

## CANBERRA AFFAIRS

### TPA Amendment Bill

On 20 June the Treasurer introduced the *Trade Practices Legislation Amendment Bill (No. 1) 2007* (“the Bill”) to amend sections 51AC and 46 of the TPA. It aims to improve protection for small business from unconscionable conduct and from misuse of market power, such as predatory pricing. The Bill’s introduction follows extensive consultation with the small business sector.

The Government will change the TPA to provide that:

- for the purposes of section 46, more than one corporation can have a substantial degree of power in a market;
- a corporation can have a substantial degree of market power even though it does not substantially control a market;
- a corporation can have a substantial degree of market power in a market even though it does not have absolute freedom from constraint in that market by the conduct of its competitors or persons to or from whom the corporation supplies or acquires goods or services; and

- in regard to below-cost or predatory pricing, the Court may have regard to any 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;
- a corporation must not take advantage of a substantial degree of market power, either in the market in which the power is held or in any other market;
- in cases where coordinated market power is present, allowing courts to have regard to any market power the corporation has that results from any agreements it has with parties outside its corporate group;
- in section 51AC matters, a court may consider unilateral variation contract terms when determining whether a corporation has acted unconscionably;
- the price limitation under section 51AC is raised from \$3 million to \$10 million, extending its application to a wider

range of transactions; and

- establish a second Deputy Chairperson position for the ACCC, with the position to be filled by a candidate who is experienced in small business matters.

The Bill makes it clear that more than one corporation may have a substantial degree of power in a particular market. A corporation does not need to be a monopolist or near monopolist to satisfy the threshold for section 46 to apply. Instead, section 46 can apply to situations where several corporations operating in the same market each have a substantial degree of power in that market.

The Bill includes further guidance to courts in relation to predatory pricing. **Predatory pricing** refers to a particular type of misuse of market power, whereby a firm deliberately sells at unsustainably low prices in an attempt to drive its competitors out of the market. The firm may follow this by greatly increasing its prices in an attempt to recoup the losses it suffered from selling at the unsustainable price. The same issue is addressed in the Private Member’s Bill outlined on the next page of this Update.

## Fielding Bill

Senator Fielding (Family First Party) has introduced the *TPA Amendment (Predatory Pricing) Bill 2007* as a private member initiative.

The Family First Bill is based on Canadian competition laws, and aims to outlaw predatory pricing which destroys competitors. It targets predatory pricing in “three key concentrated markets which are very important to families”, ie the markets for:

- groceries;
- the sale of fuel; and
- pharmaceutical products, proprietary medicines and toiletries.

Under the Family First approach, a prosecutor would have to prove that a corporation has either a “substantial degree of power in a market” or “substantial financial power”. Thus the relevant provisions would cover corporations that may not have “power in a market” but do have the “financial power” to act in a predatory way.

Where one of those two conditions is met, the corporation would not be allowed to offer goods or services for sale in a market at unreasonably low prices, with the purpose or effect of substantially lessening competition in that market or eliminating competitors.

The Bill’s “effects test”, would mean that corporations with “financial” or “market” power would need to be careful in how they use that power so they do not substantially lessen competition or eliminate competitors.

In his Second Reading Speech, Senator Fielding noted that “There are a number of other concentrated markets where small businesses have similar problems and those industries may be listed in the future.”

The Fielding approach to the problem of predatory pricing differs significantly from the Government’s. Like all private members’ Bills, its chances of success are limited. On the other hand, it does chart an alternative course that may attract Parliamentary support.

The introduction of an effects test to section 46 is supported by a number of authoritative figures, not the least of which is the ACCC under its current and former Chairmen. While there is no doubt that such a reform would make instances of alleged predatory pricing easier to prove, we are not completely convinced that this is desirable.

How competitive would a market be if inefficient players were protected against their inability to match or beat another participant’s prices? How confident should we be in the Court’s ability to judge whether a price is “unreasonably low”? And why should one market participant that happens to have “financial power” – perhaps because of stock market activity beyond its control – face restrictions on its conduct that do not apply to others?

On this analysis the Government’s proposals might be preferred. But they do not appear to address the problem of proving an illegal purpose, as an effects test would. Expect to read more about this issue.

## PETROL PRICES

### Geelong price fix allegations

On 29 May, Justice Gray dismissed ACCC allegations of price fixing in the Geelong petrol market. While many of the respondents had admitted that they regularly communicated with each other about petrol prices, the court found that it could not infer a sufficient level of commitment by the parties to a price-fix.

The ACCC alleged that the respondents telephoned one another in advance to communicate a new price and the approximate time from which it was to apply. The ACCC led evidence of more than 100 days when it alleged that the respondents entered into or gave effect to these understandings.

The issue was whether their communications amounted to an ‘arrangement or understanding’ about how the parties would price their petrol. Taking into account the oral evidence of witnesses, the judge found that the parties were not sufficiently committed to increasing petrol prices to agreed amounts.

The ACCC has decided not to appeal the Geelong petrol decision. Its Chairman, Graeme Samuel, said ““This was a very complex, factually dense case arguing multiparty multi-transaction arrangements or understandings. Despite evidence in support of each arrangement or understanding, and admissions by five parties the court found, on balance, no illegal conduct existed. The Geelong judgment turns upon the interpretation of the facts.”

**PETROL PRICES (cont'd)****Inquiry into the price of unleaded petrol**

On 15 June the Treasurer directed the ACCC to commence an inquiry into petrol pricing across Australia under Part VIIA TPA.

