Business Council of Australia

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Submission to

Senate Economics Committee

on the

Trade Practices Legislation Amendment Bill 2008

25 July 2008

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1. Introduction

The Business Council of Australia (BCA) welcomes the opportunity to provide a submission to the Senate Economics Committee's inquiry into the Trade Practices Legislation Amendment Bill 2008 (Bill).

The BCA represents the chief executives of around 100 of Australia's leading companies. The BCA develops and advocates, on behalf of its members, public policy reform that seeks to position Australia as the best place to live, learn, work and do business.

The BCA supports robust and effective competition law, because it is an important element of business regulation in Australia. Effective competition is important to maintain adequate consumer choice and to keep prices low. Any amendments that may stifle ordinary and legitimate commercial conduct or competition should be avoided.

Therefore, consistent with our broader views on regulatory reform, the BCA believes that any new business laws or proposed changes to existing laws should only occur where:

- there is a clear and identifiable problem to be addressed;
- the proposed reforms achieve the purpose for which they are intended, without having unintended consequences; and
- the proposed reforms do not stifle ordinary and legitimate business behaviour.

As such, any proposals to amend or reform the *Trade Practices Act 1974* (Cth) (TPA) require proper economic analysis and consideration of both the policy objectives and practical effect of the proposals.

This submission discusses the following key issues and makes the following recommendations:

- The conferral of jurisdiction on the Federal Magistrates Court (FMC) to consider cases involving allegations under section 46 of the TPA.
    - Recommendation: alternative solutions such as an ombudsman or a specialist dispute resolution forum would be a more appropriate means to address concerns relating to cost and difficulties in the Federal Court jurisdiction.

- Proposed changes to section 46 of the TPA – the expansion of the 'take advantage' element in proposed subsection 6A, the removal of the requirement to prove recoupment and the removal of references to market share.

  - Recommendation: the proposed changes in subsection 6A to the 'take advantage' element are not necessary, and in particular the deletion of proposed section 46(6A)(d) is strongly recommended.

  - Recommendation: proposed new section 46(1AB) relating to recoupment is unnecessary and may have unintended consequences on competition.

  - Recommendation: the removal of references to 'market share' and replacement with 'market power' is supported.

- The expansion of the information gathering powers of the Australian Consumer and Competition Commission (ACCC) under section 155 of the TPA.

  - Recommendation: sufficient safeguards should be put in place to ensure that the ACCC's powers under section 155 (as amended) do not conflict with or interfere with the proper application of Court processes or impose undue burdens on business.

2. Conferring jurisdiction on the Federal Magistrates Court for misuse of market power cases

The Bill would, if enacted, confer jurisdiction on the FMC to consider matters arising under section 46 of the TPA (the prohibition against misuse of market power). If the Bill is enacted, section 86(1A) of the TPA would provide that:

> *Jurisdiction is conferred on the Federal Magistrates Court in any matter arising under section 46, Part IVA, Part IVB, Division 1, 1AAA, IA or 2A of Part VA in respect of which a civil proceeding is instituted by a person other than the Minister or the Commission.*

The aim of the amendment is to address perceived concerns in relation to the costs, difficulties and delays associated with bringing cases under section 46 of the TPA and to provide '*simpler and more accessible alternative to litigation in the superior courts'*.[1]

[1] *Trade Practices Legislation Amendment Bill 2008,* Explanatory Memorandum p 17.

However, the BCA believes that conferring jurisdiction on the FMC may not adequately address these concerns, and may in fact exacerbate existing concerns.

Some of the reasons that the FMC is not the appropriate jurisdiction to hear cases of this type are as follows:

- The FMC is inexperienced in dealing with misuse of market power matters. Section 46 matters are highly technical and complex, involving the consideration of substantial factual and expert economic evidence. Section 46 is proven to have one of the most complex case histories of all the provisions under Part IV of the TPA. The FMC is unlikely to be more effective or efficient than the Federal Court in relation to these matters.

- In light of the complex history surrounding section 46, together with the FMC's inexperience in deciding section 46 cases, there is a risk that the proposed amendment would increase the likelihood of disputed decisions which, in turn, would result in appeals to the Federal Court.

- As the jurisdictional limit on the FMC for Part IV cases is currently $750,000, it is unlikely that the FMC will be the appropriate jurisdiction for many cases which typically involve significantly greater claims.

- As there is no accrued jurisdiction for the FMC to hear matters which raise issues under other sections of Part IV of the TPA, any case that deals with a section 46 claim accompanied by other Part IV claims will not be heard in the FMC.

