National Small Business Summit

Competition and fair trading: a fair go for small business

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Introduction

Henry Ford once labelled competition "the keen cutting edge of business, always shaving away at costs".

He said, "the competitor to be feared is one who never bothers about you at all, but goes on making his own business better all the time."

Ford, a legendary innovator in the car industry and perhaps one of the greatest businessmen of our time, recognised that for any business, large or small, the path to success comes from an ability to compete vigorously and outperform the rest of the market.

Nowhere is that spirit of entrepreneurship better understood than in Australia, where more than 95 per cent of our businesses have fewer than 20 employees.

Small business has a fine tradition in this country, thanks in no small part to our open, competitive market that provides an opportunity for anyone to become their own boss and succeed.

But in order for those businesses to be able to realise their potential, they require the same opportunities as every other competitor. In short, they deserve a fair go.

In recent weeks there has been some discussion about whether small businesses are getting that fair go.

I believe on the whole they are, but that doesn't mean there aren't areas of concern that need to be addressed. Some of those concerns are being dealt with at the legislative level, and the ACCC continues to investigate and litigate in areas of concern to small businesses and industry associations. We are pushing the boundaries on matters of unconscionable conduct, pushing more cases to test the law and firm up definitions that assist traders.

We are taking innovative approaches to dealing with problems such as franchising scams and issues of retail tenancy. Concerns in these areas are being considered as those working in small business raise them with the Government and regulators.

We are doing more in many areas, but there is also more that small businesses and their representative bodies can do to help themselves and the ACCC.

Thinking outside the square on recurring problems may obviate the need for greater regulation, and taking advantage of changes that have already come

into force is another untapped source of benefit that business has been reluctant to exploit.

Today I'd like to talk about some of the work underway to ensure the innovators and entrepreneurs among us are getting a fair go.

Section 46 of the Trade Practices Act

Firstly, it's important to remember that the Trade Practices Act (the Act) is not designed to protect small business from the rigours of normal, tough, competitive business. What it is designed to do is protect small business from unconscionable, harsh and oppressive conduct or misuse of power by big business.

In particular, section 46 of the Act is designed to prevent a misuse of market power, for example through activity deliberately designed to drive out or damage a competitor.

While sometimes heralded as the champion of small business, it's important to remember the misuse of market power provisions do have their limitations. Those provisions require that business actions are motivated by the purpose of specifically damaging competitors. It is not enough to point to the fact that competitors, even smaller ones, are being damaged by the actions of a larger more powerful business.

It is an area where the ACCC has been active on behalf of small business. There are currently 15 in-depth investigations underway in this area covering a vast range of industry sectors. So why are we not seeing more cases coming before the courts?

The reason is there are a number of difficulties in relation to section 46 cases.

The ACCC operates by investigating alleged breaches to determine what evidence can be found to support the allegations. Sometimes affected small businesses may be reluctant to provide the evidence the ACCC needs because of concerns about their ongoing commercial relationships. Evidence of the "purpose" of a large business can be difficult to find as well. If we are able to obtain what the ACCC views as substantial supporting evidence we then seek advice from our external lawyers who often tell us that with the law as it currently stands, we do not have a reasonable basis for commencing court proceedings.

The ACCC is bound by the Legal Services Directions which say we are not able to take a matter to court unless there are reasonable prospects of success with the proceedings. It seeks to ensure that the Commonwealth does not spend money on cases needlessly. It also protects private parties from careless and expensive litigation.

It is not a simple metric of "do we have a more than 50 percent chance of winning" – but an assessment of prospects is important.

The Legal Services Directions recognise that it may, in some circumstances, be appropriate for the Commonwealth to run a test case, where it might be expected that the Commonwealth will lose at first instance, if there are

prospects that the case may be won on appeal. However, I note that much of the recent judicial interpretation of section 46 emanates from several recent High Court decisions.

Changes to section 46 & 51AC of the Act

I should note that changes to section 46 were introduced to parliament on June 20. You will be well aware that it is not our practice to comment on matters of policy. However, the views of the ACCC were well reflected in our submission to the Senate inquiry into *The Effectiveness of the Trade Practices Act 1974 in Protecting Small Business*. Those views have not changed in light of further High Court clarification of section 46.

Importantly for small business, the Bill proposes that a second deputy chairperson of the ACCC be appointed. It is intended that this position would be filled by a Commissioner with small business experience.

Unconscionable conduct

The recent changes also go some way to firming up a definition of what unconscionable conduct is, although we are also taking steps to change our approach in order to provide more certainty to business.

