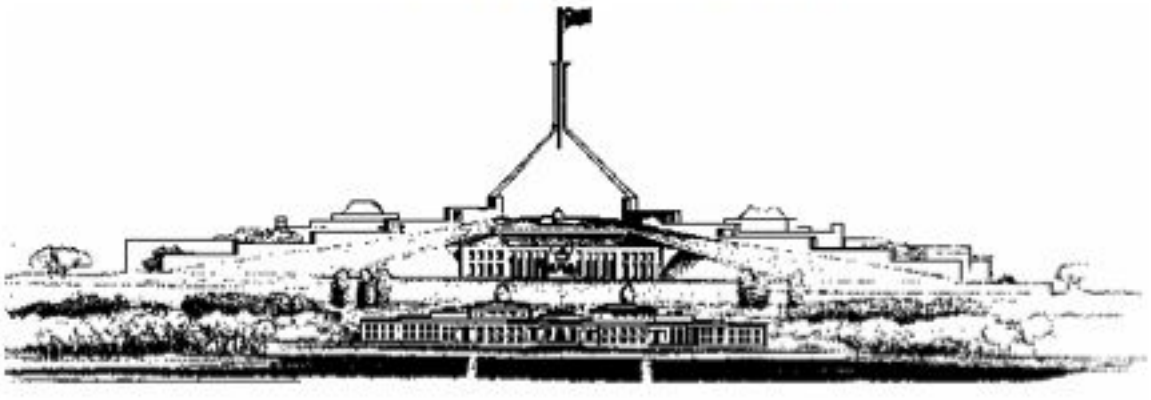
COMMONWEALTH OF AUSTRALIA

PARLIAMENTARY DEBATES



HOUSE OF REPRESENTATIVES

PROOF

BILLS

Competition and Consumer Amendment (Misuse of Market Power) Bill 2016

Second Reading

SPEECH

Thursday, 23 March 2017

BY AUTHORITY OF THE HOUSE OF REPRESENTATIVES

SPEECH

Date	Thursday, 23 March 2017	**Source**	House
Page	37	**Proof**	Yes
Questioner		**Responder**	
Speaker	O'Brien, Ted, MP	**Question No.**	

Mr TED O'BRIEN (Fairfax) (13:22): I found it hilarious that the member for Fenner compared the idea of an effects test to a species that simply will not go away, a species that will outlast any condition and live in any habitat. Well, all I can say in response is that a good idea never dies. But I am not surprised that the member for Fenner and the Labor Party are so adamantly opposed to this legislation, because, at the end of the day, this bill seeks to contain, to curb, misuse of market power. Put in a different way, it seeks to contain any misuse of monopolistic power. Since the union movement effectively controls the Labor Party—the union movement made up of a series of monopolies—it is understandable that, out of principle, the Labor Party will oppose anything that looks, smells and sounds like a restriction of monopolistic misuse of power. But the Competition and Consumer Amendment (Misuse of Market Power) Bill 2016 is a good bill, which is why I rise in support of it today.

The bill seeks to deal with one of the fundamental challenges in free market economies everywhere, which is to ensure that competition flourishes. Competition inherently creates winners and losers, and, at a Darwinian level, that is what the free market is all about. Dare I say, it is what makes the problem of dealing with monopoly situations so difficult. As the High Court has said in a passage that is often quoted in this context, because it is just so compelling and clear:

Competition by its very nature is deliberate and ruthless. Competitors jockey for sales, the more effective competitors injuring the less effective by taking sales away.

Their Honours said:

Competitors almost always try to 'injure' each other in this way …

and such injuries are inevitable consequences of the competitive environment our laws seek to foster.

Herein lies the challenge that this bill seeks to address. The competitiveness of the marketplace—the opportunity to fight, to win, to lose—must be protected. This requires acknowledgement of the fact that, if one misuses the power they accrue as a result of winning in the marketplace, then in doing so they compromise the process of competition itself, thus weakening the competitiveness of the very market in which they operate. This concept of balancing the right of companies to compete with them having a commensurate responsibility not to misuse the power they accrue in the process, to my mind, is an attempt to address what Lord Acton pointed out nearly 130 years ago—that power tends to corrupt, and absolute power corrupts absolutely. Monopolistic power is the antithesis of competition, for it tempts the misuse of power—and that, I hope all members would agree, is something our laws must militate against.

