

Trade Practices Alert September 2007

Trade Practices Act - Radical Changes - "The Birdsville Amendment"

These amendments have serious implications for any organisation that has a substantial share of a market, especially given the very high penalties that may be imposed on the organisation and its directors and officers.

The Government is amending the Misuse of Market Power provisions of the Trade Practices Act (section 46) based on submissions by Senator Barnaby Joyce.

While retaining the current provisions relating to misuse of market power, this amendment - the so called "Birdsville Amendment" - introduces radical changes that will provide added remedies for companies that have been affected by discounting where they can show:

- > that the discounting company had a *substantial share of a market*;
- > that the company supplied or offered to supply goods or services for a *sustained period*;
- > at a price that is less than the *relevant cost* to that company; and,
- > that the *purpose* was to eliminate or damage a competitor in that or any other market; preventing entry into that or any other market; or deterring competitive conduct in that or any other market.

Implications

Clearly companies such as those operating the major supermarket chains, airlines and telcos are going to be concerned about how far they can discount and for how long. Given the very high penalties (and the inability of directors and officers to obtain indemnification) we can expect such companies will be very cautious.

For example: will a supermarket be able to discount to match the prices of a competitor on the basis that the purpose was not one of the prohibited purposes but to match the competitor's prices? What if the supermarket is aware that those discounted prices will also damage a smaller competitor?

One assumes that clearances of obsolete stock may be permissible as the "purpose" would be to clear obsolete stock. But in clearing that stock, the company may also damage a competitor - what then?

"Purpose" has to be a "substantial" purpose and it is possible to have two substantial purposes - one to clear the obsolete stock and another to damage the competitor.

Market share can also apply geographically. An independent supermarket in a country town may therefore also need to be concerned. So too might a small company with a successful single product.

And what does "substantial" mean? The Courts have said that "*substantial*" means real or of substance, rather than trivial or minimal.

How long is a sustained period?

What are the relevant costs?

An additional new subsection says that for the purpose of determining whether a company has a substantial share of



market, the Court may have regard to the number and size of the competitors.

All of this indicates the many challenges that will face companies, large and small, that have a “substantial share of a market”.

Similar limitations on discounting were repealed in 1995 because they were

considered to be inhibiting companies offering consumers the best (lowest) prices.

It is quite amazing that one of the biggest changes to the Trade Practices Act should be introduced overnight. Australia may have a unique position in OECD countries as Senator Joyce claims. Whether that benefits consumers (which

include small businesses) will be a matter for time and the High Court to judge.

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