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Government introduces Bill to strengthen *Trade Practices Act*

On 26 June 2008, the Rudd Government introduced into Federal Parliament a Bill to amend the *Trade Practices Act* (TPA) in order to strengthen the prohibition against misuse of market power, extend the prohibition against unconscionable conduct and expand the Australian Competition and Consumer Commission's (ACCC's) investigative powers.

Misuse of market power

Section 46(1) prohibits a corporation with a substantial degree of market power from taking advantage of that power for a proscribed purpose.

The new Bill amends section 46 to clarify that in determining whether a corporation has taken advantage of its market power, the court may have regard to whether the corporation's conduct:

- was materially facilitated by its substantial degree of market power
- relied on its substantial degree of market power
- would be likely to have been engaged in if the corporation lacked a substantial degree of market power or
- was otherwise related to its substantial degree of market power.

In addition, section 86 has been amended to confer jurisdiction on the Federal Magistrates Court to deal with claims under section 46, although it remains to be seen whether this will prove beneficial in reducing the ultimate costs of legal proceedings.

Predatory pricing

Section 46(1AA) presently prohibits a corporation with a 'substantial share of the market' from engaging in sustained below-cost pricing for a proscribed purpose.

The Bill amends the concept of 'substantial share of the market' with 'substantial degree of power in a market', which aligns this predatory pricing prohibition with the general prohibition against misuse of market power.

The Bill also clarifies that recoupment of losses incurred in supplying goods or services below cost is not required to prove predatory pricing conduct in breach of section 46.

Unconscionable conduct

Section 51AC of the TPA prohibits corporations from engaging in unconscionable conduct in business transactions.

Currently, this prohibition applies only to transactions with a value of less than \$10 million. The Bill eliminates this monetary threshold,

thereby expanding the prohibition against unconscionable conduct to all commercial transactions.

Section 12CC of the *Australian Securities and Investments Commission (ASIC) Act* applies the unconscionable conduct rules of section 51AC of the TPA to the supply and acquisition of financial services. The Bill amends the ASIC Act to duplicate the changes made to section 51AC of the TPA.

ACCC's investigative powers

Section 155 of the TPA empowers the ACCC to require a person to provide information, produce documents, or appear before the ACCC to give evidence under oath in relation to a suspected contravention of the TPA.

The Bill amends section 155 to empower the ACCC to continue to use its investigative powers even after it commences legal proceedings, both for an interim injunction and also for a final injunction at least until the close of pleadings in those proceedings.

Senate Committee Inquiry

On 26 June 2008, the Senate referred the Bill, known as the Trade Practices Legislation Amendment Bill 2008, to the Standing Committee on Economics. The Committee is inviting submissions by 21 July 2008 and is due to report to the Senate by 27 August 2008.

Suggested action for corporations

In light of these proposed amendments, corporations should review:

- all future below cost pricing to ensure that it is not at risk of attack under section 46(1AA) and
- all standard form contracts to ensure they comply with the statutory unconscionability criteria under 51AC.

Productivity Commission recommends reform of Australia's Consumer Laws

The Productivity Commission released its final report *Review of Australia's Consumer Policy Framework* (Report) on 8 May 2008. The Report recommends a nationwide overhaul of consumer protection policy to ensure greater consistency and protection of consumers across Australia.

The key recommendations of the Report include:

- creating a single national consumer protection law (Uniform Consumer Law), based largely on the consumer provisions in the TPA
- introducing legislation to make void any 'unfair contract terms' that have caused consumer detriment
- giving regulators powers to commence representative actions on behalf of affected consumers
- re-enacting the Uniform Consumer Credit Code (UCCC) as Commonwealth legislation and
- the implementation of additional enforcement mechanisms such as civil pecuniary penalties, substantiation notices and infringement notices.

The recommendations seek to eliminate some known inconsistencies between state and territory consumer protection regimes, which are believed to have imposed additional compliance costs on businesses and which have been passed down as additional costs to consumers.

Unfair contract terms

One of the most significant recommendations is the introduction of national 'unfair contract terms' provisions aimed at making void any unfair contract terms in standard form contracts (including consumer credit) that have caused consumer detriment.

