

Chapter 4: Misuse of Market Power

Legislation Update (as at 11 February 2008)

[4.1] The *Trade Practices Legislation Amendment Act (No 1) 2007* has made significant amendments to s 46. These include the highly controversial, so-called “Birdsville amendments” which are contained in the new subsections (1AA) and (1AB). Less contentious, but also important, are the new subsections (3A)-(3C) and (4A). Subsection (1) has also been amended, as noted below. The amending Act also made corresponding changes to the ‘Schedule version’ of s 46 (this is the version that is contained in the schedule to the *Trade Practices Act 1974* and which is picked up in State competition legislation: see s 150A of the Act). Corresponding amendments to the relevant telecommunication provisions in s 150J have also been made in relation to subsections (3A)-(3C) and (5A).)

Subsection (1) has been amended to include the following italicised phrase:

(1) A corporation that has a substantial degree of power in a market shall not take advantage of that power *in that or any other market* for the purpose of etc.

This amendment was made in response to the suggestion by the Full Federal Court in *Rural Press v ACCC* (2002) 118 FCR 236 at 278 that there was no breach of s 46 unless the corporation took advantage of its market power in the same market in which it held that power. On appeal, the High Court noted this point without express approval or disapproval. The amendment removes this doubt.

The new subsections that have been added to s 46 are:

(1AA) A corporation that has a substantial share of a market must not supply, or offer to supply, goods or services for a sustained period at a price that is less than the relevant cost to the corporation of supplying such goods or services, for the purpose of:

- (a) eliminating or substantially damaging a competitor of the corporation or of a body corporate that is related to the corporation in that or any other market; or
- (b) preventing the entry of a person into that or any other market;
- or
- (c) deterring or preventing a person from engaging in competitive conduct in that or any other market.

(1AB) For the purposes of subsection (1AA), without limiting the matters to which the Court may have regard for the purpose of determining whether a corporation has a substantial share of a market, the Court may have regard to the number and size of the competitors of the corporation in the market.

(3A) In determining for the purposes of this section the degree of power that a body corporate or bodies corporate has or have in a market, the Court may have regard to the power the body corporate or bodies corporate has or have in that market that results from:

- (a) any contracts, arrangements or understandings, or proposed contracts, arrangements or understandings, that the body corporate or bodies corporate has or have, or may have, with another party or other parties; and
- (b) any covenants, or proposed covenants, that the body corporate or bodies corporate is or are, or would be, bound by or entitled to the benefit of.

(3B) Subsections (3) and (3A) do not, by implication, limit the matters to which regard may be had in determining, for the purposes of this section, the degree of power that a body corporate or bodies corporate has or have in a market.

(3C) For the purposes of this section, without limiting the matters to which the Court may have regard for the purpose of determining whether a body corporate has a substantial degree of power in a market, a body corporate may have a substantial degree of power in a market even though:

- (a) the body corporate does not substantially control the market; or
- (b) the body corporate does not have absolute freedom from constraint by the conduct of:
 - (i) competitors, or potential competitors, of the body corporate in that market; or
 - (ii) persons to whom or from whom the body corporate supplies or acquires goods or services in that market.

(3D) To avoid doubt, for the purposes of this section, more than 1 corporation may have a substantial degree of power in a market.

(4A) Without limiting the matters to which the Court may have regard for the purpose of determining whether a corporation has contravened subsection (1), the Court may have regard to:

- (a) any conduct of the corporation 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
- (b) the reasons for that conduct.

Some of these amendments have been passed to redress perceived concerns over the difficulty of catching predatory pricing, particularly in the light of the *Boral* case (extracted at [4.11C]). Subsection (4A) allows the court to have regard to the fact (and reasons for) a corporation with market power

selling below cost. This would seem to add little, if anything, to the existing way s 46 is interpreted.

Subsections (1AA) and (1AB) are, however, another matter. Again directed at predatory pricing. The threshold test, it will be noted, is expressed in terms of 'share of a market' instead of market power. This is very unfortunate. As seen in Chapter 2, market share and market power are not the same thing. Difficulties are also very likely to arise and market power are not the same thing. Difficulties are also very likely to arise over the meaning of 'sustained period' of below cost pricing and 'relevant cost'.

Subsections (3A)-(3D) are more straightforward. Subsection (3A) reflects the case law (see for example *Dowling* extracted at [4.3C]) and so adds little, if anything, to the existing law. Likewise subsection (3C), which was enacted in response to concerns that the High Court in *Boral* had established too high a threshold test of market power in subs (1), is in very general terms and would seem to add little to the current meaning of the section.