

Benefits for small operators

The ACCC recognises that the Trade Practices Act is one of many forms of regulation affecting small business operators. However, the Act can be a valuable management tool — a good knowledge of the Act and compliance with its provisions can help businesses become more successful and profitable.

The Act promotes a fair and competitive business environment. It prevents any business, large or small, from

gaining an unfair advantage over its competitors by engaging in any misleading or anti-competitive behaviour.

Small business operators should know about several recent developments in various areas of the Act:

- unconscionable conduct;
- misuse of market power; and
- avoiding disputes.

Unconscionable conduct

In 1998 the unconscionable conduct provisions of the Act were amended, strengthening the existing protections for small business.

Unconscionable conduct goes beyond driving a hard bargain. It involves situations of power imbalance where the stronger party engages in unacceptable business conduct, taking advantage of a weaker party.

The new section 51AC sets out a range of factors that a court may consider when determining whether a business has been subjected to unconscionable conduct. These include:

- the parties' relative commercial strengths;
- whether undue influence was exerted;
- whether the contract exceeded what was reasonably necessary for the legitimate interests of the larger business;
- the requirements of any applicable industry code; and
- whether there was evidence of disclosure, good faith and willingness to negotiate.

The ACCC has taken several section 51AC court actions.

Court action by ACCC

Simply No Knead

One case involved Simply No Knead, a franchisor that supplied breadmaking ingredients and equipment. In this case, disputes developed between the franchisor and some of its small business franchisees. The franchisor engaged in a range of conduct such as:

- demanding that franchisees wishing to negotiate must put their requests in writing, and that no joint meeting with franchisees was acceptable;
- refusing to supply franchisees with product because they disputed the content of advertising material or oversupply of raw materials to them;

- demanding that franchisees distribute brochures to customers that referred only to the franchisor and not the franchisee (even though the franchisees paid for the advertising and were denied products if they failed to distribute);
- directly competing within the franchisees' territories in a way calculated to damage the franchisees' business; and
- withholding disclosure documents unless each franchisee gave written consent to renew the agreement.

The court found 'an overwhelming case of unreasonable, unfair, bullying and thuggish behaviour' amounting to unconscionable conduct under section 51AC.

Cheap As Chips

Small business franchisees were also involved in another dispute with a carpet cleaning franchise, Cheap As Chips. In this case, the franchisor had:

- terminated a franchise over a payment dispute;
- threatened to terminate franchises rather than negotiate disputes;
- demanded attendance at seminars unrelated to the business of the franchise;
- threatened to suspend franchisees for associating with other franchisees; and
- refused franchisees access to business records.

The Federal Court decided that this conduct amounted to unconscionable conduct and ordered the franchisor to pay compensation, interest and the ACCC's legal costs. The franchisor was also directed to refrain from similar conduct, provide franchisees with reasonable access to records, notify all current franchisees about the outcome of the proceedings and implement a trade practices compliance program.



Leelee

The Leelee case involved a small business operating in the food court of a shopping centre. In this case, the Federal Court found that the retail landlord had engaged in unconscionable conduct by:

- failing to honour existing terms of the lease agreement;
- withholding crucial information about changes to the lease agreement; and
- not allowing the tenant to transfer the lease.

These cases have helped to clarify the scope of section 51AC. They show that unconscionable conduct is wider than unconscionable conduct in equity (or unwritten law) where a person has to establish a 'special disadvantage' which was exploited by a stronger party. This means that small businesses are better protected against exploitation by big businesses or businesses with market power.

The cases are also useful because they provide actual examples of behaviour that might be considered unconscionable conduct.

Misuse of market power

Section 46 of the Act prohibits a business with substantial market power from using that power to deliberately damage another business. Clearly this is another area of particular interest to small businesses, and again, there have been recent developments.

Boral Besser Masonry

In early 2001 the Federal Court clarified when predatory pricing could constitute a misuse of market power under the Act.

The ACCC alleged that Boral Besser Masonry had slashed prices below manufacturing costs in an attempt to drive the more efficient C&M Bricks out of the market. The court noted that when Boral Besser increased its production capacity, it publicised that fact to exert 'psychological pressure' on its rivals. It intended to signal to its rivals that it was willing to wage a price war for some time and that it would bear the losses that may result.

The court agreed, recognising that below-cost pricing can be a misuse of market power, even in markets where there is

more than one large player. This decision is currently under appeal.

Rural Press

Soon after the Boral decision, the Federal Court resolved another ACCC action claiming misuse of market power, against Rural Press and its subsidiary Bridge Printing Office Pty Limited. The court found that these companies had misused their market power in their dealings with another publisher of regional newspapers in South Australia, Waikerie Printing House Pty Ltd.

The court also decided that the three companies entered into an arrangement to withdraw the Waikerie Printing House publication, *The River News*, from the Mannum area. This breached section 45 of the Trade Practices Act, which deals with anti-competitive arrangements.

The ACCC took this action because it was clear that a powerful player in a market had used its power to threaten a family operated publisher.

Avoiding disputes

While recent cases have been useful for clarifying the law, small businesses are generally better off negotiating successful outcomes without recourse to litigation. When a problem arises, the ACCC recommends the following steps:

- raise the dispute quickly with the party involved;
- clearly set out what action is required to settle the dispute;
- check if the other party has a dispute resolution process in place and if so, talk to their dispute handling expert;

- if you are not confident about raising the matter yourself, consider asking your trade association for assistance; and
- if there is no trade association available, suggest to the other party a mediation service.

Dispute resolution processes are in place or proposed for many industry sectors, including franchising, retail tenancy, retail grocery and film exhibition and distribution.

For more information on the protections available to small business in the Act, contact the ACCC Infocentre on 1300 302 502 or visit the website <<http://www.accc.gov.au>>.