Currently, in Australia there are no national prohibitions against unfair contract terms, although some unfair practices are caught by either the consumer protection provisions of the TPA or fall under the unconscionable conduct provisions. Enforcement of these provisions can be uncertain and costly and as a result, the Report also recommends giving powers to regulators to initiate representative actions on behalf of affected consumers.

However, it is noted that this recommended national legislation differs from that which is in place in Victoria under the Fair Trading Act where unfair contract terms are void even if there has been no consumer detriment.

Other implications

Under a Uniform Consumer Law, the ACCC is expected to have powers to regulate at a national level enforcement of product safety provisions and consumer provisions, in conjunction with all state and territory offices of fair trading. The Uniform Consumer Law will also eliminate the need for the agreement of 9 separate jurisdictions to effect any changes to consumer policy. It is anticipated that greater uniformity in the laws will lead to a reduction in compliance costs for businesses.

The Report also recommends the transfer of the regulation of consumer credit to the ASIC with the re-introduction of the UCCC to provide a national regime for the regulation of the financial and credit provider industries.

Resale price maintenance

The Federal Court of Australia has ruled the kayak and sail boat company, Hobie Cat Australasia Pty Ltd (Hobie Cat), guilty of resale price maintenance, fining Hobie Cat \$168,000.

Facts

Hobie Cat manufactures and imports kayaks, sailboats and related products. Hobie Cat entered into written agreements with its dealers requiring them to endeavour to sell Hobie Cat products at its recommended retail price and prohibiting them from advertising Hobie Cat products for an amount below 90% of this price. The terms stipulated that Hobie Cat would make alternative arrangements for any violations of its policies or if it felt this would be in the best interests of promoting its products.

Contravention

Hobie Cat committed a clear contravention of section 48 of the TPA which provides that a corporation or other person shall not engage in the practice of resale price maintenance.

Resale price maintenance keeps prices high. It can occur when a supplier:

- makes it known to another person that they will not supply goods to them unless they agree not to sell (or advertise) those goods at a price less than that specified
- attempts to induce a person not to sell (or advertise) goods they supply to them (or supplied by a third party obtaining the goods from the supplier) at a price less than that specified
- enters into an agreement for the supply of goods to a person that restricts that person from selling (or advertising) the goods at a price less than that specified or
- uses a statement of price likely to be understood as the price below which the goods are not to be sold (or advertised).

Hobie Cat's response

In response to the ACCC's investigations, Hobie Cat ceased the contravening conduct, instructed its lawyers to redraft its documentation to conform with the TPA and notified the ACCC of its actions.

Court order

Hobie Cat was ordered to pay a pecuniary penalty of \$168,000. This amount represented a 30% discount of the penalty that would otherwise have been sought, with the Court taking into consideration Hobie Cat's cooperation with the ACCC's investigations, its admission of liability and its willingness to correct it.

Further relevant matters the court listed were:

- the nature and extent of the contravening conduct and the circumstances in which it took place
- the loss or damage occasioned
- whether Hobie Cat had prior contraventions
- the size, resources and market power of Hobie Cat
- whether the conduct was systematic, deliberate or covert
- the period over which the conduct occurred
- the involvement of senior management
- Hobie Cat's corporate culture of compliance with the TPA, ie whether it had a trade practice compliance program or an understanding of the TPA
- cooperation with the ACCC's investigations, its willingness to correct its behaviour and to resolve the proceedings by consent orders
- the financial position of Hobie Cat and
- the amount of pecuniary penalty decided in other proceedings.

Hobie Cat was restrained for 3 years from engaging in similar conduct relating to the future supply or potential supply of its products and was ordered to pay the ACCC's costs in relation to the proceedings. It was also ordered to establish a trade practices compliance program for its business and write to all dealers notifying them of the outcome of the proceedings.

Lessons

The case reinforces the trade practices law which provides that whilst a corporation may recommend a resale price, it cannot make it an obligation. Corporations are allowed to stipulate a maximum resale price as long as they let the reseller know they are able to sell below this maximum price.

