

Labor promises jail for serious cartel conduct - and other changes to the *Trade Practices Act*

Key Point

Serious cartel conduct is set to become a criminal offence under the new Labor Government - and a host of other changes to the *Trade Practices Act* are under consideration.

Although the *Trade Practices Act 1974* (Cth) has been amended numerous times in the last few years, it's still not in a form satisfactory to the new Federal Labor Government. As part of the ALP's election platform, Prime Minister Kevin Rudd said¹ he would make some changes to the Act, and hold a wide ranging inquiry into the need for additional reforms in the grocery sector. Mr Rudd has now confirmed that the new Government will move to criminalise cartels in 2008.

Jail for Cartel conduct

According to media reports, the new assistant Treasurer, Chris Bowen is examining the unreleased Bill prepared by the previous government to introduce jail sentences for serious cartel conduct.

We can only speculate at the approach taken in that Bill but it was likely to create some new offences by redefining cartel conduct in a simpler and more direct way than the existing provisions found in section 45 of the Act.

On this basis, we are likely to see new laws introduced which will define new criminal standards and sit alongside the existing provisions of the Act.

The existing civil cartel provisions in section 45 may conceivably be left "as is", although there is clearly an opportunity for the Government to update and modernise the drafting of the unwieldy and overly complicated definitions of price fixing and market sharing arrangements. The civil provisions will continue to apply to those less serious matters where remedies, such as monetary penalties are regarded as sufficient.

A key policy question for the previous Government was whether to introduce the notion of 'dishonest intent' into any cartel offence, as occurred in the United Kingdom¹. Dishonesty is not required to be shown in the current Act, which has opted for a so-called 'strict liability' regime.

According to recent press reports it seems that the new Labor government favours a new strict liability regime which will not require any need to prove "dishonesty" for those engaging in cartel conduct.

Given the Australian Competition and Consumer Commission's (ACCC)'s concerns about the difficulty of proving liability in these cases, (despite its recent big win in the Visy/Pratt case), one can expect the ACCC will strongly prefer the simplicity of Labor's approach.

Small business and section 46

On small business' concerns over the misuse of market power provisions in section 46 of the Act, it appears from pre-election ALP comments that the new Federal Government intends to initiate a "*wide ranging*" inquiry into national grocery prices which will address many of the concerns raised.

¹ in the 2003 Enterprise Act

However other small business concerns may have little to do with the grocery sector and so the new Government will need to work through the "shopping list" of complaints about section 46 to decide if any reforms should be pursued, independently of yet another inquiry into the retail sector.

The small business concerns are with the overall effectiveness of section 46, which prohibits firms which possess substantial market power from taking advantage of that power for various anticompetitive purposes.

This process of further review of sec 46 seems inevitable, despite the Howard government's radical changes to the *Trade Practices Act* in September 2007 to outlaw so-called "below cost pricing" for anticompetitive purposes by firms which have a substantial market share.

"Taking advantage of substantial market power"

The first concern is the meaning of "taking advantage" of a substantial market power and whether that element should be softened or made easier to prove.

Lawyers have long debated, before and after the *Boral* and *Melway* cases in the High Court, whether it should be necessary under section 46 to show that the challenged conduct went beyond normal aggressive competition and was conduct in which only a powerful entity "could or would" choose to engage.

Recent cases such as *NT Power* and *Safeway* have shown that some plaintiffs are able to prove a "taking advantage" under the existing law but the reformers continue to press for change to make cases easier for plaintiffs.

Any reform in this area is likely to provoke even more vigorous debate exactly how the courts will be expected to distinguish aggressive but lawful competition from abusive conduct.

"Recoupment" of losses through predatory conduct

The new Government may also favour the idea that, in any predatory pricing context, section 46 should state that there should be no need for an applicant to prove that the defendant predator expected, or anticipated, that it would be able to "recoup" the short term cost of the predatory behaviour, such as selling goods below cost, by later seeking to lift prices.

The recoupment notion has generally been considered relevant as an economic tool for inferring whether particular conduct was predatory. This is on the logical basis that, if no recoupment is expected by the so-called predator", one might seriously question why the conduct occurred and whether it was truly predatory, or alternatively, driven by other factors eg meeting competition, a collapse in demand, responding to customer demands, or the launch of new and untested products.

The High Court noted in the *Boral* case that, whilst an expectation of recoupment is not legally necessary under section 46, it might be factually important, and the majority of the Senate Economics Committee which considered this issue in 2004 thought the possibility of recoupment would be a useful but not essential factor to add to section 46.

Given the High Court's comments, one wonders whether there is really any sound reason to add a statement to section 46 that recoupment is not a necessary factor as a matter of law, but for some commentators, the urge to tinker with the section seems difficult to suppress.

