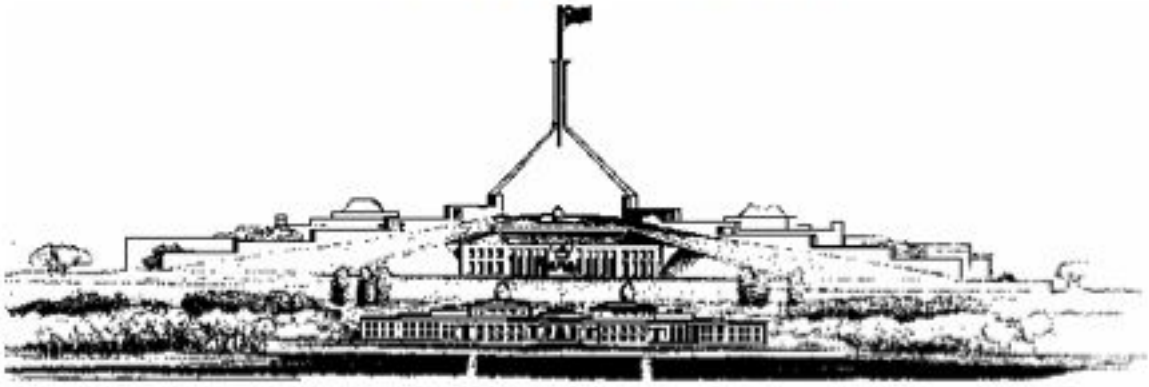
COMMONWEALTH OF AUSTRALIA

PARLIAMENTARY DEBATES



HOUSE OF REPRESENTATIVES

Federation Chamber

COMMITTEES

Economics Committee

Report

SPEECH

Tuesday, 22 November 2016

BY AUTHORITY OF THE HOUSE OF REPRESENTATIVES

SPEECH

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Questioner		**Responder**	
Speaker	Kelly, Craig, MP	**Question No.**	

Mr CRAIG KELLY (Hughes) (17:44): I rise to make a few comments on the hearings we had with the ACCC and the chairman's comments, during those hearings, on section 46 of the Competition and Consumer Act 2010, formerly the Trade Practices Act. I would like to start off at the point where our trade practices act actually originated. It is the greatest honour to have Heather Henderson, the daughter of Sir Robert Menzies, here in the chamber, because it is with Sir Robert's speech 'The Forgotten People' that I would like to start. It is the genesis of our trade practices act. The speech is from 1942, in the middle of the Second World War. He talked about the type of people that he represented in parliament. Sir Robert Menzies said:

… the kind of people I myself represent in Parliament—salary earners, shopkeepers, skilled artisans, professional men and women, farmers, and so on. These are, in the political and economic sense, the middle class. They are for the most part unorganized and unselfconscious. They are envied by those whose social benefits are largely obtained by taxing them. They are not rich enough to have individual power. They are taken for granted by each political party in turn. They are not sufficiently lacking in individualism to be organised for what in these days we call 'pressure politics'. And yet, as I have said, they are the backbone of the nation.

He finished that most famous speech with the following words:

… what really happens to us will depend on how many people we have who are of the great and sober and dynamic middle-class—the strivers, the planners, the ambitious ones. We shall destroy them at our peril.

Twenty years later, on 12 November 1963, Sir Robert gave another speech. He talked about the formation of what would be called a restrictive trade practices act or trade practices act. He said:

It is of the essence of competitive enterprise that … the road to advancement in any business should be open to all. This system we wish to protect. Privately imposed restraints which are against the public interest or submit the small trader to oppressive limitations should be eliminated.

He went on to talk about setting up a trade practices act after the election. This was the genesis of our trade practices act. It was to provide equality of competitive opportunity to the small trader. Sir Robert Menzies understood the importance of that. Yet for decades we have had a trade practices act that has failed to do so.

