

THE DAWSON REVIEW: A SMALL BUSINESS PERSPECTIVE

ROBERT GARDINI*

I INTRODUCTION

The Dawson Review¹ ('the Review') was welcomed by small business in view of concerns about increased market concentration in a large number of industries and Australia's role in the globalisation of the world economy. On 3 July 2002 the Small Business Ministers Council issued a communiqué that stated in part that:

The Council agreed that small business needs the *Trade Practices Act 1974* (Cth) to maintain an environment where there is fair and equitable treatment of small firms and new market entrants, to ensure dynamism of the economy, particularly in regional Australia, and to provide consumers with genuine competition and diversity of choice.²

In its 2000–01 annual report, the Australian Competition and Consumer Commission ('ACCC') recognised that the major forces impacting the economy – globalisation, the emergence of new technology and the progressive liberalisation of markets – while generally benefiting business and consumers, left scope for changes to be made to the *Trade Practices Act 1974* (Cth) ('TPA') to make competition law more responsive to these new forces. Small business groups had reached the same view that the TPA has not kept pace with the economic and structural changes taking place in the Australian economy.

The policy announcements of greatest interest and impact for small business arising out of the Review relate to collective bargaining, misuse of market power, unconscionable conduct and third line forcing. The suggested reforms to s 51AC dealing with unconscionable conduct in commercial transactions suggested by the Small Business Fair Trading Coalition led by the Motor Trades Association of Australia were rejected as not falling within the Review's terms of reference.

* BA, Australian National University; LLB, Melbourne University. Partner, Gardini & Co Solicitors & Consultants; legal adviser to the Fair Trading Coalition (a group of 20 peak small business organisations led by the Motor Trades Association of Australia representing 300 000 small businesses across Australia).

1 Committee of Inquiry for the Review of the *Trade Practices Act*, Parliament of Australia, *Review of the Competition Provisions of the Trade Practices Act* (2003).

2 Small Business Ministers Council, 'Final Communiqué' (Sydney, 3 July 2002).

II COLLECTIVE BARGAINING

The most significant feature for small business arising from the Federal Government's response to the Review is the acceptance of the need to amend the *TPA* to establish a new notification procedure for collective bargaining by small businesses. The Government's acceptance of the Dawson Committee's recommendations provides express recognition that there is need for small business to have a level of countervailing power in the Australian economy in circumstances where concentration of industry has significantly increased. In this sense, the Government's acceptance of collective bargaining signals a philosophical shift in the public interest policies which underpin the *TPA*.

The Review recognised that collective bargaining at one level may lessen competition, but on another level, it may provide countervailing power to enable small business to negotiate more effectively with big business. The Review considered the role of collective bargaining in the context of s 45 where a group of competitors joins together to negotiate the price at which they might either acquire or be willing to acquire goods from a supplier. The Review also considered the application of collective bargaining in the context of s 45 where parties enter into a contract arrangement or understanding to deliberately exclude a person from participating in a market. The Review formed the view that if collective bargaining were to have any real effect, it would need to be associated with an ability to engage in a primary boycott if the price negotiated were unsatisfactory.

Although ss 88 and 90 already provide a mechanism for authorisation of collective bargaining where the ACCC is satisfied of a net public benefit, the Review accepted the need for a simpler mechanism to enable small businesses to take themselves outside the provisions of the *TPA* in order to be able to bargain collectively with businesses possessing a large degree of market power. The Government has accepted the Review's recommendations numbered 7.1 to 7.4 and agreed that a notification process should be developed along the lines of the process contained in s 93 of the *TPA*. It appears that a notification process for collective bargaining by small businesses will have certain defined features and requirements.

First, notification will initially be limited to transactions valued at more than \$3 million. This amount can be changed if the Minister believes that a higher threshold should apply. Second, the protection afforded by notification will not take effect until a period of 14 days after it has been lodged with the ACCC and immunity under the notification will extend for three years. Third, the notification procedure will enable third parties such as industry bodies to make a collective bargaining notification application on behalf of a group of small businesses. Fourth, the notification fee will be set at an appropriately low level.

