

update

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Friday Facts: Upcoming reforms to the Trade Practices Act to deter anti-competitive behaviour by corporations

With rising concern about the cost of living by consumers, particularly in a time of global financial crisis, the Australian Government is now considering what the ACCC Chairman, Graeme Samuel has tagged as the 'third wave' of competition and consumer law reforms to the Trade Practices Act ("TPA") since the major reforms of the '70s and '90s.

For many years, small businesses have complained about large corporations misusing market power in the aim to push them out of the market place.

Under section 46 of the TPA, a corporation that has a substantial degree of power in a market is prohibited from taking advantage of that power by eliminating or substantially damaging a competitor, preventing the entry of a person into that or any other market, or deterring that person engaging in competitive conduct.

Examples of breaches of section 46 include (but are potentially not limited to):

- a. price-fixing
- b. restricting outputs in the production and supply chain
- c. allocating customers, suppliers or territories, or
- d. bid-rigging

The tests involved in proving that a company has abused its market power have been inconsistently interpreted by the courts over recent years, which has led to very few successful cases being brought by the ACCC against companies engaging in anti-competitive conduct.

In particular, the meaning of **substantial degree of power** has been difficult for the courts to interpret, due to problems with

quantification of market power, and the factors to be taken into account in determining whether a company actually has market power.

The proposed reforms seek to introduce a 'substantial market share' test to be applied by the courts to clarify the existing confusion, and to extend protection to small business seeking to invoke this section of the Act.

The ACCC has also increased activity in investigating cartels, particularly at a time where there is great alarm as to the rising cost of essential consumer goods, notably petrol and groceries.

Since 2003, the ACCC has brought 21 alleged cartels to court as well as introducing the cartel immunity policy in 2005 to overcome the difficulties in proving the illegal activity.

Despite this, the ACCC does not have the power to impose criminal sanctions on the worst offenders, unlike other countries such as the United States, the United Kingdom and Canada.

When the United States Department of Justice interviewed executives involved in major cartels in 2006 and questioned why cartel arrangements were stopped at the US border, the overwhelming response was the fear of being sent to jail under the US anti-trust laws.

Therefore, the current government has released a draft Bill, including criminal sanctions for cartels, with a proposal to include sentencing of up to five years for a person involved in a cartel.

Harsh civil penalties against a corporation involved in cartel activity are also proposed, not exceeding the greater of the following:

1. \$10,000,000;
2. If the Court can determine the total value of the benefits obtained and are reasonably attributable to the commission of the offence, 3 times that total value; or
3. If the Court cannot determine the total value of those benefits, 10% of the company's annual turnover during the 12-month period ending at the end of the month in which the corporation committed, or began committing, the offence.

If the reforms become legislation, it will be interesting to see whether there will be an increase in successful enforcement litigation by the ACCC and if any positive results are achieved for small businesses against large corporations engaging in uncompetitive conduct.

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