



## SPEECH

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### Trade Practices Legislation Amendment Bill (No. 1) 2007 Second Reading

8 August 2007

[Dr EMERSON](#) (Rankin) (4.27 p.m.)—In my contribution today, I want to set out the purpose of the Trade Practices Act, the amendments that the government has moved and the further amendments that the member for Prospect and shadow minister for competition policy has moved. It is worth asking why we have a Trade Practices Act; what is its purpose? If we are to fashion and sustain an open, competitive economy in Australia, we need some basic rules under which it can operate.

I happen to be from the spectrum of the argument that supports competition and openness. I am a very strong supporter of the opening up of the Australian economy to competition from abroad and from within Australia, which the Hawke and Keating governments brought about. Before the election of the Hawke government, the Fraser government and various other coalition governments had dominated the government of Australia since about 1949. The only Labor government had been the Whitlam Labor government, which held office between 1972 and 1975. Over that period of predominantly coalition rule, the Australian economy became heavily regulated. It was an inward-looking economy where, over that period, competition was discouraged, deals were stitched up and tariff protection was raised relentlessly.

That did not bring out the best in Australian entrepreneurs; it brought out the worst. It meant that, by 1983, the Australian economy was sclerotic; it was uncompetitive. Unemployment had exceeded 10 per cent; so too had inflation. Indeed, 90-day bank bills—short-term interest rates—reached a record of 22 per cent on 8 April 1982. As a result, the economy was in a shocking state, which was not only because of the drought or a one-off event but also because of policy sloth over a very long period.

It took the election of a Labor government to recognise that the economy needed to be opened up. It was a Labor government that recognised that today's productivity growth is tomorrow's prosperity and that it was essential to lift productivity growth below the very low levels that had been recorded up to that time. Australia's poor productivity growth was very much responsible for us slipping down the international ladder in terms of our living standards compared with those of other rich countries. So the Hawke and Keating governments embarked on a program of reform, designed to lift productivity growth through the opening up of the Australian economy. All of the major markets were liberalised, beginning with the floating of the dollar and financial market deregulation, followed by product market deregulation, where quotas and tariffs were reduced, and then by labour market liberalisation through the introduction of enterprise bargaining in 1993. Incidentally, upon election in 1996, the coalition lauded and supported enterprise bargaining; they said it was a great reform. You do

not hear them talking about enterprise bargaining anymore. They talk only about individual contracts. But that is a debate that will continue robustly inside and outside this chamber at other opportunities.

I ask, then, about the role of trade practices legislation in the opening up of an economy, because, on the surface of it, trade practices regulation is adding more regulation. But, if we are to create an open, competitive economy, some rules are needed. In the first instance, enforceable property rights are needed; otherwise, why work if you can just hack into someone's bank account and steal their money? If you have no property rights and no rights over the value of your own labour, you can be enslaved, but we do not do that in market economies; we ensure that there are some basic rules that establish and enforce property rights.

But in an open, competitive economy we also need to be vigilant. We need to be vigilant against anticompetitive behaviour, and that is where the Trade Practices Act comes in, because, 217 years ago, Adam Smith lamented, and in fact foresaw, the behaviour of some businesspeople and their disposition to collude—to get together and create cartels, to create anticompetitive circumstances to the great cost of the public. It is that monopoly behaviour that Adam Smith described as the enemy of the public good. Adam Smith foresaw, in one way, and called for, in another, the implementation of trade practices acts in market economies. They are essential to ensure that it is truly an open, competitive economy.

So Australia's economy was as an open, competitive economy and the productivity growth that the previous Labor government had expected did in fact occur. During the 1990s, the miracle decade of productivity growth, labour productivity grew, on average, by 2.6 per cent per annum. But, as the Labor Party has pointed out time and time again, since the turn of the century, productivity growth has faltered. During the 2000s to date, productivity growth has fallen from that miracle 2.6 per cent to 2.1 per cent. In the period since the end of 2003 it has fallen away further to an average of 1.2 per cent per annum and in the last 12 months to 0.9 per cent per annum. If today's productivity growth truly is tomorrow's prosperity, these are very worrying developments.

That is why we need to ensure that we embark upon a new productivity-raising reform agenda. That productivity-raising reform agenda of course will have as its central feature investment in the talents of our young people. It will have the reduction of red tape for business, large and small, in Australia—red tape that had been piled up over the last 11 years. It will involve wise investment in infrastructure, such as Labor's national high-speed broadband network. But, as important as all of these are, it will also involve ensuring that Australia has an effective Trade Practices Act to ensure that we have open, competitive markets and to ensure that there is not the capacity legally to collude, to engage in predatory pricing and to engage in unconscionable conduct—all at the expense of openness and competitiveness.

Labor's approach to the Trade Practices Act amendments has been guided by this principle: Labor supports competition. Labor is barracking for consumers, for lower prices. Labor is not in the business of protecting business from competition. To the contrary: Labor has faith and confidence in the business community that it performs best in competitive markets, and it is the role of amendments to the Trade Practices Act to ensure competition, not to protect particular businesses, whether they be big businesses, medium sized businesses or small businesses. It is not to protect them from competition but to help enable them to survive and thrive in an open, competitive market.