While the Government's recognition of the need for small business to engage in collective negotiations is a welcome initiative, it remains to be seen to what degree the new policy initiative will be translated into legislation that will be of real benefit and assistance to small business. This concern arises because of the lack of clarity and shortcomings in the Government's response to date. The

Government has been silent on the right of boycott, recognised by the Review as essential if collective bargaining is to have any real effect. The application of the \$3 million threshold is unclear. If this threshold refers to the value of involved transactions, the notification process will be of little benefit to small business. The single transaction test applied in s 51AC should be applied to the notification procedure. Further, if the notification procedure applies only where it invokes a corporation with a substantial degree of market power, it will not be of utility to many small businesses which are nevertheless economically captive of a company which does not have the requisite market power. Accordingly, the proposed new notification procedure must recognise that small businesses that are economically captive, such as franchisees and tenants in a shopping centre, must also have access to the right to collectively negotiate.

Finally, it is unclear at present on what grounds the ACCC should or will be able to deny or reject a notification application. These grounds, together with guidelines governing the role of the ACCC in the notification procedure, must be prepared for public consultation before any legislation is passed. A small business should also have the right to seek review of an ACCC decision denying a notification application.

III ABUSE OF MARKET POWER

For small business in concentrated markets, s 46 is an important provision as it fosters competition by preventing corporations with a substantial degree of market power from abusing such power. It also provides protection for small businesses which compete with dominant market participants.

The Review and the Government's response have rejected any change to s 46. The Review considered several reform proposals based on an 'effects' test and it also considered a proposal that s 46 be amended to impose on a company the burden of proving that it did not take advantage of its market power for a proscribed purpose. The Review, while finding difficulty with each of these reform proposals, did not consider alternative approaches or for that matter consider any entirely new provision which could address abuse of market power. In addition, the Review's report contains a technical legal discussion which fails to consider the nature or extent of problems experienced by small businesses in concentrated markets. In this sense, the report is disappointing and a failure as a public policy document. A small business operator would no doubt be bemused by a report where the actors are absent from the stage.

While it is acknowledged that appropriate reform of s 46 is not an easy task, the Review also had an opportunity to address small business concerns about misuse of market power under the unconscionable conduct provision (s 51AC). Misuse of market power often involves unacceptable behaviour or conduct by large corporations with substantial market power, but the Review did not consider reform of s 51AC to be within its terms of reference. This was so notwithstanding that there is a clear relationship between the competition role of s 46 and conduct by powerful corporations falling within s 51AC.

Following completion of the Review but before its report was released, the application of s 46 suffered a major setback when the High Court delivered its judgment in *Boral Besser Masonry Ltd (now Boral Masonry Ltd) v ACCC*³ (*'Boral'*), where it found that Boral Masonry did not have substantial market power in the market for the sale of concrete masonry products. The decision not only overturns a unanimous decision of the Full Federal Court, but it leaves s 46 with little application: few cases are likely to meet the threshold test and those that do will still meet the obstacle of the purpose test.

Contrary to the Parliament's intention, the High Court's decision in *Boral* has given a restricted view of what constitutes a substantial degree of power in a market. The 1986 amendments of the *TPA* lowered the threshold contained in s 46 from a firm in a position to 'substantially to control a market' to a firm that has 'a substantial degree of power in a market'. The Explanatory Memorandum stated that the introduction of a lower threshold was undertaken with a clear intention of expanding the reach of the section, not only to corporations controlling a market (monopolies), but also to corporations participating in oligopolistic markets and to leading corporations in less concentrated markets.

The High Court's decision in *Boral* reduces the effectiveness of the 1986 amendments and effectively marks a reversion to the former test of being in a position substantially to control a market. The ACCC has stated that:

this judgment raises concerns about the ability of s 46 to protect viable small businesses and efficient new entrants from anti-competitive targeting by larger and better resourced competitors, thereby undermining the benefits of competition.⁴

The dissenting judgment of Kirby J illustrates the weakness of the majority when his Honour states:

With respect, the mistake of the primary judge, and of those who hold a view contrary to that taken by Beaumont J, is to construe the phrase 'power in a market' in a way that drastically reduces the effectiveness of section 46 of the Act. It is to read the section, in effect, as confined to monopolists and near monopolists. In substance, the notion of 'control' of the market is thereby restored. But, as a matter of law, that is erroneous for the reasons that I have given.⁵

It is not only the ACCC and small business who are concerned about the impact of the *Boral* judgment on the ability of a person bringing proceedings under s 46 to satisfy the threshold test. In the Senate Hansard of 26 March 2003, Senator George Brandis stated:

But the second reading speech does reveal plainly enough that Parliament did intend section 46 in its current form to be operative at a lower threshold of economic power than the conduct of a dominant firm.⁶

It is also of concern that *Boral* places too great an emphasis on the role of s 46 in promoting and fostering competition without giving due weight to its role in protecting competitors. The wording of s 46 is directed at conduct which:

3 (2003) 195 ALR 609.

