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TRADE PRACTICES LEGISLATION AMENDMENT BILL 2008
01/09/2008 Second Reading

Mr KELVIN THOMSON (Wills) (5.37 p.m.)—The Labor government is committed to promoting competition and cracking down on anticompetitive behaviour by powerful companies. I am therefore very pleased to rise to speak in support of the Trade Practices Legislation Amendment Bill 2008. The bill will facilitate our objective by improving the effectiveness of the Trade Practices Act in protecting competitive processes in the Australian economy. The primary purpose of this bill is to amend the act to clarify the meaning of the term ‘take advantage’ and to 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. It is the government’s view that a series of court decisions have undermined the operation of the act, section 46 in particular. The government’s amendments strengthen section 46 and crack down on anticompetitive behaviour by: first, ensuring that victims of predatory pricing will not need to prove that the predator has the ability to recoup losses after participating in an anticompetitive below-cost pricing strategy; second, clarifying the meaning of the term ‘take advantage’ in section 46 in response to concerns that the present meaning of that term has prevented section 46 from capturing anticompetitive behaviour; and, third, removing the unnecessary uncertainty that has arisen following the two-track process for predatory pricing that developed under the previous government.

The ACCC has said that the dual-track process has caused considerable confusion because it focuses on the fundamentally different concepts of market power and market share. The Law Council of Australia stated that this process deters corporations with substantial market share from discounting to low prices for what may be genuine competitive reasons for fear of action from the ACCC. These amendments will deal with predatory pricing while allowing businesses to engage in genuine competition and discounting for the benefit of consumers. The bill forms a key part of the government’s economic reform agenda, giving the ACCC the tools it needs to promote competition and fair trading and to protect consumers. The government will extend the reach of the ACCC by removing the arbitrary monetary threshold currently applicable to allegations of unconscionable conduct, enhancing the protection of small business from transactions involving such things as undue influence. The ACCC will be required to have a deputy chair with knowledge of small business, and the act clarifies the commission’s information-gathering powers, which will strengthen its ability to fully investigate suspected breaches of the law.

Giving small business a permanent voice within the ACCC will improve understanding of the special circumstances confronting small businesses and the

difficulties that they face in dealing with anticompetitive behaviour by more powerful larger businesses. These reforms will make it easier to prosecute businesses engaging in anticompetitive behaviour, give small business permanent representation on the ACCC and allow small business to access cheaper and more efficient judicial processes. Allowing small and medium businesses in appropriate circumstances to have their cases heard in the Federal Magistrates Court, rather than in the Federal Court, will save considerable costs. The amendments undertaken by this government strengthen the provisions of the Trade Practices Act to curtail misuse of market power by addressing the real impediments that have prevented the law from functioning properly.

The Motor Trades Association of Australia have acknowledged that the bill will assist small business operators in seeking redress against predatory behaviour while also ensuring a diversity of competitors and choice for consumers. They have commended the government for recognising the need for these reforms. The Australian Retailers Association has also supported the bill, stating that the 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 Trade Practices Act under recent amendments. The ACCC has stated that the reforms 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.

Small businesses can be at a distinct competitive disadvantage in the market. This bill will give them a fair go when in competition with those businesses with considerable market power, providing them with what I believe is the greatest protection in 30 years against predatory pricing and the misuse of market power. Working families will also benefit from the government's reforms because they will facilitate effective competition, which should result in lower prices, greater choice and better quality products and services. In the tradition of Labor governments, this bill makes a substantial contribution to the legacy of competition reforms—and we can go back to the introduction of the Trade Practices Act in 1974, to tariff reform, to deregulation of the banking sector in the 1980s and the National Competition Policy in the 1990s. This stands in stark contrast to the opposition, who are either economic reform plodders who covet as their own the economic dividend that previous Labor government reforms delivered in the form of low inflationary economic growth, or who are, on the other hand, reform extremists, as was demonstrated with Work Choices and the disadvantage this inflicted on ordinary workers. This government has competition policy as the centrepiece of its economic agenda. This bill is no exception to our intention to make markets work more efficiently, with consumers and small business being the ultimate beneficiary.

I want to commend to the House the Small Business Charter of Fairness recently produced by the Fair Trading Coalition. The Fair Trading Coalition comprises an impressive range of small business representatives, including the various motor trades associations around the states, the Pharmacy Guild of Australia, the Victorian Automobile Chamber of Commerce, the Australian Newsagents Federation, the Australian Motor Body Repairers Association, the Civil Contractors Federation and many more. There are many things proposed in the Small Business Charter of Fairness which I would commend to the attention of my parliamentary colleagues, but there are two which are particularly relevant in the context of this debate. The first is this:

The strengthening of section 51AC (unconscionable conduct) of the Trade Practices Act to proscribe 'take it or leave it' contracts and the termination of contracts at will without just cause.

Too many small businesses are subjected to unfair business practices, including the use of 'non-negotiable' contracts and termination of contracts at will without just cause. Section 51AC should be amended to proscribe these practices.

The second is this:

Access to justice for small business.

To ensure that all businesses have affordable access to the protection and remedies available under the Trade Practices Act:

the jurisdiction of the Federal Magistrates Court should be extended to deal with contraventions of Part IV of the Trade Practices Act including misuse of market power, contravention of industry codes and unconscionable conduct matters; and

the ACCC should be able to seek compensation for victims of breaches of the Trade Practices Act so that individuals don't have to take their own action and there should also be effective and inexpensive scope for victims of breaches of the Trade Practices Act to use sections 82 and 83 of the Act following successful prosecutions by the ACCC.