It is against that yardstick that we have measured the government's amendments. They constitute some very modest progress. They are better than nothing, and for that reason Labor will support them. Those amendments are a product of four years deliberation following the recommendations of the Dawson committee report. The

Dawson committee report made a number of other recommendations which have not been accepted by government. So over the period of this government to 2007 there has been a slackness in the resolve that any government should have to ensure that competition prevails, that consumers get the lowest possible prices. We want consumers to get low prices through the operation of competition, and it is a sensible response to the problems being experienced around Australia today of the high cost of living.

If you ask anyone around Australia, they complain of the high cost of living. If we can bring that competition blowtorch to the cost of living, we will keep costs down. Since the amendments of the government make some progress, we will support them but, frankly, we are very disappointed in them. If this is the best the government can do after three or four years deliberation on the Dawson committee report, then it tells us a lot about this government's attitude to competition. It tells us that this government is not fair dinkum about the open, competitive economy just as previous coalition governments were never fair dinkum about creating an open, competitive economy. It was Labor that had to do that, and there would need to be a Rudd Labor government to ensure that we remain an open, competitive economy and that we combat the disposition of some businesses to collude and behave as cartels.

I will go through a small number of the amendments that Labor want, which are definable not only by the amendments that we are accepting but by the ones that we have rejected. There have been plenty of people in the small business community—and they do not speak for the small business community at large—who have wanted us to go much further and in some cases to protect them from competition. That is not our business; that is not our go. We want to make sure that competition prevails, and that is what the amendments that Labor want would do.

The first amendment relates to recoupment. This issue arose in a High Court decision in relation to Boral. In 2003 the High Court found that, since Boral, in reducing the price of cement below its cost, could not necessarily have recouped the losses from that below-cost pricing, it had not engaged in predatory pricing. The effect of that decision was to gut section 46 of the Trade Practices Act. It meant that the ACCC or another complainant would have to prove that, in order for predatory pricing to be found, the business that was doing the below-cost pricing was able to recoup all of those losses subsequently. It meant that the legislation only applied to monopolies because it could only be a monopoly that could be sure of recouping those losses. If there were one, two or three competitors in the market, they might not be able to fully recoup those losses. As a consequence, the High Court ruled that is not predatory pricing: go for your life. As a result of that decision, the ACCC has not taken any further cases because they believe it to be a waste of taxpayers' money; they would all fail. The government has not addressed that fundamental problem in its amendments, and we will. Through our amendments we are going to remove the requirement, the obligation, to demonstrate that a business that was engaged in below-cost pricing would have had the ability to recoup all those losses. We want to take that away as an essential test. That will make it easier on the ACCC or another complainant to demonstrate that predatory pricing has occurred.

You would think that if the government were interested in genuine competition it would support Labor's amendments. We do not like the idea of any business large or small—especially a large one in this case, because it would have the power to do it—driving its competitors out of the market through below-cost pricing and then putting the prices back up. Our amendments are designed to deal with the problem of predatory pricing. If the government were fair dinkum, it would say, 'That's fair enough,' because the ACCC says, 'That's fair enough.' If you look at the various submissions that the ACCC have made since the Dawson committee report and various Senate inquiries, you will see that it supports the provision that Labor has put in its amendments relating to recoupment. It supports making that section of the Trade Practices Act effective again, and we support the ACCC in its endeavours.

The next area is the area of creeping acquisitions. At present the ACCC does not have the power to take account of other recent acquisitions in assessing whether the purchase of a small competitor by a larger competitor is anticompetitive. So the ACCC is obligated to assess the single purchase of a competitor with reference to the whole market but cannot assess the purchase with reference to previous purchases made—in other words, if a big company is taking over lots of small ones. Say, in the supermarket area, the ACCC wants to be able to take account of the fact that this might not be the first acquisition but the 99th acquisition. Again, this is a power that the ACCC has sought, and the government will not give it to them. Why is that? Why is the government so relaxed about creeping acquisitions, about larger businesses being able to gobble up the small rivals and not be found to be in breach of the Trade Practices Act? I find that very curious, because that is anticompetitive behaviour. If you are able to gobble up all your competitors you become a monopolist. We do not support that; we support competition.

The next amendment that Labor is moving relates to cartel operations. The Dawson committee report itself recommended jail terms for serious cartel behaviour. This is not some sort of extreme Left committee; it was very conservative in relation to the recommendations that it made. In the United States there are jail terms for serious cartel behaviour. In many Western countries there are jail terms for serious cartel behaviour. Labor is not modelling its amendment on some former Eastern bloc country.

[Mr Martin Ferguson](#)—It is a long-established practice.

[Dr EMERSON](#)—That is right. Why won't the government do this? It says it will now, but we probably have only two, three or maybe four weeks of parliamentary sittings remaining and this recommendation was made in 2003. I do not support jail terms for a range of other offences under the Trade Practices Act. One of the many reasons for that is that the ACCC will find it very hard to get a conviction because the courts will not want to send company directors or executives to jail. But you need to be able to respond to serious cartel behaviour with jail terms, and that is why we are recommending it.

With regard to enforcement powers, we want to make sure that the ACCC can continue gathering evidence after an injunction has been sought. We want to ensure less expensive justice for small businesses and medium enterprises. Our amendments would allow them to go through the relatively less expensive Federal Magistrates Court. We want the deputy chair to have a small business background. Most of these recommendations have the support of the ACCC, they are pro-competition and they will ensure that Labor can deliver lower prices over time because we will ensure that the open competitive economy, fashioned by Hawke and Keating, remains open and is not closed through the sloth of this government through its meagre amendments to the Trade Practices Act.