4 ACCC, 'High Court Decision Highlights Difficulties in Establishing Misuse of Market Power' (Press Release, 7 February 2003).

5 *Boral* (2003) 195 ALR 609, 353.

6 Commonwealth, *Parliamentary Debates*, Senate, 26 March 2003, 10189 (George Brandis, Senator).

- (a) eliminates or substantially damages a competitor;
- (b) prevents the entry of a person into a market; or
- (c) deters or prevents a person from engaging in competitive conduct.

On the face of its wording, it is clear that s 46 is intended to protect individual competitors from predatory behaviour. Section 46, unlike ss 45 and 47, does not contain a test of substantially lessening competition.

In *Boral*⁷ McHugh J adopted the view of Mason CJ and Wilson J in *Queensland Wire Industries Pty Ltd v Broken Hill Proprietary Co Ltd*,⁸ who said ‘the object of s 46 is to protect the interests of consumers the operation of the section being predicated on the assumption that competition is a means to an end’.⁹

In public policy terms, the decision of the High Court fails to acknowledge the history and purpose of s 46. Competition law is a mechanism to promote efficiency and economic growth, but it should also recognise situations where social objectives are required to be met. As the Hilmer Report acknowledged: ‘These accommodations are reflected in the content and breadth of application of pro-competitive policies as well as the sanctioning of anti-competitive arrangements on public benefit grounds’.¹⁰

It was the report of the 1979 Trade Practices Consultative Committee reporting on Small Business and the Trade Practices Act¹¹ (the ‘Blunt Committee’) and its recommendation to lower the threshold test in s 46 that led to the 1986 amendments to the *TPA*. Many years later, small business has not only lost recognition of the fact that s 46 was intended to protect individual competitors, it has also lost the protection from price discrimination contained in the former s 49. The point of strengthening and amending s 46 in 1986 was to provide small business with protection from price discrimination.

The Blunt Committee also recognised the role of the *TPA* and in particular, the role of s 46 in protecting small firms when it said

the primary thrust of the competition provisions of the Act should be towards efficiency. However, there should be protection of small firms from the predatory conduct of other firms with any substantial degree of market power to support such conduct, irrespective of their size ... Without some protection, firms possessing substantial market power may well be able to insulate themselves from competition from smaller firms by driving them from markets or by preventing them from entering markets. The diminution of competition consequent upon small businesses being denied the opportunity to compete may well work, in the long term, against efficiency because the firms with market power would eventually be free of the disciplines of the market place.¹²

7 (2003) 195 ALR 609, 164.

8 (1989) 167 CLR 177.

9 *Ibid* 191 (Mason CJ and Wilson J).

10 Committee of Inquiry into National Competition Policy, *Review of the Committee of Inquiry into National Competition Policy* (1993).

11 Commonwealth, *Trade Practices Consultative Review Committee*, Small Business and the Trade Practices Act (December 1979).

12 *Ibid* 69.

The Blunt Committee went on to recommend the adoption of a ‘substantial degree of market power’ test in s 46 noting that:

The market position of small business would be improved upon adoption of our recommendation because small businesses will more readily perceive that this section rather than section 49 [the now repealed section dealing with price discrimination] is designed to protect them from predatory price discrimination, price cutting and other conduct amounting to abuse of power.¹³

While the Government has agreed with the Review and rejected any change to s 46, it remains to be seen whether the Parliament will accept this position. While s 46 has its origins in United States antitrust legislation, it needs to be acknowledged that the Australian economy in comparison to the United States economy is significantly smaller and, as a result of micro-economic reform, market liberalisation and globalisation, has become highly concentrated in a large number of industries. In this context, there is need for an effective abuse of market power provision which can preserve competition for the benefit of consumers.

IV UNCONSCIONABLE CONDUCT – SECTION 51AC

The failure of the Review to deal substantively with unconscionable conduct in business transactions is a significant weakness given the relationship of unconscionable conduct to s 46 and the serious deficiencies of s 51AC that have emerged in the five years since it was enacted. The Review’s recommendation that the ACCC should give consideration to issuing guidelines on its approach to Part IVA is of no relevance when the wording of s 51AC is substantially deficient.

