

CORRS IN BRIEF

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CONTINUING REFORM OF THE TRADE PRACTICES ACT – OFF THE BIRDSVILLE TRACK AND A RETURN TO THE BEATEN TRACK

Since taking office, the current government has embarked upon a programme of legislative reform of the Trade Practices Act (**the Act**) that is largely consistent with the reforms that it flagged whilst in opposition.

To date, draft legislation has been released for comment and consultation concerning the criminalisation of cartels and component pricing. The periods for comment on these exposure drafts have now closed and the government is considering the submissions received.

The latest instalment in this reform package was released on 1 May – in the exposure draft of the *Trade Practices Legislation and Amendment Bill 2008*. These proposed amendments are aimed at strengthening the operation of the Act in relation to anti-competitive behaviour by powerful businesses and “allow the ACCC and small businesses to begin anti-competitive cases with some prospect of success”¹. Notably and unfortunately, this Bill has not been released for consultation. Mr Chris Bowen, the Federal Government Minister for Competition and Assistant Treasurer, has stated “*The time for talk is over. It’s time to get on and do it*”².

So what are these proposed changes?

- 1 The prohibitions on predatory pricing and misuse of market power in section 46 are to be amended.
- 2 Price limitations in relation to unconscionable conduct under section 51AC are to be removed.
- 3 The ACCC’s power to issue section 155 notices is to be extended.
- 4 The provisions relating to the make-up of the ACCC’s board are to be amended to ensure greater small business representation.
- 5 The jurisdiction of the Federal Magistrates Court is to be amended to allow it to hear claims under section 46.

SECTION 46 AND THE DEMISE OF THE BIRDSVILLE AMENDMENT

As was discussed in Corrs’ September 2007 *In Brief* (Click here or see www.corrs.com.au to view), changes made to section 46 of the Act in September 2007 (often referred to as the “Birdsville Amendments”), introduced a specific prohibition on predatory pricing conduct. The new provision, subsection 46(1AA), introduced several novel concepts and was widely criticised in the business community and by the Labor Party.

The proposed amendments to subsection 46(1AA) seek to address some of the criticisms of the Birdsville Amendment and are made with the support of the ACCC.

The current predatory pricing provision prohibits a corporation with a *substantial share of a market* from supplying goods or services for a sustained period at a price less than the corporation’s relevant cost of supplying the goods or services for a prohibited purpose.

It is proposed that section 46(1AA) be amended in two important ways:

- References to a corporation with a “*substantial share of the market*” are to be replaced with references to a corporation with “*substantial degree of market power*”, adopting the language long used in subsection 46(1). This change addresses two criticisms of the Birdsville Amendment. The first was that, by introducing the concept of market share into section 46, the Birdsville Amendment created a ‘dual-track’ system for considering allegations of predatory pricing under either subsection 46(1) or 46(1AA). The second criticism was that, by using market share as a proxy for market power, the Birdsville Amendment could apply pricing oversight to businesses that lacked the market power necessary to engage sustainably in anti-competitive pricing; and
- The concept of “taking advantage”, which is fundamental to the misuse of market power provision in subsection 46(1)

is to be introduced into the predatory pricing provision in subsection 46(1AA). That is, section 46(1AA) will prohibit powerful corporations from taking advantage of that power by pricing below their relevant cost for a sustained period. This proposed change addresses a third criticism of the Birdsville Amendment – that, by not including the “taking advantage” requirement it could apply to powerful corporations that did not actually use that power to engage in the conduct and, as a result, restrain legitimate conduct.

As illustrated by Figure 1 below, these changes mean that subsection 46(1AA) will become so similar to subsection 46(1) as to raise questions about the need for its retention. If passed, the predatory pricing provision would have the identical “market power”, “taking advantage” and “anticompetitive purpose” requirements of the misuse of market power provision but impose an *additional* requirement with two elements: that the taking advantage must be constituted by supplying below relevant cost for a sustained period.

Figure 1 – Comparison of elements of misuse of market power and current and proposed predatory pricing provisions

| Misuse of market power | Predatory pricing (current) | Predatory pricing (proposed) |
|-----------------------------|--|--|
| Substantial degree of power | Substantial share of a market | Substantial degree of power |
| Taking advantage | Pricing below relevant cost for a sustained period | Taking advantage by pricing below relevant cost for a sustained period |
| Anticompetitive purpose | | |

The new amendments would also seek to give guidance in determining whether a corporation has taken advantage of market power. Concerns have previously been expressed that the High Court has defined the “take advantage” concept too narrowly. Under the amendments, in deciding if a corporation has “*taken advantage of market power*” the Court can have regard to whether the corporation’s conduct was:

- materially facilitated by its substantial degree of market power;
- engaged in, in reliance on its substantial degree of market power;
- likely to have been engaged in if the corporation lacked a substantial degree of market power; or
- otherwise related to its substantial degree of market power.

