



fair trading
coalition

The Secretary
Senate Economics Committee
The Senate
Parliament House
CANBERRA ACT 2600

Dear Sir

The Fair Trading Coalition (FTC) welcomes this opportunity to comment on the Trade Practices Legislation Amendment Bill 2008.

The FTC is an informal coalition of small business organisations committed to reform of the Trade Practices Act. The Members of the Fair Trading Coalition believe that a vibrant small business sector is important if Australia is to sustain a competitive market. The Fair Trading Coalition has as its guiding principles its Small Business Charter of Fairness; first developed in 2002 for the Dawson Inquiry into the Trade Practices Act and amended and updated on a number of occasions since; most recently in 2007 just prior to the Federal election. I have attached a copy of that Charter for your information.

As you will be aware some of the issues in the current Bill were considered previously by the Senate Economics References Committee 2004 *Inquiry into the Effectiveness of the Trade Practices Act in Protecting Small Business*. The FTC supported the recommendation of that Inquiry that the concept of "taking advantage" in section 46 of the Trade Practices Act be clarified. The FTC had urged the previous Coalition Government to make that clarification and is now pleased that the issue is being addressed via this Bill.

The FTC therefore fully supports the proposed amendments which are proposed to clarify the phrase 'take advantage'. In particular the FTC supports the retention of the proposed new sections 6A(c) and (d). In the FTC's view any suggestion that those sections be deleted would weaken a very necessary and welcome change to section 46.

The FTC has long been of the view that recoupment should not be a mandatory factor in determining section 46 predatory pricing matters and thus the Members of the Fair Trading Coalition strongly support the amendment that is proposed in this Bill. The FTC does not agree that such a change is not necessary; as some opponents of the amendment have suggested.

members of the Fair Trading Coalition:

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|-------------------------------------------------|----------------------------------------------------------------|------------------------------------------|---------------------------------------------------------------------|-----------------------------------------------------------|
| 1 Apple & Pear Growers Association of SA Inc | 7 Australian Petroleum Agents and Distributors Association | 13 Drycleaning Institute of Australia | 20 The Motor Trades Association of the Australian Capital Territory | 26 The Pharmacy Guild of Australia |
| 2 Australian Automotive Aftermarket Association | 8 Australian Private Hospitals Association | 14 Growcom | 21 The Motor Traders' Association of New South Wales | 27 Service Station Association Limited |
| 3 Australian Automobile Dealers Association | 9 Australian Service Station and Convenience Store Association | 15 The Horticulture Council | 22 The Motor Trades Association of the Northern Territory | 28 Victorian Automobile Chamber of Commerce |
| 4 Australian Hotels Association | 10 Chamber of Women in Business | 16 Independent Liquor Group NSW | 23 The Motor Trade Association of South Australia | 29 Western Australian Dental Implant Society AOS (WA) Inc |
| 5 Australian Motor Body Repairers Association | 11 Civil Contractors Federation | 17 Independent Liquor Stores Association | 24 The Motor Trade Association of Western Australia | |
| 6 Australian Newsagents' Federation | 12 Council of Small Business Organisations of Australia | 18 Liquor Stores Association of Victoria | 25 National Institute of Accountants | |
| | | 19 Motor Trades Association of Australia | | |

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The FTC also supported the introduction of the so-called 'Birdsville' amendment into section 46; primarily because for the first time predatory pricing was explicitly recognised within the Act. This was a significant step forward for small business. In fact it was also a major step forward for both major political parties to accept the need for a separate provision to cover below-cost selling. The FTC was very pleased with that decision.

For small business the issue is not so much about whether one set of words is better or more consistent than another, the issue is about whether in proposing amendments to s46(1AA) the outcome for small business will be a stronger and more workable predatory pricing provision.

Having said that, the FTC believes market share will often be easier to prove than market power. The victims of below-cost selling will most likely not focus on what the 'test' is, as long as the law provides a remedy for them and their business. Businesses which may engage in below-cost selling will be better able to judge whether they have a substantial market share rather than substantial market power and act accordingly.

The FTC is though happy to support the proposed amendments but, importantly, will monitor how the amendments operate in the market and how the ACCC administers the new law. Most of the problems identified by the ACCC in relation to the 'Birdsville' amendment will still exist following the proposed amendments, such as, what is below the 'relevant cost', what is 'a sustained period' and what is 'purpose'.

I would suggest that with a specific below-cost provision and the need to show below-cost selling for 'a sustained period' serious consideration should be given to having the words 'purpose or effect' inserted into the new section. Adding 'effect' will assist with the enforcement of the provision and indeed could see it become a self-enforcing provision. It is important, in the FTC's view, that the law conditions behaviour, as well as facilitates enforcement.

In relation to the proposed removal of the monetary threshold in section 51AC, that is strongly supported by the FTC and notes that the removal of the threshold was supported by the majority report of the Senate Economics References Committee 2004 *Inquiry into the Effectiveness of the Trade Practices Act in Protecting Small Business*.

The FTC also supports the proposed amendment to the ACCC's use of section 155 powers. However the FTC would not support any extension to the ACCC being able to use section 155 powers on a matter once a substantive hearing has been commenced.

The Fair Trading Coalition welcomes the proposal that the Act specify that the second Deputy Chair of the ACCC should have small business experience and the Members of the FTC support that amendment.

The FTC supports any measures to improve access to legal remedies; particularly for small business. Access to the Federal Magistrates Court for the hearing of section 46 cases will improve that and in particular for 'coat-tails' damages action.

Whilst the FTC supports the amendments to the Trade Practices Act as set out in this Bill, I do note that many of the recommendations of the 2004 Senate Economics References Committee



report, which were supported by the FTC, have not been adopted. In particular, those relating to creeping acquisitions (though I note of course that the Committee is considering a Bill relating to creeping acquisitions), cease and desist orders, divestiture and the application of the Trade Practices Act to Government commercial activities.

The other issue mentioned briefly above is the issue of compensation for victims of breaches of the Trade Practices Act. The intention of the Act as indicated in section 83 has not, in our view, been realised and I would ask that the Committee consider recommending further amendments to the Act to ensure the intention of that provision is met.

The Members of the Fair Trading Coalition recommend to the Senate Economics Committee that it support the Trade Practices Legislation Amendment Bill 2008.

Please do not hesitate to contact me if you require any further information.

Yours faithfully

MICHAEL DELANEY
Executive Director of the Motor Trades Association of Australia
Chair and Convenor of the Fair Trading Coalition

21 July 2008