

Small business suffers under a weak Trade Practices Act

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THE TRADE Practices Act is not a friend of small business. Section 46 (misuse of market power), though always weak, was neutered by the High Court's decision on Boral in February 2003. Section 51AC (business to business unconscionable conduct) was weak even when enacted in 1998.

Section 49 (price discrimination) was repealed following an undefended recommendation in the 1993 Hilmer National Competition Policy Report. Section 50 (mergers) tolerates creeping acquisitions by corporate giants.

Along comes Treasurer Peter Costello proposing amendments to s.46, a mere three years after the Senate Economics References Committee identified an existing malaise with a string of recommendations.

The Costello-proposed amendments include wording intended to clarify the meaning of the hurdle of "substantial market power" and to assist in the differentiation of predatory pricing from legitimate competition.

The proposals are comparable to some of the Senate committee's recommendations, which the Government originally greeted with indifference or opposition.

In general, these proposals constitute change so mild as to be insignificant.

There is continued neglect of buyer (as opposed to seller) market power. There is an explicit neglect of financial power as a vehicle for predatory leverage. The hurdle imposed by the wording of s.51AC remains untouched.

There is also the tough nut of judicial culture. The High Court decision favouring Boral was shoddy compared to the judgment that it overturned by the Federal Court of Appeal under Justices Beaumont, Merkel and Finkelstein, all trade practices specialists.

Boral's behaviour combined everything that the 1986 amendments to s.46 intended to capture, including the "smoking gun" intent. But who will take on the pooh-bahs of our highest court for a dubious performance?

Undoubtedly, finding language to make s.46 and s.51AC discriminating instruments is a complex task. But first one must have intent. The Government threw a fortune at the best legal brains to produce the WorkChoices amendments. The Government's interest in effective amendments to the Act has been desultory.

Follow the political trail. Why the Senate committee inquiry? Because the broader small business lobby opposed the outcome of the Dawson inquiry into the Act, which reported in January 2003.

The Dawson inquiry sought to legitimise the corporate merger frenzy by bypassing the Australian Competition and Consumer Commission's procedures in favour of the Australian Competition Tribunal.

The Government sought to buy-off the small business lobby by supporting the streamlining of collective bargaining procedures. How else can one interpret the collective bargaining recommendation in the Dawson report, totally alien to its general thrust?

Costello thought he could quickly legislate the Dawson recommendations and leave the Senate committee recommendations to the receding future.

He didn't anticipate Senator Barnaby Joyce not lining up behind Senator Ron Boswell's stitch-up of National Party votes. So Family First Senator Steve Fielding was smooched, and the package was passed in October 2006. As for further crucial amendments, Costello and Small Business Minister Fran Bailey have told the small business lobby take what we offer you or you get nothing. Remarkably they appear to have pulled off the threat by offering nothing.

On February 28, Costello secured agreement for his Clayton's package from a group that included representatives of the Council of Small Business Associations (COSBOA - an umbrella without a stem?) and the National Association of Retail Grocers (NARGA - read Metcash). The Motor Trades Association-centred Fair Trading Coalition has disappeared from the lobbying forefront.

On February 27 in Parliament, Costello used a Dorothy-dixer to claim that the Coalition has been the greatest force for Australian small business since sliced bread. But his contemporaneous moves have the hallmark of undiluted cynicism.

The high point of the Coalition Government's support of small business was the 1996 Reid committee inquiry, which produced the exemplary bipartisan report Finding a Balance. That was a decade ago. Apart from the feeble s.51AC, the only thing of substance that the Government delivered from that report was the overdue mandatory franchising code of conduct. Since then it has been smoke and mirrors.

Wherever a small business or the family farmer goes, there is a corporate expropriating a sizeable share of his/her rewards of enterprise by virtue of an unlevel playing field: franchisee by franchisor; tenant by shopping centre owner/manager; supplier by retail giant or processor/manufacturer; borrower by bank lender; and so on. In particular, regulation of bank unconscionable conduct towards small business borrowers is effectively non-existent.

There are the small businesses facing horizontal asymmetry against corporates exercising oppressive purchasing leverage against suppliers and enjoying rental cross-subsidisation (at small business tenant expense) from landlords.

Meanwhile, the "streamlining" of collective bargaining, the one carrot Costello gave small business, is in limbo. Since the commission authorisation was replaced by participant notification on 1 January 2007, how many notifications have been received by the commission? None.

The procedures are a bureaucratic and legal minefield. Costello wants a Trade Practices Act that delivers to corporate business (as long as collusion is avoided) while creating a facade of support for small business. Behind this stance is a furious lobbying campaign from corporate interests, the Business Council of Australia in particular, against meaningful amendments to the Act.

The implicit lesson? Small business is yesterday's model. Small business is justifiable fodder in the corporates' inexorable drive to market dominance. In the language of the financial media, multiple firms produce undesirable overcrowding and instability, generating the need for "rationalisation" and "consolidation".

Why should small business proprietors and family farmers deliver their significant voting bloc to this sham?

It's all in the packaging that denies an alternative: the Liberals are the party of enterprise; the Opposition cannot be trusted to manage the economy or to constrain workers and wages pressure. There's a small business sucker born every minute.

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