Although decided cases already take the first of these three factors into consideration, the “otherwise related to” phrase may tend to expand the application of subsections 46(1) and (1AA).

In High Court cases, there has been a diversity of views as to whether recoupment is a necessary element of predatory pricing. Recoupment is the ability of a corporation to recover the losses incurred in below cost pricing by raising its prices without fear of reprisals after it has driven other firms from the market. The Government proposes to make it clear that, while the ability to recoup losses may be a indicative of whether pricing is predatory, it will not be a necessary or determining factor. This of course does not preclude the possibility that the inability to recoup losses may provide strong inferential evidence that conduct was not predatory.

REMOVAL OF SECTION 51AC PRICE LIMITATIONS

The amendments remove the \$10 million price ceiling that applies to actions brought under section 51AC of the Act for unconscionable conduct in business transactions. Duplicate amendments to the equivalent provisions of the *Australian Securities and Investments Commission Act 2001*, which apply to financial services, are also proposed. These amendments would open up unconscionable conduct actions to a wider class of dealings.

THE ACCC’S INVESTIGATORY POWERS

Section 155 of the Act gives the ACCC a broad investigatory power to issue notices requiring the production of documents, provision of information or for a person to attend and answer questions on oath. Nothing in the Act explicitly indicates a point in time beyond which this power cannot be used. Cases have decided that, once the ACCC has commenced proceedings in relation to a matter, it cannot issue a notice directed at investigating the same matter.

The Government seeks to amend section 155 to allow the ACCC to issue a notice about a matter up until:

- the commencement of proceedings concerning that matter (other than proceedings for an injunction); or
- the close of pleadings in a matter where the ACCC seeks a final injunction.

The amendments will allow the ACCC to issue a notice right up until the point it institutes substantive proceedings. The amendments do not permit the ACCC to exercise or continue the exercise of any of its powers to issue a notice after the first

to occur of these points. Pleadings do not “close” in a matter until a defence, and possibly a reply, have been filed. In practice, this can be many weeks after the proceedings have commenced. An issue arises as to whether a notice issued prior to the close of pleadings, would still be effective after that time so as to require the production of documents or answering questions in an examination.

SMALL BUSINESS REPRESENTATION ON THE ACCC BOARD

The proposed amendments will require at least one of the Deputy Chairpersons of the ACCC to have knowledge of, or experience in, small business. This is in addition to the existing requirement that one Deputy Chairperson have experience in or knowledge of consumer protection.

AMENDMENT TO JURISDICTION OF FEDERAL MAGISTRATES COURT

Claims for contraventions of section 46 are currently heard in the Federal Court. The Minister also announced that the jurisdictional limits of the Federal Magistrates Court will be expanded, to include claims under section 46. The aim of this change is to make it easier (and cheaper) for small and medium sized businesses to take action for contraventions of section 46.

For further information, please contact:

Richard Flitcroft
Partner, Sydney
Tel +61 2 9210 6435
richard.flitcroft@corrs.com.au

Eddie Scuderi
Partner, Brisbane
Tel +61 7 3228 9319
eddie.scuderi@corrs.com.au

Bill Keane
Partner, Perth
Tel +61 8 9460 1600
bill.keane@corrs.com.au

Stephen Kroker
Partner, Melbourne
Tel +61 3 9672 3494
stephen.kroker@corrs.com.au

Conway Restom
Partner, Sydney
Tel +61 2 9210 6067
conway.restom@corrs.com.au

Mark McCowan
Senior Associate, Sydney
Tel +61 2 9210 6080
mark.mccowan@corrs.com.au

SYDNEY

Governor Phillip Tower
1 Farrer Place
Sydney NSW 2000
Tel +61 2 9210 6500
Fax +61 2 9210 6611

MELBOURNE

Bourke Place
600 Bourke Street
Melbourne VIC 3000
Tel +61 3 9672 3000
Fax +61 3 9672 3010

BRISBANE

Waterfront Place
1 Eagle Street
Brisbane QLD 4000
Tel +61 7 3228 9333
Fax +61 7 3228 9444

PERTH

Woodside Plaza
240 St George's Terrace
Perth WA 6000
Tel +61 8 9460 1666
Fax +61 8 9460 1667

GOLD COAST

Corporate Centre One
2 Corporate Court
Bundall QLD 4217
Tel +61 7 5577 7777
Fax +61 7 5574 0478

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1 Chris Bowen, “Keynote address to the Fourth Annual Trade Practices and Corporate Compliance Summit” 28 April 2008
2 Interview with Alan Jones, Radio-2GB 873AM 29 April 2009