- It is unlikely that small business will seek to commence section 46 actions in Court. This appears to be supported by the Council of Small Business Organisations of Australia which was recently quoted as stating that:

  > *Not many small businesses are going to take on large companies [on] through the Courts. We would be calling on the ACCC to run more of these cases.*[2] *[sic]*

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[2] Matthew Drummond, 'Law Reforms Ridiculed', *The Australian Financial Review*, 4 July 2008, p11: However, COSBOA was also reported in that article as backing the plan to give the FMC jurisdiction to hear section 46 cases.

The BCA believes that, rather than conferring jurisdiction on the FMC, alternative solutions such as an ombudsman or a specialist dispute resolution forum would be a more appropriate means to address concerns relating to cost and difficulties in the Federal Court jurisdiction.

3. Misuse of market power

3.1 Proposed expansion of the 'take advantage' element of section 46

Section 46(6A) has been proposed to clarify the meaning of 'taking advantage'.

Proposed section 46(6A) is as follows:

(6A) In determining for the purposes of this section whether, by engaging in conduct, a corporation has taken advantage of its substantial degree of power in a market, the Court may have regard to any or all of the following:

(a) whether the conduct was materially facilitated by the corporation's substantial degree of power in a market;

(b) whether the corporation engaged in the conduct in reliance on its substantial degree of power in the market;

(c) 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;

(d) whether the conduct is otherwise related to the corporation's substantial degree of power in the market.

The amendments proposed in sections 46(6A)(a) – (c) attempt to codify the way in which courts have interpreted and applied the 'take advantage' element of section 46. The BCA believes that unnecessary prescription in the legislation should be avoided. There is a risk that the introduction of new legislative provisions may have unintended consequences and introduce uncertainty into how the law will be applied in practice.

The BCA considers that proposed amendment set out in section 46(6A)(d) introduces a new concept into the 'take advantage' element of section 46. The words 'otherwise related to' are much wider than the current judicial interpretation of the 'take advantage' element and could consequently dilute, or even eliminate, the current causal connection which is required between a corporation's market power and its purpose.

Conduct which is 'otherwise related to' a corporation's market power could extend to a wide range of conduct and unknown circumstances which ordinarily would not be regarded as causally connected to, or 'taking advantage of', that market power. The unintended broadening of the scope of the meaning of 'taking advantage' may therefore ultimately stifle legitimate business behaviour.

The BCA considers that the proposed changes in subsection 6A to the 'take advantage' element are not necessary, and specifically strongly supports the deletion of the proposed section 46(6A)(d).

3.2 Recoupment

The proposed new section 46(1AB) states that:

> *A corporation may contravene subsection (1AA) even if the corporation cannot, and might not ever be able to, recoup losses incurred by supplying the goods or services at a price less than the relevant cost to the corporation of the supply.*

The BCA submits that this new provision is unnecessary because, based on judicial decision-making, it is not currently necessary to prove that a business must be able to recoup its losses in order to show the firm has market power and has taken advantage of that power. [3] Rather, recoupment has been one element that the courts have used in considering whether a firm has market power, and has taken advantage of that power.

Courts should therefore feel they have the flexibility to decide whether recoupment is an important element, based on the particular circumstances of each individual case.

The amendment arguably creates an impression that recoupment is not an important element in assessing conduct under section 46. The BCA submits that courts should, and ordinarily will, look for evidence of recoupment when considering allegations of predatory pricing. If for example, there is no prospect of recoupment, there may be

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[3] While the High Court has stated that likely recoupment is 'important', it is not determinative. For example, in Boral, Gleeson CJ and Callinan J stated that while the *'… possibility of recoupment is not legally essential to a finding of pricing behaviour in contravention of section 46, it may be of factual importance'*: Boral Besser Masonry Ltd v ACCC (2003) 215 CLR 374, 422. McHugh J also referred to the usefulness of recoupment in assessing whether market power exists and whether there has been any taking advantage of that market power.

significant competition or low barriers to entry which are constraining the corporation's capacity to do so. In turn this may indicate that the corporation does not possess substantial market power at all.