We are of course not the first Australian parliament to grapple with this question. Our first effort to deal with it was in 1915, but it was not until the Menzies era, post World War II, as the pace of the global economy picked up, that major efforts began to reduce the adverse consequences of excessive market concentration. In 1960 the Governor-General, William Morrison, said:

The development of tendencies to monopoly and restrictive practices in commerce and industry has engaged the attention of the Government which will give consideration to legislation to protect and strengthen free enterprise against such a development.

What flowed from that commitment of the Menzies government was a historic piece of legislation, the Trade Practices Act 1965, which sought to establish principles of fairness in business across a very broad canvas, but especially in relation to this issue of appropriate use of market power and constraints on the misuse of market power by the then emerging big operators.

Since 1974 until here and now, section 46 of the act, which has now become the Competition and Consumer Act, has sought to define 'misconduct' in relation to the use of market power through two legal tests. The first involves

the question of whether the entity was taking advantage of its market power, and the second involves an entity's intent. That is the question of purpose—whether the purpose of an activity seeks the elimination or the cause of substantial damage to a competitor, or the prevention of another entity entering the market, or the deterrence of a person from engaging in anticompetitive conduct. The legal arguments, and indeed the arguments in this place around the explicit, practical meaning of both the 'take advantage' and the 'purpose' tests of section 46 have been long, complex and, frankly, confusing. But the bottom line in the view of the government, and in the view of a recent root-and-branch review of this issue, is that these tests have ultimately proved to be inadequate. The 'take advantage' test has faltered in the courts, with an effective defence being that a particular form of behaviour that is alleged to be inappropriate for a firm with market power is permissible for a firm without market power. Thus it prompts the reasonable question: how then can it be considered to be taking advantage? If the behaviour is okay and legal for a firm without market power, how can it not be the same for a firm with market power? But it is the 'purpose' test that has really been assessed—

The DEPUTY SPEAKER (Mr Coulton): The debate is interrupted in accordance with standing order 43. The debate may be resumed at a later hour. The member for Fairfax will be given an opportunity at that time to conclude his contribution.

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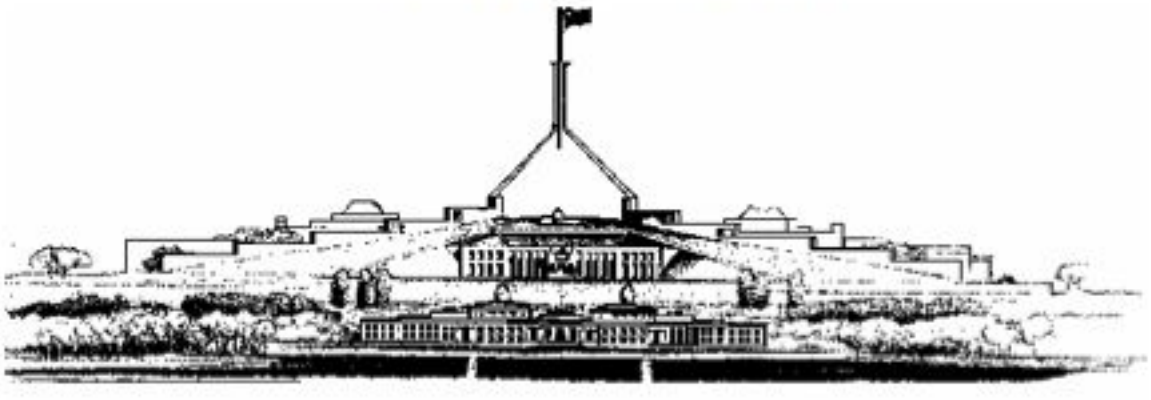

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Questioner		**Responder**	
Speaker	O'Brien, Ted, MP	**Question No.**	

Mr TED O'BRIEN (Fairfax) (16:12): It is the purpose test that has really been assessed as the key failure of the current regime, due to it being too difficult to prove and too specific in its application. How do you prove one's purpose in doing something? How do you prove what one's intent is? It almost reminds me of the song the nuns in the convent sing in the *Sound of Music*: 'How do you catch a cloud and pin it down?'. It is just all too hard. How do you prove one's real intent? The application of the purpose test has also proven to be too specific, with cases typically seeking to challenge the purpose of an activity undertaken by one firm against other single entities, whereas the idea behind the act was to protect the process of competition itself.

