1AB) which contains a list of factors to which the court may regard in deciding whether a corporation has a substantial share of the market under subsection 46(1AA). With the changes to subsection 46(1AA) which are contained in **item 1**, existing subsection 46(1AB) becomes redundant.

Item 2 inserts **proposed subsections 46(1AB) and (1AC)** which make clear what part ‘recoupment’ plays in determining whether predatory pricing has occurred. Under the proposed subsections it is not necessary to prove that a corporation has an ability to recoup losses incurred from predatory pricing in order to establish a breach of subsection 46(1AA). The amendment takes into account the comments of the High Court in the *Boral* case that matters relating to ‘recoupment’ of costs were useful but not essential for analysis in cases where pricing behaviour is alleged to contravene section 46.³¹

Item 4 repeals existing subsection 46(4A) which currently deals with the question of what constitutes ‘taking advantage’ of market power.

Item 5 inserts **proposed subsection 46(6A)** which sets out those matters to which a Court **may** have regard in determining whether a corporation, by ‘engaging in conduct’³² has ‘*taken advantage*’ of its substantial degree of power in a market. Those matters include, but are not limited to:

- whether the conduct was materially facilitated by the corporation’s substantial degree of power in the market
- whether the corporation engaged in the conduct in reliance on its substantial degree of power in the market
- 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
- whether the conduct is otherwise related to the corporation’s substantial degree of power in the market.

The amendment is introduced in response to the decision of the High Court in the *Rural Press* case which interpreted the meaning of ‘take advantage’ very narrowly. The matters listed in **proposed subsection 46(6A)** are intended to ensure that the term ‘take advantage’ can be interpreted more broadly.

31. *Boral Besser Masonry Limited v Australian Competition and Consumer Commission* [2003] HCA 5, 7 February 2003, para. 130.

32. ‘Engaging in conduct’ is defined in paragraph 4(2)(a) of the TPA as to doing or refusing to do any act, including the making of, or the giving effect to a provision of, a contract or arrangement, the arriving at, or the giving effect to a provision of, an understanding or the requiring of the giving of, or the giving of, a covenant.

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Conferring jurisdiction on the Federal Magistrates Court

Existing subsection 86(1) confers jurisdiction on the Federal Court in respect of any civil proceeding arising under the TPA. Existing subsection 86(1A) confers an additional jurisdiction on the Federal Magistrates Court (FMC) under certain limited parts of the TPA where the relevant civil proceeding is instituted by a person other than the Minister or the ACCC.

Item 7 amends existing subsection 86(1A) to include section 46 matters in the additional jurisdiction of the FMC. **Item 3**, which omits the word ‘Court’ and inserts the word ‘court’ in existing subsections 46(3), (3A) and (3C) reflects the increased jurisdiction of the FMC.

During the Senate Inquiry, submissions expressed concerns about the costs and delays associated with bringing section 46 matters, particularly for smaller businesses. If the costs associated with enforcing section 46 are prohibitively high, then it will not be effective in addressing anticompetitive conduct no matter how well it is otherwise suited to doing so.³³ The Bill addresses those concerns by conferring jurisdiction for section 46 matters on the FMC for civil proceedings instituted by a person other than the Minister or the ACCC.

It should be noted that section 86AA of the TPA provides that for proceedings instituted in the Federal Magistrates Court, the amount that can be awarded for loss or damage is capped at \$750,000. In addition, the Federal Magistrates Court is permitted to transfer proceedings to the Federal Court where appropriate under Part 5 of the *Federal Magistrates Act 1999*.

Schedule 2 – Misuse of market power by persons

Schedule 2 makes amendments to the version of section 46 found in the Competition Code as set out in the Schedule of the TPA.

The Schedule originates from the agreement by the governments of Australia entered into on 11 April 1995 – [the Competition Code Agreement](#) – under which the States and Territories of Australia agreed to submit, to their respective legislatures, legislation to implement the version of Part IV of the TPA contained in the Schedule.³⁴ The intention was to extend the operation of the restrictive trade practices provisions of the TPA to all

33. Explanatory Memorandum, p. 17.

34. This referral of powers by the State to the Commonwealth is permitted by section 51(xxxvii) of the Constitution. Its purpose is to achieve a co-ordinated nationwide approach to consumer protection.

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sectors of the community through the enactment of complementary State and Territory legislation.³⁵

To this end, section 150C of the TPA provides that the Competition Code consists of, amongst other things, a schedule version of Part IV of the TPA.

The amendments in Schedule 2 of the Bill are in exactly the same terms as the amendments in Schedule 1 of the Bill. This is so that the schedule version of Part IV in the Competition Code is in exactly the same terms as Part IV of the TPA.

Schedule 3 – Other Amendments

Schedule 3 contains amendments to both the *Australian Securities and Investments Commission Act 2001* (the ASIC Act) and the TPA.

