



MEDIA RELEASE

2 July 2007

Trade practices reforms short change small business

Proposed legislation currently before Parliament fails to sufficiently protect small business against cartels and the misuse of market power, according to Deakin law lecturer, Ms Julie Clarke.

“In 2004, a Senate committee recommended significant changes to the Trade Practices Act and the government’s reform bill now passing through Parliament ignores some of its key recommendations,” Ms Clarke said.

“The legislation fails small business in three areas: misuse of market power, unconscionable conduct and cartels.”

“While it makes some useful minor changes major issues remain to be addressed and it is a lost opportunity.”

The *Trade Practices Legislation Amendment Bill (No 1) 2007* is the Government’s response to the 2004 report of the Senate Economics References Committee on the effectiveness of the *Trade Practices Act* in protecting small business. The Committee recommended significant changes to the misuse of market power and unconscionable conduct provisions of the Act.

Section 46 of the Act prohibits a corporation which holds a substantial degree of power in a market from taking advantage of that power for a prohibited purpose, including eliminating a competitor or deterring competitive conduct.

“The prohibition in section 46 appears broad but has suffered from a restrictive judicial interpretation in recent years,’ said Ms Clarke.

“The Senate Committee recommendations appeared to address these concerns, but the Government rejected a number of those recommendations and those that were accepted are largely cosmetic,’ Ms Clarke said.

“In particular, the Senate Committee’s recommendation that the “taking advantage” requirement of the prohibition be clarified was rejected by the Government.”

There is some, however, some good news. “The *Bill* does implement a number of the recommendations relating to the Court’s determination of whether a party has market power,” said Ms Clarke.

.../2

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MEDIA RELEASE

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Page 2

“The *Bill* also has provisions relating to leveraging market power and predatory pricing which might assist to reverse the current restrictive interpretation placed on these aspects of s 46.”

The other area in which the *Bill* will assist small business relates to unconscionable conduct. The Act currently prohibits a corporation that supplies or acquires goods or services to or from a small business from engaging in unconscionable conduct in relation to transactions valued at \$3m or less.

“The Senate Committee recommended that this threshold be removed,” said Ms Clarke.

‘The Government rejected the removal of the threshold but did agree to increase the threshold to \$10m per transaction to capture a wider range of small business activity.’

The other change to the small business unconscionable conduct provision makes clear that conduct may be unconscionable when the other party has the right to vary a term or condition of their contract without agreement from the small business.

“This is an important inclusion’ said Ms Clarke, ‘but is also cosmetic in that the Court already had the power to consider this factor when determining if conduct was unconscionable.”

The other key deficiency of this *Bill*, according to Ms Clarke, is that it fails to introduce the long-awaited criminal sanctions for cartel conduct, which were announced by the Government in February 2005.

“The Government keeps promising tougher penalties for cartel conduct but nothing seems to be happening,” said Ms Clarke.

While the current *Bill*, should pass into legislation with the support of Labor, which has described it has ‘long overdue’, Ms Clarke claims that it is unlikely to provide any significant improvement for small business.

Ends

Julie Clarke is available for interview Tues, Thursday and Friday, July 3, 5 and 6.

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