Essentially, this bill seeks to address these flaws in the existing act by swapping the test of 'intent' or 'purpose' with a test of 'effect'. What is more, it is to relate not so much to an activity by one powerful firm towards another single entity, but rather to the question of whether such activity adversely impacts the competitive process. In other words, what counts is whether the little guy actually gets done over by the big guy, regardless of whether the big guy says he meant it or not. If, when this happens, competition is lessened, or is likely to be lessened, then that is enough for it to be against the law.

Clearly, this bill is to be contested. There is no point in denying that. A number of large corporates and their representative bodies are opposed to what it proposes. Small and medium sized entities, which are the bedrock of our economy, and who are most vulnerable to any misuse of market power, are very much in favour of the bill. Some opposition from the bigger end of town is no doubt based on the fact that the current regime has been in place for a long time; they are familiar with it and they would prefer the certainty it offers, along with simple continuity. I get that. Some have said that it could have a material impact on the speed and nature of business decision making and cause delays or changes in investment decisions. Obviously we want our big corporates to continue to invest, but we want those investments to be in line with community expectations that they will be fair and reasonable, not unfair—especially in regard to small and medium businesses.

The Harper review of competition policy, which in 2014 recommended the changes to section 46 that this bill engages, recognised the arguments that were being put by both sides and concluded that, on balance, these changes should be made. The government undertook its own augmentative investigation and discussion around the proposed changes and agreed, early last year, that the Harper review was right and that the changes should be made. The Senate Economics Legislation Committee came to the same conclusion.

As we know, the Labor Party opposes the bill, but its position is, as ever, full of contradiction and of opposition for the mere sake of being in opposition. The opposition Treasury spokesman, who is almost as big a critic of big business as his leader and deputy leader, is suddenly animatedly pro the big end of town when it comes to section 46. The shadow Treasurer does not see any need for change, arguing that the amendments will 'dull' investment, while at the same time, almost with the same breath, he argues against corporate tax cuts, which would positively impact investment and, subsequently and just as importantly, jobs. In other words, on this issue Labor is simply playing a tactical game of opposition politics—it supports the big end of town and then it attacks the big end of town, never with consistency in debate but simply with a view to acting as an opposition. But Australians are better than that. I am sure the vast majority of Australians want those that possess substantial market power to be held to account.

Some people who oppose this bill argue that it represents a breach of faith with the free market economy in that it meddles with Adam Smith's infamous invisible hand and thus undermines the notion of free trade. With all due respect to some otherwise learned warriors who run that line of argument, they have misread their economic theory and, what is more, they have certainly misunderstood the working of the real market economy. I say this as an unashamed, unabashed disciple of the free market and of free trade. Trade that is not fair is trade that is not free.

Small businesses know this best. In my home state of Queensland, there are 414,000 small businesses—that is 97 per cent of all businesses—each employing less than 20 employees. It is even higher in regional Queensland,

including in my neck of the woods, on the Sunshine Coast, where around 32,000 small businesses constitute 98 per cent of the total. Should these companies be ring fenced and protected from competition? No, absolutely not—and nor do they want to be, because people who back themselves in private enterprise are not typically shrinking violets who are scared of competition. They are people who are prepared to invest their own bucks in an opportunity and to fight in the marketplace. They are every bit as talented and every bit as competitive as those who operate in large enterprise, but they have a right to compete on a level playing field, and that is what this bill seeks to support. A level playing field is absolutely consistent with the principles of free trade, because free trade is fair trade. It is on that basis that I support the bill and commend it to the House.