

FOCUS

COMPETITION LAW



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AMENDMENTS TO TRADE PRACTICES ACT 1974 (CTH) TO PROTECT SMALL BUSINESS

On 20 June 2007, the Federal Government introduced into parliament a Bill to amend the *Trade Practices Act 1974* (Cth) to provide better protection for small business from misuse of market power and unconscionable conduct. Partner Wendy Peter and Lawyer Alistair Newton consider the implications of these changes.

We report on proposed changes to the *Trade Practices Act 1974* (Cth) designed to help protect small business

HOW DOES IT AFFECT YOU?

- The Trade Practices Legislation Amendment Bill (No.1) 2007 introduces changes to section 46 of the *Trade Practices Act 1974* (Cth) that are designed to make it easier to establish that a corporation has substantial power in a market.
- In relation to predatory pricing, the amendments direct a court to consider below-cost pricing and the reasons for this conduct.
- Section 51AC of the Trade Practices Act, which prohibits unconscionable conduct in small business transactions, will now apply to transactions up to \$10 million with unlisted companies, and the list of factors to be considered by a court in determining whether unconscionable conduct has occurred will

now refer to unilateral variation clauses.

- A second deputy chairperson position with the Australian Competition and Consumer Commission is to be created, to be filled by a candidate experienced in small business.

MISUSE OF MARKET POWER

Section 46 of the *Trade Practices Act 1974* (Cth) (the **TPA**) prohibits corporations from misusing their market power. Specifically, corporations that have a *substantial degree of market power* must not *take advantage* of their market power for the *purpose* of eliminating or substantially damaging a competitor, preventing entry by another person into any market, or deterring or preventing a person from engaging in competitive conduct in any market.



Following a series of High Court and Federal Court decisions that failed to establish a misuse of market power, small business groups questioned the effectiveness of s46 in preventing misuses of market power by large businesses, particularly in relation to predatory pricing. This concern was shared by the Australian Competition and Consumer Commission (the **ACCC**), which said that the High Court's decision in *Boral v ACCC* [2003] HCA 5 raised questions about the effectiveness of s46 in concentrated markets.

In response to these concerns, a Senate Economics References Committee Report in March 2004 (the **Senate Report**) recommended reforms to s46 in order to reinvigorate its effectiveness.

In addition, key National Party Senators, Ron Boswell and Barnaby Joyce, and Family First Senator, Steve Fielding, have lobbied for further protection for small business under the TPA. The Trade Practices Legislation Amendment Bill (No.1) 2007 (the **Bill**) implements the Federal Government's response to the Senate Report and the small business lobby's push for change.

SUBSTANTIAL DEGREE OF POWER IN A MARKET

The Bill inserts new provisions into s46 of the TPA. These new provisions will be taken into account when determining whether s46 applies to a corporation because it has a substantial degree of market power. Once these amendments come into effect, s46 will provide that:

- more than one corporation can have the requisite substantial degree of power in a market;
- a corporation may have the requisite substantial degree of power in a market, even though it does not substantially control the market or does not have absolute freedom from constraint by the conduct of competitors, customers or suppliers; and
- for the purposes of determining the degree of power that a corporation has in a market, the court may take into consideration power that results from contracts, arrangements or understandings with others.

The amendments will also confirm that a corporation may not take advantage of its market power in either the market in which it has that power or any other market, after some uncertainty about this issue was created by the Full Federal Court's decision in *Rural Press Limited v ACCC* [2003] HCA 75.

The amendment likely to have most practical significance is the new provision that provides that a corporation may be found to have a substantial degree of market power despite not having absolute freedom from constraint by the conduct of competitors, customers or suppliers. This potentially modifies the current position, where market power is considered to be the absence of constraint.

PREDATORY PRICING

The Bill also introduces a provision designed to clarify the application of s46 to predatory pricing conduct. The new section will allow a court to consider conduct that consisted of supplying goods or services for a sustained period, at a price that was less than the relevant cost to the corporation of supplying such goods or services, and the reasons for that conduct. The term 'relevant cost' is not defined in the TPA or amendments, however the explanatory memorandum to the Bill states that the relevant cost measure is to be at the court's discretion. In practice, it may encompass the concepts of average cost or marginal cost.

A proposal to explicitly refer to pricing below *variable* cost was rejected by the Federal Government as unwieldy, since the ACCC and courts would have to engage in lengthy consideration of a corporation's cost structure, and, in any event, economists disagree about what costs are variable. As a result, there will remain some uncertainty about the cost measure to be applied in predatory-pricing cases.

The Bill **does not** introduce any provisions dealing with recoupment of any losses incurred as a result of pricing goods or services below cost, despite a recommendation in the Senate Report that the TPA be amended to provide that it is not necessary to demonstrate a capacity to subsequently recoup the losses that have resulted from predatory pricing. Consequently, we expect the courts to continue to consider the prospects of recoupment as important evidentiary material when determining whether below-cost pricing is a result of competitive pressures or a use of market power (as in *Boral*).

CHANGES TO UNCONSCIONABLE CONDUCT PROVISIONS

Section 51AC of the TPA prohibits corporations from engaging in unconscionable conduct in transactions involving small business. This is achieved by limiting the application of this section to transactions worth up to \$3 million with unlisted companies.

The Bill will increase this transactional limit from \$3 million to \$10 million.

In addition, the Bill will introduce a new factor into the non-exhaustive list of factors that may be considered by a court for determining whether a corporation has engaged in unconscionable conduct. Under these amendments, a court is explicitly referred to unilateral variation contract terms as a factor for consideration when determining whether a corporation has engaged in unconscionable conduct. This change reflects a concern that unilateral variation clauses may be used by larger businesses to unfairly shift risk to a small business, in circumstances where the larger business has significantly greater bargaining power or better knowledge of intended future variations.

NEW DEPUTY CHAIRPERSON WITH SMALL BUSINESS EXPERIENCE

Confirming that the Bill is a response to small business concerns, the TPA will also be amended to establish a second deputy chairperson position for the ACCC, to be filled by a candidate experienced in small business matters.

END OF THE DEBATE?

While the Federal Government has presented the Bill as a big win for small business and acknowledged the work undertaken by Senator Ron Boswell, Senator Joyce has indicated that he may propose amendments to the Bill in the Senate and Senator Fielding has not yet provided his support for the Bill. It seems unlikely that the continuing 'small- versus big-end of town' debate will be resolved by the amendments contained in this Bill.



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