Extension of jurisdiction to the Federal Magistrates Court

Items 1-4 of Schedule 3 amend various sections in Part 2 of Division 2 of the ASIC Act. That Part is about unconscionable conduct and consumer protection in relation to financial services. Each of the amendments omits a reference to ‘the Court’ and substitutes a reference to ‘the court’. The effect of the amendments is to recognise that courts other than the Federal Court have jurisdiction in relation to matters arising under those sections. **Items 8-11** relate to those parts of the TPA which are about unconscionable conduct. As with items 1-4, they omit references to ‘the Court’ and substitute references to ‘the court’. These amendments are consequential to an amendment in 2006³⁶ when the jurisdiction of the FMC was expanded to include unconscionable conduct matters. That amendment was in accordance with recommendation 17 of the 2004 Senate Committee.³⁷

Prohibition on unconscionable conduct—removal of price thresholds

Item 5 repeals existing subsections 12CC(8), (9) and (10) of the ASIC Act which provide that the prohibition on unconscionable conduct in relation to financial services does not apply in relation to a supply or acquisition of goods or services at a price in excess of \$10 million. The effect of the amendment is that the prohibition against unconscionable conduct will apply regardless of the price paid.

35. Russell V Miller, ‘Millers’ Annotated Trade Practices Act: Australian Competition and Consumer Law, 26th Edition’, Thomson Lawbook Company, Pyrmont, 2005, p. 1167.

36. *Jurisdiction of the Federal Magistrates Court Legislation Amendment Act 2006*.

37. Senate Economics References Committee, *op. cit.*, p. xx.

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Similarly, **item 12** repeals existing subsections 51AC(9), (10) and (11) of the TPA so that the prohibition against unconscionable conduct applies to all transactions – not just those under \$10 million.

The 2004 Senate Committee noted that section 12CC of the ASIC Act and 51AC of the TPA currently did not, at that time, apply where the complainant is a publicly listed company or where the services involved are priced at more than \$3 million. Recommendation 7 in the 2004 Senate Committee report was that the \$3 million threshold be removed.³⁸

This was rejected by Government Senators who were not persuaded of the need to lift the ceilings altogether so as to extend the protections in the section to all firms, irrespective of size. They did, however, consider that the statutory ceiling was too low and recommended the threshold be lifted to \$10 million.³⁹ Accordingly, the threshold amount was lifted to \$10 million in the *Trade Practices Legislation Amendment Act (No. 1) 2007*.

Items 5 and 12 of this Bill give final effect to the majority recommendation of the 2004 Senate Committee.⁴⁰

ACCC Deputy Chairperson—knowledge of small business affairs

Item 7 inserts **proposed subsection 10(1B)** into the TPA. This provides that the Minister must be satisfied that at least one Deputy Chairperson of the Australian Competition and Consumer Commission (ACCC) has a knowledge of or experience in, small business matters.

The *Trade Practices Legislation Act 2007* amended the TPA to create a second Deputy Chairperson for the ACCC. The then Treasurer, the Hon. Peter Costello said:

The government intends for the position to be filled by a candidate who is experienced in small business matters. On implementation, the government will consult with the states and territories on its preferred candidate for the position, in accordance with the requirements of the Conduct Code Agreement.⁴¹

However, despite this statement, there was no legislative provision to that effect. This Bill gives effect to that intention.

38. *ibid.*, p.37.

39. *ibid.*, p.88.

40. Senate Economics References Committee, *op. cit.*, p.37.

41. Hon. Peter Costello, Treasurer, ‘Second reading speech: Trade Practices Legislation Bill (No. 1) 2007’, House of Representatives, *Debates*, 20 June 2007, p. 6.

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Information gathering powers of the ACCC

Subsection 155(1) of the TPA provides the ACCC with powers, under certain circumstances, to obtain information relevant to its decisions under the Act, by issuing a notice requiring a person:

- (a) to furnish to the Commission ... within the time and in the manner specified in the notice, any such information
- (b) to produce to the Commission ... in accordance with the notice, any such documents; or
- (c) to appear before the Commission at a time and place specified in the notice to give any such evidence, either orally or in writing, and produce any such documents.

These powers are similar in nature to powers available to the Australian Securities and Investments Commission, the Australian Prudential Regulation Authority, the Australian Customs Service, and the Australian Taxation Office under their various Acts.

Currently, the courts have established that the ACCC's powers under section 155 cease once legal proceedings have commenced. This view is based on the notion that executive government agencies should not interfere in judicial proceedings, once such proceedings are underway.⁴²

The ACCC argued to the 2004 Senate Committee that this interpretation of section 155 deters it from seeking interim injunctions against companies undertaking anti-competitive behaviour, because once those injunction proceedings have commenced, its powers under section 155 cease.⁴³ The ACCC put its position as follows:

At the moment, we have a trade-off between either getting an interim injunction and therefore losing the ability to use our section 155 powers thereafter, or not getting an interim injunction until the point where we have more or less, if you like, got our case together and finished using our 155 powers. But that can be a reasonable way down the track and the conduct continues in the meantime.⁴⁴

The 2004 Senate Committee considered that it was appropriate to amend the [TPA] to enable the ACCC to seek, from the court in which injunctive proceedings are brought, an

42. *Brambles Holdings Ltd. v TPC & Anor* (1980) ATPR 40-179.