Despite the appointment of a Small Business Commissioner to the ACCC, a ministerial direction that the ACCC take test cases and the provision of funding for such cases, the provision is not fulfilling its expectations as stated by the then Minister for Workplace Relations and Small Business, Mr Peter Reith, on the passing of the amending Act:

The purpose of these historical changes is to induce behavioural change in commercial practices so that small businesses do get a fair go and, where they are treated unfairly, they have available to them a means of redress.¹⁴

There are a number of reasons for this. First, while s 51AC was intended to, and applies to, circumstances beyond the equitable principles of unconscionability it falls well short of the concept of unfairness as unanimously recommended by the 1997 Report of the House of Representatives Standing Committee on Industry, Science and Technology¹⁵ (the ‘Reid Committee’) and reflected in s 106 of the *Industrial Relations Act 1996* (NSW).

13 Ibid 72.

14 Commonwealth, *Parliamentary Debates*, House of Representatives, 6 April 1998, 1802 (Peter Reith).

15 House of Representatives Standing Committee on Industry, Science and Technology, *Finding a Balance – Towards Fair Trading in Australia* (1997).

Second, since s 51AC was introduced in 1998 there has been only one successful case brought by the ACCC – *ACCC v Simply No-Knead (Franchising) Pty Ltd*¹⁶ – which concerned extreme conduct by the franchisor. While complaints lodged with the ACCC relating to s 51AC were in excess of 450 per year for the years 1999–2000, there was a very low ratio between complaints lodged and legal action taken by the ACCC. The reason for this is clear – the threshold test of unconscionability is too difficult to establish except for the most blatant forms of conduct. The writer is aware that senior counsel at the Sydney bar are of the same view.

Third, the High Court's unwillingness to reflect the intention of the Parliament impedes the taking of legal proceedings under s 51AC. *Boral* and more recently the High Court's judgment in *ACCC v CG Berbatis Holdings Pty Ltd*¹⁷ ('*Berbatis*') provides evidence of a restricted interpretation of s 46 and s 51AA of the *TPA*. In *Berbatis* Kirby J said 'Yet again this Court has a choice between affording a broad and beneficial application of the relevant provisions of the Act, as opposed to a narrow and restrictive one'.¹⁸ The majority of the High Court adopted the narrow and restrictive view.

In the absence of any amendment to include 'unfair' conduct, s 51AC will continue to be ineffective. Oppressive and opportunistic behaviour by corporations with greater bargaining power or the ability to hold tenants and/or franchisees economically captive will continue unabated.

V THIRD LINE FORCING

The Government has accepted the Review's recommendation that the existing prohibition of third line forcing should cease to be a per se prohibition and should be made subject to a substantial lessening of competition test. This policy change will increasingly subject small businesses to conduct that unduly restricts their decision making. The *TPA* has for many years prohibited third line forcing and has acted as a brake on unacceptable and anti-competitive conduct. The report of the *Trade Practices Act Review Committee*¹⁹ (the 'Swanson Committee') was right when it concluded that while third line forcing may be justifiable in certain cases, it nearly always had an anti-competitive impact. The Review's reference to reforms that have taken place in financial markets as justification for a policy change is grossly inadequate with regard to the application of third line forcing conduct throughout the Australian economy and particularly for small businesses. The Review's own conclusion that 'third line forcing proscribes conduct that may benefit consumers and may not be anti-competitive' is hardly convincing.

16 (2000) 104 FCR 253.

17 (2003) 197 ALR 153.

18 Ibid 65.

19 Commonwealth, *The Trade Practices Act Review Committee*, Report to the Minister of Business and Consumer Affairs (1976).

VI CONCLUSION

Economics, economic history and competition theory tell us to be wary of the adverse consequences of monopolies, oligopolies and concentrated markets. The alleged benefits of lower consumer prices are often illusory when shareholder pressures for increased dividends often result in increased profitability rather than lower prices. There are also economic losses and social costs caused by a decline in the number of businesses, and the small business sector in particular suffers employment losses.

Since its amendment in 1995, the justification for the *TPA* has been much wider than its previous reliance on economic efficiency and the promotion of competition. The amendment to s 2, with its reference to the ‘welfare of Australians’ and ‘fair trading’, is evidence of the broader social purpose of the *TPA* to serve the public interest. In 1998, and consistent with the broader public interest, the *TPA* was amended to proscribe unconscionable conduct in business transactions – as a restraint on unfettered market power by powerful corporations in dealing with small business.

The proposal to enable small business to collectively negotiate is an important step to provide small business with a level of countervailing power to redress imbalances of power which flow from excessive market power by large and dominant corporations in an increasing number of highly concentrated industries. However, it remains to be seen when the amending bill is released whether the concerns referred to in this paper are addressed by the Government.