The ACCC chairman, in his opening statement, said of section 46:

The current law in itself is badly crafted, but further it has been interpreted by the courts as largely unworkable. So having an effective misuse-of-market-power test rather than an ineffective one can only be pro competition and I think pro innovation, in a way I will illustrate.

He continued:

… whatever other way you want to look at it, the key provision we would want to use if the major banks were to seek to remove important new competitors is section 46.

This is where I take a different view to the chairman. He went on:

But, with all that is going on that we hope will occur in banking with new technology, the change to section 46 cannot come too soon, because at the moment we could not deal with that form of exclusionary behaviour. But, with the new Harper 46, we can.

With the greatest respect to the Chairman of the ACCC, I disagree with his summary. The current provisions of section 46 of the trade practices act have three hurdles. The first is that there must be a substantial degree of market

power. You must show that the company had a substantial degree of market power. Second, they must have taken advantage of that market power. Third, it must have been done for the purpose of damaging a competitor.

The problem with the structure of that law is that it has been extremely difficult to show that a company has a substantial degree of market power. It goes back to 1986, over 30 years ago. This parliament tried to fix that. The 1986 amendments to the Trade Practices Act, 30 years ago, changed it from substantial control of a market to a substantial degree of market power, because they thought the test was too high. That change 30 years ago did nothing, and we are stuck where we are today.

This has been a bit of a false debate. Many people have argued that in section 46 we should change the word 'purpose' of damaging a competitor to 'effect' of damaging a competitor. That overlooks the fact that section 46(7) of the act has a specific provision that says you can infer the purpose from the conduct. You do not need a smoking gun or some type of document that shows a company went out to deliberately damage its competitors; it can be inferred from the conduct. So the idea over these years about simply changing the word 'purpose' to 'effect' has been, I think, a funny debate.

This change is being described as an effects test, but what it is proposed to add on to the law is the effect not of damaging a competitor but of substantially lessening competition, and that is a completely different test. We have that test currently in the mergers provision. So, when the ACCC analyses a merger, the test is that that merger will be blocked if it substantially lessens competition. But we have seen how little that is used, because in most of the mergers that go through in this country there is not a substantial lessening of competition, so therefore the merger goes ahead. So in fact what we are doing is putting another hurdle into this act which will actually make it harder to prove that a small business has been damaged by anticompetitive conduct. We are not making it easier with this provision.

One of the other issues that we have is that the first provision is that, for there to be a breach of section 46, you must show that the firm has a substantial degree of market power. The ACCC were at the hearing basically saying that they thought this act would help them to take action against anticompetitive conduct in the banking industry, but the problem is that, if you are going to use this act, you have to show that one of the banks has a substantial degree of market power in some market. I specifically put it to the ACCC—the chairman and the other ACCC board members that were there—and not one of them could identify any market where any bank had a substantial degree of market power, because the test that the courts have held to show that a firm has a substantial degree of market power is that they have to be able to raise prices without losing business to their competitors. Where you have at least four competitors in the banking sector, in a theoretical market, if I am with the ANZ and the ANZ put their price up, I can simply move to Westpac, the Commonwealth or the NAB. So therefore I am at a loss to see how, even though the banks are so powerful—probably the most powerful organisations in our country—they are going to meet the threshold of having a substantial degree of market power. If you cannot get over that hurdle, the entire section 46 is completely and utterly useless as far as the banks go.

The other issue is that firms can engage in anticompetitive conduct to damage the competitive process without a substantial degree of market power, and that was noted in the Boral case some years ago, where Justice McHugh said:

Conduct that is predatory in economic terms and anti-competitive may not be captured by s 46 simply because the predator does not have substantial market power when it sets out on its course to deter or injure competitors … Section 46 is ill drawn to deal with claims of predatory pricing under these conditions.

We are doing nothing. The Birdsville amendment is there to deal with this exact thing that Justice McHugh spoke about, and the proposal is to get rid of it. I cannot agree with the amendments that have been proposed, and I think the hearing with the ACCC shows the weakness of it.