

MEDIA RELEASE



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Radical predatory pricing reforms pose risk to discounters

Proposed new legislation, passed by the Senate on Tuesday, could have a significant numbing effect on discounting by large retailers, according to Deakin University law lecturer, Ms Julie Clarke.

The *Trade Practices Legislation Amendment Bill (No 1) 2007* is the Federal Government's response to the 2004 report of the Senate Economics References Committee on the effectiveness of the *Trade Practices Act* in protecting small business. In its original form the Bill ignored many of the significant changes to the misuse of market power provisions of the Act and was criticised as being largely cosmetic.

But in an extraordinary last minute amendment, introduced to the Senate on Monday and passed on Tuesday, the Government has created an entirely new prohibition on predatory pricing.

"The predatory pricing amendment goes well beyond anything recommended by the Senate committee. It appears clearly intended to pacify small business, at the possible expense of competitive discounting," Ms Clarke said.

"Currently, predatory pricing is prohibited only where a firm with substantial market power takes advantage of that power for a prohibited purpose, such as eliminating or deterring a competitor. The new provision removes both the need for a defendant firm to have substantial market power or the need for it to 'take advantage' of that power, the two elements that have proved the downfall of predatory pricing cases in the past.

"Instead of substantial market power, a firm will be caught by the new provision if it has substantial market share, even though this does not give it substantial market power. This is a significantly lower threshold than the current test.

"Even more radical is the removal of the requirement that the defendant firm use its market power for the prohibited purpose. It will be sufficient if a firm, having substantial market, engages in sustained below cost pricing for a prohibited purpose. There will need to be no connection between their market share and the prohibited purpose."

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In introducing the amendment for the Government, Senator Brandis was quick to point out that, while many held the view that the existing provisions of s 46 were 'sufficiently broad to deal with the problem' of predatory pricing, these amendments were proposed 'out of a sense of abundant caution'. The bill was supported by Labor and the Democrats in the Senate, although Senator Sherry considered it would have been better to strengthen section 46, not introduce new sections, and expressed concern that the 'amendment was hastily cobbled together at the last minute'.

"Given the Government's reluctance to bolster the core prohibition of misuse of market power in section 46 of the Act and the cosmetic nature of its original amendments to section 46, aimed predominantly at clarifying the definition of 'market power', this latest amendment is extraordinary," said Ms Clarke.

When the amendment bill was first introduced in June, Senator Barnaby Joyce proposed a similar amendment which failed to attract sufficient support. This new, last-minute, amendment constitutes a revised version of Senator Joyce's original proposal.

"It is unfortunate that the amendment has been rushed through the Senate at the last minute without sufficient time for full debate in the lead-up to the federal election," said Ms Clarke.

"While there is a clear need to bolster the misuse of market power provisions, which have proved impotent since the High Court's decision in *Boral* in 2003, there is a real fear that the new amendment, with its vastly different threshold test based solely on market share, will generate uncertainty among larger business about their ability to lawfully discount and may prohibit pro-competitive discounting. While this might constitute a win for small business, it may deter the vigorous competition the Act is designed to protect at the expense of the consumers it seeks to benefit."

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Julie Clarke is available for interview and comment.

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