The inquiry will consider a number of matters, including but not restricted to:

- the current structure of the industry;
- the extent of competition at the refinery, wholesale and retail levels, including the role of imports;
- the determination of prices of each of these levels, including the methodology for determining wholesale prices; and
- current impediments to efficient petrol pricing and possible methods to address them.

Part VIIA of the Act delivers a range of powers to the ACCC, including the taking of evidence on oath or affirmation, the ability to compel witnesses to appear, and a prohibition against witnesses refusing to answer questions when appearing before the inquiry.

Inquiries of this kind are always a useful substitute for action. No doubt it will find that petrol market participants have from time to time made unusually high margins; that there is nothing in Australian law to prohibit such conduct; and that maybe there should be, but maybe not.

**ACCC ENFORCEMENT SNIPPETS – PART V****Organic foods**

In November 2005 the ACCC commenced court action against GO Drew and Mr Timothy Drew, GO Drew's former manager and compliance officer, for misrepresenting that its range of organic eggs were all organic.

In fact, over a period of two years Mr Drew had deliberately substituted its free range eggs to make up short falls in organic egg production.

The parties came to an agreement in settlement of the matter: that GO Drew would provide a total of \$270,000 to help develop a national Australian standard for organic and biodynamic produce.

The Organic Federation of Australia, the peak organic industry body, will receive \$216,000 to assist in the development of a national standard for organic and biodynamic produce. The National Association for Sustainable Agriculture, Australia Ltd will receive \$54,000 to enhance its ability to certify and monitor organic produce.

The decision in respect of the orders to be made by the court has been reserved. Parties asked the court to make declarations, injunctions and an order for costs in an amount agreed between the parties. In the course of the hearing Justice Gray advised the parties he had no objection to the disbursement of the funds before handing down his decision. Consequently the ACCC has taken action to permit release of the monies to OFA and NASAA ahead of the decision.

**Made in Australia**

Unscrupulous enterprises continue to use country of origin claims to enhance the appeal of their imported products. In the last quarter two market sectors were the targets for ACCC action in respect of these claims.

***Complementary medicines***

Two suppliers of complementary medicine products – traditionally used in Chinese medicine – have admitted to labelling products that were actually manufactured in New Zealand as 'Made in Australia'.

Careline Australia imported bulk supplies of Squalene and Propolis capsules, which were then packaged into retail quantities and labelled 'made in Australia'. Aussia Australia did the same thing.

Careline extended the practice to Omega 3 and Royal Jelly products. Aussia claimed to operate a factory and employ its own researchers, when it had no role in research or manufacture of its products.

The products were not substantially transformed in Australia and less than 50 per cent of the cost of manufacture occurred in Australia, so neither party could rely on the defences available.

The companies undertook to: review promotional material and not represent that products are made in Australia unless they can substantiate those claims; advise resellers and consumers of the incorrectly labelled products; publish a corrective article in appropriate Chinese language publications, and undertake a trade practices compliance program.

### *Fruit juice*

Fruit juice producer Bevco Pty Ltd will change its products labelling following an ACCC investigation. Bevco had labelled fruit juice beverage products as "100% Australian Made & Owned" although the products predominantly consisted of imported juice.

Bevco has undertaken to:

- refrain from labelling products as "100% Australian Made and Owned" unless it can substantiate the claims,
- publish a corrective notice, and
- implement a TPA compliance program.

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## CN MATTERS

### **Competitive Neutrality in Water Trading**

The Victorian Competition and Efficiency Council (VCEC) has recently undertaken a competitive neutrality investigation concerning the operation of the Watermove water exchange. Watermove is a government owned business unit operating within the Goulburn-Murray Water Authority (G-MW).

At the time G-MW established Watermove it considered that competitive neutrality policy did not apply, but did not document the basis of that decision. However, G-MW had put in some measures to place Watermove's activities at arms length from G-MW's activities as a statutory monopoly.

The VCEC received a complaint in September 2006 that the activities of G-MW, and its business unit Watermove, failed to comply with competitive neutrality policy

There were two key issue sets:

- Whether competitive neutrality policy applied to Watermove. - it does, because Watermove is a significant business
- Whether the specific complaints had validity. The VCEC found that five aspects of G-MW and Watermove's activities were not consistent with competitive neutrality

VCEC said that while the lack of consideration of CN issues by G-MW appears to have been unintentional, greater attention will need to be paid to CN as an issue in G-MW's decision making in future, including improving consultation arrangements with operators of competing trading platforms and brokers.

It recommended that G-MW review its corporate communications, including the G-MW website; and where information about Watermove is included, and this provides a competitive advantage resulting from G-MW's regulatory or statutory-monopoly functions, then either similar opportunities should be provided to other competing businesses or G-MW should publish the reasons as to why this is not possible.

An interesting aspect of this matter is that much of the behaviour driving the complaint concerns non-pricing issues.

The complainant's concerns largely emanate from an arrangement where G-MW, through Watermove, operates a water exchange platform on a commercial basis and performs administrative functions in its capacity as a rural water authority or statutory monopoly.

There is a perceived conflict of interest between G-MW performing the administrative functions that it is obliged to perform, and operating a water exchange in competition with private exchanges and brokers.

VCEC upheld the complainant's position on several issues, finding (for example) that it was inappropriate to maintain a link to Watermove's website on the G-MW website unless there were equivalent links to its competitors. VCEC's clear preference in this kind of situation is to corporatise the business in question – unless there is a strong cost-benefit argument against this solution.

Please direct queries about items in this publication to your Compliance Officer; or contact Greg d'Arville at **crgESSENTIALS**, on 0414 250025.

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