I think that these are important things for the House to consider. In the time I have been a member of the federal parliament, I have experienced representations from small businesses who have been the victims of rough handling from large businesses. I remember, in particular, cases involving retail tenants who were in dispute with shopping centre landlords and, back in the 1990s, some of the disgraceful ways in which retail tenants were being treated by those landlords. I remember cases involving petrol station franchisees and their dealings with the large oil companies. I remember motor accident repairers and their struggle to get fair value for work done.

On each occasion, in seeking to assist them, I would find that the previous federal government, the Howard government, was essentially unsympathetic to small business concerns and was on the side of large corporations. That is typical. On any given issue, whether we are talking about industrial relations laws, Fuelwatch, grocery prices, banks passing on interest rate reductions, the Medicare levy surcharge or the levy on condensate, given an opportunity to support small business, to support workers, to support consumers, the Liberal Party always passes by on the other side. It always supports large corporations. It always supports big business at the expense of small business, at the expense of workers, at the expense of consumers. That is why it has fallen to a Labor government to introduce the legislation before the House here.

To return to some of the detail of the bill, part IV of the Trade Practices Act promotes competition by prohibiting anticompetitive conduct. Section 46 in part IV prohibits unilateral anticompetitive conduct, most notably by prohibiting corporations from misusing substantial market power to harm or eliminate competitors or competition generally. Part IVA of the Trade Practices Act promotes fair trading by prohibiting unconscionable conduct. In particular, section 51AC of part IVA prohibits unconscionable conduct in connection with the supply of goods or services to or the acquisition of goods or services from a corporation.

Labor in opposition indicated that we would strengthen the Trade Practices Act to restore it to the original 1986 intention. This bill strengthens section 46 and section 51AC as part of our ongoing commitment to improve trade practices laws

in Australia. These really do constitute the biggest reform to the Trade Practices Act legislation in over 20 years.

I mentioned that the bill amends the Trade Practices Act to require that at least one of the deputy chairpersons of the ACCC have knowledge of or experience in small business matters. I think this is a very important reform. Those opposite say that they support small business, but effectively they get the support of small business on false pretences. They never do anything to help them and they certainly do not do anything to help them in their struggles with big business.

Section 46 contains two prohibitions against unilateral anticompetitive conduct. Firstly, subsection 46(1) prohibits a corporation with a substantial degree of market power from taking advantage of that power for a prescribed purpose. This bill amends the prohibition on predatory pricing in subsection 46(1AA) to align it with the prohibition on the misuse of market power in subsection 46(1). Consistent with the findings of the Senate inquiry, a specific prohibition against predatory pricing makes predatory pricing a clear target of section 46.

The bill also incorporates four non-exclusive factors into section 46 which may be considered by a court in determining whether a corporation has taken advantage of its substantial market power. Importantly, the amendment ensures that, in addition to considering whether a corporation could have engaged in the relevant conduct in a competitive market, the court may also consider whether that corporation would have been likely to do so.

I turn to the question of jurisdiction. Concerns have been expressed about the costs and delays associated with bringing section 46 matters. If the costs associated with privately pursuing section 46 claims are prohibitively high, then it will not be as effective in addressing anticompetitive conduct. The bill addresses these concerns by conferring jurisdiction on the Federal Magistrates Court to hear private matters arising under section 46. By doing so, the bill improves access to justice for businesses in cases arising under this important provision in appropriate circumstances.

Schedule 3 repeals the price thresholds that currently limit the protection afforded by section 51AC of the Trade Practices Act against unconscionable conduct in business transactions. In doing so, the bill implements a recommendation of the Senate inquiry. It enhances the protection afforded by section 51AC by focussing the prohibition on the wrongdoing involved, rather than arbitrary monetary thresholds. The ACCC chairman, Mr Graeme Samuel, stated on 11 June this year that, as a result of the amendments contained in the bill, small businesses will soon enjoy their greatest protection in 30 years against predatory pricing and the misuse of market power.

I also want to comment on the Birdsville amendment, given that the coalition has indicated they will be voting to keep it. I want to point out to the House that the Birdsville amendment is not supported by the ACCC. It is not supported by the former ACCC chairman, Professor Alan Fels—for whom I think there is high regard right around the country in terms of his commitment and expertise in this area—and it is not supported by Bob Baxt, the former chairman of the Trade Practices Commission.

The present reference to market share has given rise to uncertainty and may reduce pro-competitive price competition in markets. The ACCC has publicly stated that subsection 46(1AA), as currently drafted, adds considerable confusion to the law and should be amended to clarify the protection it provides. This bill

achieves this by aligning the Birdsville amendment with the long-standing prohibition in subsection 46(1). In particular, the bill amends subsection 46(1AA) to focus it on a corporation's market power as opposed to its market share. The size of a firm, including its market share, will, however, remain a relevant factor in establishing a corporation's market power for the purposes of the revised prohibition.

Subsection 46(1AA) presently operates in relation to firms with 'a substantial share of a market'. This is inconsistent with the long-standing prohibition in subsection 46(1) which operates in relation to firms with 'a substantial degree of market power'. The concept of 'market power' allows a court to consider all the relevant characteristics of a market in determining whether a firm has acted in an anticompetitive fashion. Such factors would include the size of a firm, as well as the size and number of its competitors. The concept of market power has been effective in targeting unilateral anticompetitive conduct. I heard this example mentioned in the House previously, but in 2006 the Federal Court imposed penalties totalling \$8.9 million on Safeway with respect to four breaches of section 46(1) and other anticompetitive conduct. This was despite Safeway having only around a 16 to 20 per cent share of the relevant market.

I think this is a good bill. It is a bill which is good for small business; it is a bill which is good for consumers; it is a bill which continues the Labor tradition of providing assistance to small business and providing assistance to consumers. I commend it to the House.