Creeping Acquisitions

A further area for the upcoming grocery inquiry is whether Labor will support either of the competing proposals from Senator Fielding and Senator Murray to give the ACCC more powers to address so-called "creeping acquisitions" .

These are powers to challenge a small acquisition which of itself does not give rise to a substantial lessening of competition in any market, on the basis that, when aggregated with other past acquisitions made by the acquirer over a 5 or 6 year period, the overall impact is said to have cumulatively lessened competition.

The usual example given is that of a large retail chain making a series of small single store acquisitions in different areas which over a period of time, lead to an increase in the size and the scale of the chain and its power in a wholesale market when dealing with suppliers.

This is an area where the ACCC itself has noted the argument but not actively sought additional powers, citing the complexity of the issue.

The majority of the 2004 Senate Economic Committee recommended that additional powers be given to the ACCC over creeping acquisitions, seemingly on the basis that if there was a problem, its better to have the powers available than not.

But if the law is changed, the complexities of such an analysis cannot be understated and have not really been canvassed in any considered way.

To apply a new "cumulative" review, the ACCC would need more than a crystal ball to assess the overall impact on competition over a 5 or 6 year timeframe.

Moreover, the ACCC needs to be able to demonstrate those effects to a standard of proof that would hold up in court if the ACCC wished to block such an acquisition.

Hypothetical guesswork?

For instance, the ACCC would need to compare the cumulative effects of the series of acquisitions to a hypothetical world where none of the acquisitions had been made - acquisitions which by definition, were lawful when made and not considered likely to reduce competition.

To consider that question, what kind of model might be required to provide an assessment and what kind of records will need to be kept by business about those acquisitions and the state of the market at the time? As the ACCC knows, competition is dynamic and the markets constantly evolve and change. Virtually no market today is in the same position as it was 5 years ago.

However any reform bill was framed, it will not require a simple comparison between the state of the market today and as it was 5-6 years ago - a static view of that kind would be contrary to the dynamic assessment of competition which section 50 requires.

So a reform on the lines discussed would create some unique and novel challenges for the ACCC to determine the "alternative world's" state of competition, against which to assess the "difference" likely to be caused by another acquisition. In reviewing past acquisitions, the ACCC will also need to consider the possibilities that some other third parties - and if so which - might have acquired some or all of the businesses concerned anyway.

As the Chairman of the ACCC has commented, many acquisitions of independent operators by larger firms are made in circumstances when the independent looks to retire or to exit the industry. and the ability to exit on reasonable terms is critical to those operators. So it may be quite possible that the independent in question would have been acquired by another operator anyway.

Each of these possibilities would need to be considered, as well as the alternate possibilities that the business might have failed or gone out of business if not acquired.

The ACCC will need to rewrite their Merger Guidelines to apply this type of assessment and market share tests will presumably be of little assistance.

In 2004, the ACCC was wise to be circumspect about calling for this change and one thinks the new Government should carefully weigh the practicalities of this proposal before writing a "crystal ball" test into an Act carrying multiple million dollar penalties and applying across the entire economy.

No other modern economy has taken this path- and. as an exercise in speculation, applying this new law would take some beating.

Investigations

Finally there are suggestions that the ACCC might be given clearer or additional powers to use section 155 to gather information even where the ACCC has commenced litigation against the firm required to supply information. Currently the section 155 process is seen as something which must be concluded before proceedings are commenced by the Commission.

This reform is procedural but it would require a balancing of the traditional role of the courts in supervising litigation and the extent of requests for information which one side can make of the other.

Giving the regulator additional powers to extract information under duress from a person or firm already defending litigation and already required to provide discovery or other evidence, raises questions of fairness and the possibilities for abuse of such powers.

It also raises fundamental questions about reconciling our litigation process- which is adversarial with the type of civil law inquisitorial system that lies behind section 155. Modern litigation is about testing the issues which the parties choose to fight- not an open ended exercise in flushing out any fact or detail which might be "of interest" to a suspicious regulator.

One hopes that if this reform proceeds, the courts will retain a strong supervisory role to oversee the manner in which any such powers are conferred.

Section 155 requests are notorious for their breadth and scope and can require many thousands of hours and thousands of dollars to be spent by the recipient without any recourse, even if nothing incriminating is produced.

Finally, it looks from recent comments that the new Labor government will review the area of port and rail bottlenecks and the question of third party access to infrastructure, under Pt IIIA of the Act. This area is topical given Fortescue's current applications against Rio and BHP Billiton,ⁱⁱ and the attention given to the bottlenecks involving the export coal chain in the Hunter Valley.

Thanks go to Kirsten Webb, Partner for some very useful suggestions for this article.

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Endnotes

ⁱ. Australian Labor Party 'Labor moves to strengthen the Trade Practices Act' media release (7 August 2007), available at <www.alp.org.au>.

ⁱⁱ See Warren Pengilly's lead article on this case in this issue.