43. Senate Economics References Committee, *op. cit.*, p. 74.

44. Brian Cassidy, Chief Executive Officer, Australian Competition and Consumer Commission, Senate Standing Committee on Economics, *'Trade Practices Legislation Amendment Bill (No. 1) 2007 [Provisions]'* Transcript of Evidence, 31 October 2003, p. 91.

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order to enable the continued operation of its powers under section 155 and recommendation 15 is in those terms.⁴⁵ However, the former Government did not accept the recommendation on the grounds that the court already had very extensive powers to compel exchange of information in preparation for trial. The former Government did not accept that those powers were inadequate.⁴⁶

Item 14 inserts **proposed subsection 155(4)** into the TPA which is a response to that recommendation. It provides that the ACCC can continue to exercise its powers under subsection 155(1) until:

- the ACCC commences proceedings (other than injunctive proceedings) in relation to the matter or
- the close of pleadings in relation to an application by the ACCC for a final injunction in the matter.

Concluding comments

The real question in respect of the amendments in this Bill is: ‘will they work when all previous attempts to prohibit ‘predatory pricing’ and define what it means to ‘take advantage’ of market power, have not?’

According to Professor Frank Zumbo, Justice Kirby’s powerful insights as to the impact of the present High Court’s decisions on section 46 provide strong evidence of the need to amend the section to restore its parliamentary intention:⁴⁷

This is the third recent decision of this Court (*Melway and Boral Besser Masonry Ltd v Australian Competition and Consumer Commission* being the other two) in which a majority has adopted an unduly narrow view of s 46 of the Act. In effect, it has held, in each case, that the established large degree of market power enjoyed by the impugned corporation was merely incidental or coincidental to the anti-competitive consequences found to have occurred. Notwithstanding the proof of market power, the Court has held that the impugned corporations did not directly or indirectly ‘take advantage’ of that power to the disadvantage of competition in the market.

In my view, the approach taken by the majority is insufficiently attentive to the object of the [Trade Practices] Act to protect and uphold market competition. It is unduly

45. Senate Economics References Committee, op. cit., p. 74.

46. Australian Government Response to the Senate Inquiry into the Effectiveness of the *Trade Practices Act 1974* in protecting small business, op. cit., p. 15.

47. Frank Zumbo, ‘The High Court’s Rural Press decision: The end of s 46 as a deterrent against abuses of market power?’, *Trade Practices Law Journal*, Vol. 12, 2004, pp. 126-134 at p. 133.

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protective of the depredations of the corporations concerned. It is unrealistic, bordering on ethereal, when the corporate conduct is viewed in its commercial and practical setting. The outcome cripples the effectiveness of s. 46 of the Act. It undermines this Court's earlier and more realistic decision in *Queensland Wire*. The victims are Australian consumers and the competitors who seek to engage in competitive conduct in a naive faith in the protection of the Act. Section 46 might just as well not have been enacted for cases like these where its operation is sorely needed to achieve the purposes of the Act. Judicial lightning strikes thrice. A novel doctrine of innocent coincidence prevails. Effective anti-competitive threats can be made without the redress which s. 46 appears to promise. Once again I dissent.⁴⁸

It has been argued that there are very real concerns that the present High Court is failing to do justice to the parliamentary intention behind section 46 and, as a result, section 46 is now an ineffective deterrent against abuses of market power by large and powerful corporations.⁴⁹ Although the amendments in the Bill take into account the reasoning of the High Court in each of the recent section 46 cases, it remains to be seen how they will be interpreted judicially in future cases.

On a related matter, the Law Council of Australia has been particularly critical of the plan to have Federal Magistrates decide misuse of market power cases on the grounds that they will be more, rather than less expensive to run.⁵⁰ This view is based on the complexity of section 46 cases and the inexperience of magistrates in dealing with competition cases.

Shadow Attorney General, the Hon. George Brandis supported the comments by the Law Council of Australia stating that:

section 46 cases are, of their nature, complex and usually long. Conducting the hearings in the Federal Magistrates Court will not make them less complex or shorter.⁵¹

As already stated, there has been considerable criticism of the High Court's interpretation of the provisions of section 46 to date. That being the case, it seems premature to extend the jurisdiction for such matters to the Federal Magistrates Court before judicial interpretation of the amendments in the Bill has occurred. A likely outcome of a

48. *Rural Press Ltd v Australian Competition and Consumer Commission* [2003] HCA 75 (11 December 2003), paragraphs 138–139.

49. Frank Zumbo, op. cit., p. 134.

50. Matthew Drummond, 'Law reforms ridiculed', *Australian Financial Review*, 4 July 2008, p. 11.

51. Hon. Peter Dutton and Senator the Hon George Brandis SC, 'Trade Practices Act – Section 46 Cases', Joint Media Release, Canberra, 4 July 2008.

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proceeding lodged in the FMC is that it will be transferred directly to the Federal Court under the *Federal Magistrates Act 1999*.

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