

1 September 2008

TRADE PRACTICES LEGISLATION AMENDMENT BILL 2008

Second Reading

Mr BRADBURY (Lindsay) (5.18 p.m.) — I rise in support of the Trade Practices Legislation Amendment Bill 2008. I note that there have been a considerable number of contributions from both sides of the House on this bill and the points of difference between the approaches that have been adopted by both sides, I think, are now clear. On the one hand, those on this side of the chamber have sought to place this set of amendments within the broader context of the Australian Labor Party's long-term commitment to delivering greater competition within markets right across the economy. It was the Labor Party that introduced the Trade Practices Act and the Labor Party have played a significant role in all of the significant competition reforms that have occurred certainly since that time.

In relation to the bill before us, a range of measures are proposed and they have been set out by speakers previously. To summarise the items that I wish to comment on, I wish to make some comments in relation to the proposals to clarify the definition of market power, which of its nature involves comment on the so-called Birdsville amendment as it currently exists within the existing legislation. I also will be commenting on the efforts of this bill to clarify and legislate in respect of the issue of recoupment of losses and to make it clear that recoupment of losses should not be necessary in order to make out a case in respect of predatory pricing. Another important element of the bill relates to the provision of more guidance in relation to the definition of 'take advantage of', which is something that, in the absence of any legislative detail, the courts have been left to interpret. The parliament now has an opportunity to provide some guidance that might overcome perceived inadequacies in the interpretations that the courts have previously had applied in respect of that definition. I also wish to make some comments in relation to the legislative requirement for a deputy chairperson of the ACCC to be someone with knowledge of or a background in small business.

That brings me to the issue of small business generally. Certainly those on the other side have sought to hide behind some belief in the merits of their case being advantageous to small business as being one of the primary arguments that they have mounted in this debate. It is interesting that just about every speaker from the coalition that has spoken on this issue has said, 'We are the party of small business' — that is, the coalition, and presumably that includes the National Party as well. On that basis, they cannot support these amendments.

Sometimes it is just as interesting to reflect on what is not said as on what is said. I reflect upon the fact that the shadow minister for small business, the service economy and tourism has not made a contribution to this debate. I think that is telling. I think it also exposes as a fig leaf the argument that the opposition is opposed to these amendments on the basis of its commitment to small business. I note an article on 29 April 2008 in the Australian:

Opposition small business spokesman Steve Ciobo said the coalition would back the amendments "in principle" —

Interjection

The DEPUTY SPEAKER (Hon. Peter Slipper)—*The honourable member ought to refer to the honourable member for Moncrieff by the title of his electorate and not by his actual name.*

Continue

Mr BRADBURY—I am sorry; I was quoting from the article. The member for Moncrieff, the shadow minister for small business, is on the record in April as saying that the coalition supported the amendments ‘in principle’. We should not be surprised, because the coalition had a position back before the legislation was previously introduced—until Senator Joyce got his hands on it. A recurring theme that seems to be emerging in a number of the debates that I have been involved with in the last little while has been the increasing dominance of the National Party in driving economic policy from the opposition. I think that is a matter of grave concern and I will explore that a little bit further in a few moments.

In terms of what small business really thinks of this, I heard a number of people on the other side say, ‘We are standing up for small business on this,’ but there were not all that many comments by people who genuinely represent small business introduced into the debate. I saw a quote in the Australian on 28 April of this year:

Tony Steven, chief executive of the Council of Small Business Organisations of Australia, said the Rudd Government had gone further to protect small business than the previous government, with the changes sending a much clearer message to the courts.

I think Mr Steven is well placed to represent small business; certainly, his endorsement of this bill is one that is not lost on those of us on this side of the House, because we are committed to ensuring that the things that we do in this place are going to assist small business and at the very least not hamper their efforts to get on with doing what they do—that is, generating so many jobs throughout our economy.

I also noticed that the Australian Chamber of Commerce and Industry chief executive, Peter Anderson, said that the competition reforms were ‘a balanced package’. We see further endorsement of these measures by industry and representatives of business—in particular small business. It really does pose the question: if small business is at least largely supportive of these measures—and certainly, on the basis of those quotes, it is—and if defending small business is the argument that is being presented as the basis upon which those on the other side are opposed to the amendments, what is their reason for opposing them?

I turn to the predatory pricing provisions and in particular to the question that clearly emerges in the debate about this bill: whether or not we should retain the very new definition that came in as a result of the so-called Birdsville amendment, which favours this notion of a share of market, as opposed to market power, as being the formulation of words by which we can ascertain whether or not these predatory pricing provisions should apply. Clearly, if the definition is as restrictive as market share then there is a certain possibility, and it has been noted by speakers on all sides that these matters have not yet been tested before the courts. I have to say I find it rather peculiar that those in the opposition are suggesting that there is some benefit in us pursuing this through the courts, that somehow leaving these things to the courts is how really good law emerges.

I happen to think that one of the motivations for many of us to come into this place is to make the laws and to do it in a way that is going to provide some certainty to those citizens and businesses within our community, our society and our economy so that they can operate on the basis that they are either complying with those laws or they are not. It is an absolute absurdity to suggest that it is good law to come into this place, to acknowledge that something is unclear and uncertain and to abdicate our responsibility to the courts. If you listen to those on the other side, that is what they would have this place do.

On this side we are very much committed to meeting our responsibility as legislators, and that is why we would like to provide greater clarity in the market power definition. On the share of market versus market power debate, we have seen—at least from the example of the Safeway case—that market share, of itself, does not necessarily demonstrate market power or potentially taking advantage of market power. If we look at the Safeway case 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.

