

TRADE PRACTICES LEGISLATION AMENDMENT BILL 2008

Second Reading

Mr ROBERT (Fadden) (1.07 p.m.)—I rise to speak on the [Trade Practices Legislation Amendment Bill 2008](#). The big question this afternoon is: is there a difference between market power and market share? The member for Blair would have us believe, through diatribe and legalese, that indeed market power is the panacea for all evil and that the current market power test will sustain all corporate evil and provide the right and best thing for small business. May I remind the honourable member for Blair that history has proven otherwise, and by history he stands condemned. Labor says no, the market power test is sufficient; I contend very strongly that the market power test is not sufficient and that the market share test, that of the Birdsville amendment, needs to remain.

Small business in this country employs almost 50 per cent of the nation's workforce, and up to 50 per cent of these small businesses employ no-one. They are the engine room of the modern economy. Small business knows what it is to fight against large predatory competitors. They know what it is to battle daily to increase market share, feed their families and employ Australians—notwithstanding Labor's recent budget of 134,000 unemployed; something, I contend, the Labor Party takes rather glibly.

I speak on behalf of the hardworking men and women of my electorate of Fadden, the fastest-growing electorate in the nation and one of three Gold Coast seats. As this House knows only too well, those three seats of the Gold Coast are the small-business powerhouse of the nation. The Gold Coast has more small to medium-sized enterprises per capita than any commensurate city or area in the country. And small business says the market power test is not sufficient to protect it from predatory pricing from competitors. So, whilst I support elements of the bill, I cannot support a return to market power by removing the Birdsville amendment on market share, nor can I support the move to allow the Federal Magistrates Court to hear section 46 cases.

Before understanding where we are to go in the future, it is important to understand where we have come from in the past. The provisions of part IV of the Trade Practices Act, 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 Trade Practices Act. 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 anticompetitive behaviour and promote competition in the marketplace.

The original form of section 46 of the TPA reflected provisions which went back to Sherman Antitrust Act 1890 in the United States and the Australian Industries Preservation Act 1906. It was directed at a corporation operating independently using its market power against a competitor. Since that time, section 46 has been the subject of 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 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;
- (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.

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.

The *Review of competition provisions of the Trade Practices Act*, 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 provisions since the Independent Committee of Inquiry into a National Competition Policy for Australia in 1993. After the Dawson committee had completed its consultations, a number of decisions about section 46 of the TPA were handed down by the full Federal Court and High Court. Of these, *Boral Besser Masonry Ltd v Australian Competition and Consumer Commission* (2003) 215 CLR 374, the Boral case, raised a number of issues. However, the full weight of these judgements and decisions and the impacts they would have were not fully known; thus, the Dawson committee did not make any recommendations for change.

The following year, the Senate Economics References Committee conducted an inquiry into 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 guidance as to what constitutes taking advantage of market power; whether there is 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 there is 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 recurring themes in calls for an update to section 46; hence the coalition's addition of the Birdsville amendment in 2007 to further protect business from predatory firms who have a substantial market share.

The Birdsville amendment was introduced a year or so ago. It stops a company with a substantial market share from selling or offering to sell goods or services below cost for a sustained period of time for the purpose of eliminating or substantially damaging a competitor of the corporation, or of a body corporate that is related to the corporation; 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 market.

Some on the Labor benches will argue that the Birdsville amendment introduced considerable uncertainty into the law by introducing concepts of 'substantial market share', 'sustained period' and 'relevant cost', terms which had not been determined by the courts. May I refer my honourable Labor colleagues to the fact that, in the vast bulk of legislation in this House, terms will be defined by the courts from time to time and that waiting for the courts to determine the relevant meaning of phrases or words before enshrining them in legislation is farcical at best and perhaps a little stupid at worst.

The bottom line is this: this amendment has not been in long enough for it to be properly tested in the courts in any way, shape or manner. Because the amendment is less than 12 months old, it clearly could not have any of the morose effects that are being suggested in such hyperbole from the Labor government or, indeed, from big business. The provisions have not been in long enough for it to be clear how they need to be changed. All law needs time to settle down, to shake out, and for its relevance to be judged by industry. In this case, 12 months is clearly not enough.

The overwhelming question is: why would a company sell or offer to sell goods and services below cost for a sustained period of time if not to wipe out a competitor? The market share test simply says you cannot sell or offer to sell your goods and services at less than what you paid for them for a long period of time to knock out the bloke next door. And if you have got your goods and services for sale at a price less than what you

paid for them for a sustained period of time, unless you have large market share, I would suggest very quickly you are heading for the bankruptcy courts. It is poor business practice to sell things for less than you bought things for, and the only reason you would do it for a sustained period of time is to knock out a competitor. This is not about sales over Christmas; this is not about a special to get customers through your front door; all of those things have a short duration attached to them. This is below-cost pricing for a sustained period of time. There is only one viable, economic reason why you would do that and that is to knock out your competitor, to put them out of business. I would have thought there would have been a term or a phrase or a concept that an economic conservative would understand, but clearly, in this form of government, I am vastly mistaken.