The Canadian Competition Bureau has explicitly recognised the importance of recoupment as an element in assessing whether predatory pricing behaviour exists. In releasing their Enforcement Guidelines on Predatory Pricing this month, which detail how the Bureau intends to enforce the *Competition Act* in relation to predatory pricing, the Bureau describes predatory pricing as:

> *a firm deliberately setting prices to incur losses for a sufficiently long period of time to eliminate, discipline or deter entry by a competitor, in the expectation that the firm will subsequently be able to recoup its losses by charging prices above the level that would have prevailed in the absence of the impugned conduct, with the effect that competition would be substantially lessened or prevented.*[4]

Adopting the proposed amendment may create significant uncertainty for businesses when formulating their pricing strategies as it may not be clear when pricing strategies will be construed as predatory pricing.

3.3 Removal of the concept of 'market share'

The BCA welcomes the proposal to remove references to 'substantial market share' under proposed section 46(1AA) as this will remove the confusion between the concepts of 'substantial market power' and 'substantial market share'.

4. Amendments to section 155

Section 155 of the TPA empowers the ACCC to require a person to provide information, produce documents or appear before the ACCC in relation to a suspected contravention of the TPA and certain other matters.

If the Bill is enacted, section 155(3A)(4) would provide that:

> *A member of the Commission may exercise, or continue to exercise, a power under subsection (1) in relation to a matter referred to in that subsection until:*

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[4] The Guidelines are available at http://www.competitionbureau.gc.ca/epic/site/cb-bc.nsf/en/02713e.html

(a) the Commission commences proceedings in relation to the matter (other than proceedings for an injunction, whether interim or final); or

(b) the close of pleadings in relation to an application by the Commission for a final injunction in relation to the matter.

Section 155 is an essential tool for the ACCC to gather information necessary for an investigation into suspected contraventions of the TPA. However, the BCA considers that it may be necessary for sufficient safeguards to be put in place to ensure that the ACCC's powers under section 155 (as amended) do not conflict with or interfere with the proper application of Court processes or impose undue burdens on business.

In addition, the BCA is very mindful of the very large burden on business (both in terms of time and cost) involved in complying with section 155 notices, including:

- Compliance with section 155 notices issued by the ACCC can be extremely costly for business. Costs include not only sourcing the information to be given to the ACCC (eg through extensive electronic searches), but also the use of personnel and administration associated with such an exercise.

- Electronic searches in large corporations, for example, to find emails or documents which refer to a specified subject matter, can be very costly. The fact that one word in a document of hundreds of pages may require the disclosure of the entire document imposes significant cost and risk for business. Given the uncertainty as to the ability of third parties to access those documents once in the hands of the ACCC (e.g. under a freedom of information request) some practical and risk related issues also exist.

- There are a number of difficulties faced if organisations wish to challenge the scope of a section 155 notice. While it is ultimately possible to challenge the lawfulness of a section 155 notice in Court, there is currently no mechanism to challenge the burdensome nature of a notice or the timeframes for production of documents.

The BCA considers that greater emphasis on collaborative mechanisms and safeguards (including in circumstances where the section 155 notice is directed to respondents who are not the subject of the ACCC's investigation) would assist in ensuring that the scope of section 155 notices and timing for production of information and documents are not unduly burdensome for businesses. This is particularly important in light of possible criminal sanctions for non compliance with the strict terms of a notice and that any

perception of delays in responding to a section 155 notice can attract significant adverse publicity.

The ACCC should generally be required to collaborate with a respondent both before and after issuing a section 155 notice. The BCA understands that, in some situations, dialogue before a notice is issued will not be appropriate (e.g. where there are real concerns about meeting deadlines or the potential loss of documents). However, dialogue before the notice is served with the respondent should be encouraged and dialogue after the notice is served should be a requirement.

Accordingly, the ACCC Guidelines could include additional processes to require the ACCC to collaborate with business and individuals on specific issues, so that:

- where appropriate, the scope of the notice can be tailored to suit the circumstances (particularly in circumstances where the notice is issued to a 'third party');
- the respondent's record keeping practices can be assessed and investigations tailored to suit them, for example:
  - the respondent's custodians for records and information could be identified and the number of custodians who are required to search for records could be limited;
  - information sought could be kept to a manageable size, while still providing the ACCC with the information necessary for the investigation; and
- the relevant period for which records and information are required can be limited to the circumstances.

The implementation of such processes may be consistent with the recent caution by the Administrative Review Council that:

> *it is essential that agencies do not impose unnecessary cost and compliance burdens on notice recipients by seeking information beyond what is required at the time.*[5]

[5] Administrative Review Council, *The Coercive Information-gathering Powers of Government Agencies*, Report No. 48, May 2008, p.16.