Those on the other side have said that one of the great virtues of the market share test is that it is easily ascertainable to those who might be willing to meet their obligations because you can quantify someone's market share. You can quantify someone's market share, but what remains a mystery, to me and to all of those citizens out there wanting to meet their obligations under this legislation as it currently stands, is what level of market share gets you over the line. Is it 16 per cent? Is it 20 per cent? Is it 25 per cent? Is it 50 per cent? This is just one of the questions that remains unanswered as a result of the so-called Birdsville amendment.

I understand the Birdsville amendment was conceived in a hotel in Birdsville by Senator Joyce. On occasion I have certainly seen some good ideas, some inspired thoughts, emerge over a cleansing beer at the local hotel. But, thankfully, on most occasions those inspired thoughts wash away with a Berocca the next morning—they do not find their way into legislation. The unfortunate reality here is that this proposal, which was ill-conceived, made it through the Senate on the last occasion because the government of the day required the support of Senator Joyce.

Interjection

The DEPUTY SPEAKER (Hon. Peter Slipper)—Just before I vacate the chair to the relieving Deputy Speaker, I should point out to the honourable member that I hope that he did not intend to cast a reflection on the senator from Queensland.

Continue

Mr BRADBURY—Certainly not. Thanks, Deputy Speaker; I was merely seeking to—

Interjection

Mr Baldwin—Madam Deputy Speaker, I rise on a point of order. The previous occupier of the chair made a very light directional invitation to the member to withdraw the comments asserting that Senator Joyce's development in the Birdsville amendment occurred because he had consumed too much alcohol.

Interjection

The DEPUTY SPEAKER (Ms S Bird)—There is no point of order. A comment was made by the chair which I

heard on my entry. It was not a direction.

Interjection

Mr Baldwin—*With due respect, Madam Deputy Speaker, you were not in chamber to hear what was said.*

Interjection

The DEPUTY SPEAKER—*I did hear what was said, and I heard the Deputy Speaker invite the member to consider his statements. It was not a direction to withdraw.*

Interjection

Dr Emerson—*On the point of order: I simply make the point, Madam Deputy Speaker, that the shadow minister has just reflected upon the chair in a rather adverse way. It was completely unjustified.*

Interjection

The DEPUTY SPEAKER—*I thank the member for the intervention, but I think we can proceed with the debate.*

Continue

Mr BRADBURY—Thanks, Madam Deputy Speaker. I certainly was not seeking to make any such implication. What I was merely attempting to draw the House's attention to was the ill-conceived nature of these proposals. I think it is demonstrative of the fact that the National Party are now increasingly driving the economic policy of the coalition. I can understand why they might have given in to Senator Joyce back in the previous parliament, where they really needed his vote in the Senate, but what absolutely bewilders me is why they continue to pay homage to this amendment, which I note has been criticised roundly in many circles.

I note that Australian Industry Group spokesman Peter Burns said of the Birdsville amendments:

They were silly. It is sensible to get rid of them. They have created a lot of uncertainty.

I note that Professor Alan Fels, who was the previous chairperson of the ACCC, said in the Australian Financial Review on 25 September 2007:

The pendulum has swung too far in the wrong direction.

These are eminent and respected commentators criticising the outcome of that particular ill-conceived thought, the result of an ill-conceived process which occurred in the Birdsville Hotel. We are all familiar with the term DUI, driving under the influence. It seems to me as though—and I say this without casting any aspersions on Senator Joyce—this is LUI, legislating under the influence of the National Party. We have seen the once-great Liberal Party caving in, when it comes to key economic policy decisions, to the demands of the National Party—in the same way as the then Treasurer, who, when the previous amendments were introduced, was not from the outset prepared to countenance these proposals, ended up having to give in. The shadow minister for small business was not able, unfortunately, to get his policy through the opposition party room, and we can only speculate that that may be the reason he has chosen not to speak on this particular debate, which those on the other side have consistently reminded us is on a critical set of amendments affecting small business.

In relation to recoupment, it is critical that these amendments be passed. They ensure that the case law that has developed, which runs counter to the intention of the parliament—or certainly counter to what this parliament believes was the intention of the law at the time—will be rectified and there will be no such requirement to prove recoupment in order to make out a case under these provisions.

In relation to the definition of ‘take advantage of’, it is critical that these proposals are adopted. The courts have been left with the expression ‘take advantage of’, and they have interpreted it in a certain way. It is imperative that, if the parliament believes that that is not the correct interpretation or that the courts have not always ended up with the correct interpretation, there be rectification of the statute to ensure that greater guidance is given to the judiciary when these matters come before them.

Importantly, these proposals ensure that a very strong voice is always present for small business within the institutional arrangements of the ACCC. I think ensuring that a deputy chairperson of the ACCC is someone that has knowledge and experience from a small business perspective will ensure that, in the continued deliberations of the ACCC, the needs of small business will be taken into account to a greater extent. Once again, it strikes me as strange that the shadow minister for small business has chosen not to make a contribution to this debate.

There are a range of other amendments contained within this bill, but, to summarise, what we have seen with this bill is in large part a consolidation of the great commitment of those within the government, the great commitment of the Australian Labor Party, to ensuring greater competition within the marketplace. Greater competition is not something that we pursue as a goal in its own right; it is something we pursue to get a better deal for consumers. There are many consumers, I am certain, within electorates such as mine that will benefit greatly from these amendments when they are passed by the parliament. I commend the bill.