The government wants to repeal the Birdsville amendment; it wants to get rid of the market share test and return to market power. Let me give the parliament a brief example. The Woolies and the Coles service stations have something like 16 to 17 per cent of service station locations, yet they control 80 per cent of the market. Their market power is 16 per cent of service stations; their market share is 80 per cent of fuel sold. The two concepts are different and needed. Labor's amendment would reduce the scope of Birdsville and make it harder for the ACCC to bring action against large businesses who engage in some form of predatory pricing. Small business in particular, and especially in my electorate, is concerned that the meaning of market power, as defined by the High Court, is far too narrow. Market share is highly likely to be a simpler economic term for the courts to apply within their judgements.

It is interesting to reflect upon the Boral case, as this has defined, more than any other case, what the market power test means. By way of history, Boral manufactures concrete masonry products—blocks, bricks, pavers. Boral, Pioneer, C&M, Rocla and Budget—five companies—all supply these products in the Melbourne marketplace. In the 1990s a price war broke out between manufacturers of these masonry products for the supply of products into Melbourne. By their nature, a price war is a good thing for consumers. The price war took place when the Victorian economy was in recession. Surprise, surprise—a Labor government at the helm! It 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 and masonry significantly and, in many cases during the war, Boral's prices were less than their variable costs. In 1995 Rocla closed down all its Victorian masonry operations, followed in June 1996 by Budget, which stopped making concrete and masonry products. The 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—

Mr Shorten—Madam Deputy Speaker, I rise on a point of order. Between 1992 and 1999 it was a conservative government in Victoria.

The DEPUTY SPEAKER (Ms AE Burke)—There is no point of order.

Mr ROBERT—Hence I referred to it as being in the early 1990s, when the Labor Party was actually in power, that the price war broke out. But I thank the parliamentary secretary for his grasp of history, as only a great Labor man could possibly understand.

Referring to the Boral case in particular, 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 that Boral had not breached section 46 of the TPA. Section 46 did not contain, at the time, any concerns or words regarding predatory pricing. Clearly this case demonstrates that market power by itself is not sufficient. If market power could not be attached to the Boral case—Boral being the size that it was at the time when the price war started,

when the Labor Party of Victoria had destroyed the economy, causing Kennett to come back in and restore the economy to the sort of First World economy that it was—market power by itself was not sufficient, considering what had happened during that time.

Birdsville will not stop legitimate and pro-competitive discounting, as is claimed by some large business organisations. The amendment will only be triggered by below-cost pricing, when that occurs, over an extended period of time for an anti-competitive purpose—an extended period of time; the period of time it took the Labor government in Victoria to almost wipe the economy out prior to the Kennett government.

The DEPUTY SPEAKER (Ms AE Burke)—The member for Fadden will refer to the bill before the House.

Mr ROBERT—Birdsville will not stop pro-competitive discounting. It should not stop any company from matching a competitor's price or from holding Christmas sales, any other clearance sales, or sales to clear old stock at the end of the trading day. The Birdsville amendment is designed to protect small business from predatory pricing over an extended period of time. It is a good amendment. It needs time to work its way out. It has the support of the small business community—a community that Labor is perhaps not listening to, as they are seeking to remove the market share test.

Moving onto the Federal Magistrates Court, the coalition does not support the proposal to allow the Federal Magistrates Court to hear section 46 cases. Existing section 86(1) confers jurisdiction on the Federal Court in respect of any civil proceeding arising under the Trade Practices Act. Existing section 86(1A) confers an additional jurisdiction on the Federal Magistrates Court under certain limited parts of the Trade Practices Act. 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.

Section 46 cases are, by their very nature, complex and are unlikely to be beneficial to small and medium business—that section of the economy that employs up to half of all Australian workers and that the coalition stands by, supports and defends. Section 46 cases often end up in the High Court. The Federal Court is best placed to hear section 46 cases because it contains most of the expertise pertaining to the TPA.

It is unclear what this Labor government actually plan to do with the Magistrates Court. The jury is clearly out as to whether the court will remain or be subsumed. The government may abolish it, which may make the whole process completely useless. The coalition will stand up for small business. I will stand up for small business in the electorate of Fadden and for small business on the Gold Coast. The powerhouse that actually runs the economy is the small to medium enterprises. The coalition will stand up for it, and we will stand up for the Birdsville amendment. We will stand up for those hardworking men and women who, through incentive, through opportunity and through choice, go out to make a difference for their families. We will stand up for these people and will not support the government's changes to these two elements of the TPA.