

Trade practices

The *Trade Practices Act 1974* (Cth) has recently been amended to introduce a new ban on 'predatory pricing'. The ban came into effect suddenly in late September 2007 and relates to supplying goods or services below cost. Breach of the new ban may result in significant penalties and other sanctions. Businesses should be alert as to whether they, or any of their competitors, may be in breach.

Background

Discounting is an important element of a competitive market. If a supplier cuts its prices low enough for long enough, however, its competitors may be unable to compete and consequently go out of business. With some or all of its competitors gone, the supplier can then increase its prices to above those normally available in a competitive market. This practice is known as 'predatory pricing'.

Previously, predatory pricing was only illegal if it amounted to a 'misuse of market power'. This has been notoriously difficult to prove because, amongst other reasons, it was necessary for the ACCC to have solid proof of an intent to injure competitors. The ACCC has lost many cases alleging 'misuse of market power', including its prosecution of Boral for selling below cost.

The Government promised to consider changes to the misuse of market power law earlier this year. The new ban on predatory pricing was first proposed in June by Senator Barnaby Joyce, who dubbed it the 'Birdsville Amendment' after the Queensland town in which it was formulated. Senator Joyce's proposal was accepted by the Government in mid-September.

The Government has stated that the new law achieves the right balance between promoting competition and protecting consumers and small business. Critics, however, claim that it will discourage discounting to the detriment of consumers and competition generally.

The new ban

The amendments create a new, stand-alone prohibition on 'predatory pricing'. The new sub-section 46(1AA) prohibits supplying (or offering to supply) goods or services 'for a sustained period at a price that is less than the relevant cost to the [supplier] of supplying such goods or services' if:

- the supplier has 'a substantial share of a market'; and
- the supplier is acting for any of three prohibited, anti-competitive purposes.

The prohibited purposes are:

- eliminating or substantially damaging a competitor;
- preventing the entry of a new competitor; and
- deterring or preventing someone from competing.

There will be much uncertainty about the scope of the new ban at least until the courts have had an opportunity to interpret it. Crucially, there is no definition of 'relevant cost', which could mean total cost, marginal cost, opportunity cost or something else. The production cost of a product may exceed its market value if the product has technology that becomes superseded or has a limited useful life, such as perishable groceries.

It is also not clear how the courts will interpret a 'sustained period', although this might provide an exemption for one-off clearance sales and special introductory offers. What constitutes 'sustained' may also differ from industry to industry. For example, it may depend upon the rate of turnover of the product – ordinary, everyday consumer goods as opposed to more significant, one-off purchases. The question may ultimately come down to the overall effect of the discounting on the market or competitors.

The ban only applies to suppliers who have 'a substantial share of a market'. The courts, however, have interpreted 'substantial' in other sections of the Act to mean merely something that is real and not trivial. The ban may therefore apply to some small businesses as well as large businesses.

The new ban also applies where a prohibited purpose was just one of the supplier's reasons for discounting. This is problematic for suppliers because discounting to increase market share will, if successful, inevitably result in competitors losing market share.

Penalties and ACCC authorisation

Both the ACCC and private individuals and companies (including competitors) can take legal action against a supplier for predatory pricing. As a provision of Part IV of the *Trade Practices Act*, a wide range of significant penalties and remedies apply.

The ACCC is able to seek pecuniary penalties (fines) up to the greatest of:

- \$10 million;
- three times the benefit gained by the supplier from the predatory pricing; or
- if that benefit cannot be calculated, 10 per cent of annual turnover (on a group basis for corporations).

Anyone who suffers loss or damage as a result of the predatory pricing is able to seek compensation. This presumably includes competitors who have lost sales.

Company officers and employees who are involved in predatory pricing also face personal liability, including fines and disqualification from managing a corporation.



Unlike most of the other prohibitions of the Act designed to protect competition, the ACCC will not have the power to authorise predatory pricing. This is somewhat anomalous as discounting below cost may be pro-competitive or have other public benefits in some cases.

Conclusion

There is considerable uncertainty surrounding the scope of the new ban on predatory pricing. This will persist until the courts have had the opportunity to interpret it and provide guidance. It also remains to be seen whether the ACCC will commence a campaign of prosecuting companies for predatory pricing; whether small businesses will sue big businesses for predatory pricing; and even whether big businesses may use the new laws against small businesses. ACCC Chairman Graeme Samuel has, however, already publicly acknowledged that the amendments will make it easier for the ACCC to prosecute companies for predatory pricing.

For now, businesses should consider whether their own pricing practices, and the pricing practices of their competitors, may fall foul of the new ban. Businesses should also consider whether they have sufficient documentation to demonstrate that they are not supplying below 'the relevant cost'. Such material may be invaluable if a business is sued by a competitor or investigated by the ACCC for predatory pricing.

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