There is no hard and fast definition in the Act of what constitutes unconscionable conduct. In broad terms the courts have considered the threshold for unconscionable conduct under section 51AC to be something that goes so far beyond harsh commercial dealings, or the notion of unfairness, that it shows no regard for conscience and is irreconcilable with what is right or reasonable.

Whilst it is often the case that a party to a commercial agreement may consider the conduct of the other party to be unfair, this will not in itself be sufficient to establish unconscionable conduct. The conduct concerned must clearly demonstrate, in all the circumstances, a disregard for conscience and behaviour that is unreasonable to the extreme.

In most unconscionable conduct cases there is also an element of misleading and deceptive conduct, which is much easier to prove. As a result there has been a tendency for us to say, ‘let’s just tackle the misleading and deceptive conduct rather than take the more difficult route of going after the unconscionable conduct elements of a case’. While this approach often works in shutting down the conduct, it is sometimes a bit too easy for our investigators to let the unconscionable behaviour slide.

Well, no more. We are changing our focus to take a much more aggressive attitude to pursing unconscionable conduct, and this means pushing to get more matters before the courts. By doing so we will not only test the law, we will firm up a better definition of what constitutes unconscionable conduct, thereby providing more guidance to businesses.

Identifying areas of concern to small business

Franchising

Franchising is a unique form of business, and while it has its own specific issues, many of the concerns that arise are also relevant to the broader small business community.

While it does receive a lot of attention, the number of complaints the ACCC receives is relatively small. In the past 12 months, less than 2 per cent of the total complaints recorded in our national database were franchising related. The number of complaints has also remained reasonably steady, except for a brief spike which can be attributed to publicity of a review of the Franchising Code of Conduct.

The Franchising Code, which the ACCC administers, has gone a long way to addressing many of the concerns raised in the past, but like any regulatory instrument, it needs to be reviewed from time to time to ensure it is still relevant to the changing needs of those it affects.

In June last year Minister for Small Business Fran Bailey announced a review of the disclosure provisions of the Code. The review came back with a number of key recommendations, and among those the government agreed to in its response were:

- addressing the right of franchisors to unilaterally change franchise agreements;
- reducing the time required for a franchisor to report a material change in circumstances to their franchisees, from 60 days down to 14; and
- providing franchisees with audit reports of franchise marketing funds.

These amendments are yet to come before Parliament.

The strong growth and success of the franchising sector has also led to an increase in the number of scams specifically targeting franchise businesses and people thinking of taking up a small business opportunity. While these can be addressed by the Code of Conduct and other provisions of the Act, we believe prevention is better than cure. The ACCC already has a strong education and consultation program for small businesses and franchises. But we have stepped up our efforts to confront franchising scams and dubious business behaviour through initiatives such as the SCAMwatch website and the Australasian Consumer Fraud Taskforce.

We are also not just sitting back waiting for complaints to come into our infocentre. Our teams are scouring newspaper classifieds, searching out potentially bogus job opportunities. We are using our outreach offices in every state and territory, seeking leads from local businesses to identify any suspicious behaviour that may need to be investigated.

Retail tenancy

Retail tenancy issues have also been somewhat of a hot issue of late. I know this is an area of importance to many of you in this audience, and there are concerns that smaller players are perhaps not getting as good a deal as they

think is fair in some circumstances. It's important to remember that market forces play a central role in determining prices for areas like the amount of rent a business must pay. There are times when this may seem unfair, but as the law currently stands, it is largely up to the market to determine what is a fair price for tenants to pay.

While it is true that government and regulators have a responsibility to look at these concerns, there are also proactive steps small businesses can take to improve their own position in this area.

I must firstly note that the Treasurer and Small Business Minister have recently called on the Productivity Commission to conduct an inquiry into retail tenancy leases, following on from concern expressed by small business.

I do not want to pre-empt the findings of that inquiry, but I would urge you and all your members who have concerns to make submissions to this inquiry. This represents a good chance to have any grievances aired and investigated by an independent body.

I would suggest however, that a closer dialogue between tenants and landlords such as shopping centre owners may address some of these concerns.

One of the major complaints the ACCC hears from retail tenants is that they object to providing their turnover details to landlords. We must remember that in some cases this information can be useful to a shopping centre when assessing possible future development and the tenancy structure that in turn assists with the success of the centre.

Secondly, we often hear that tenants are unhappy at not being able to discover the rents paid by neighbouring traders. This is not always strictly true, as NSW, Queensland and the ACT have compulsory retail leasing registers, and it can be as simple as searching these publicly available registers. Other states also make some limited information available.

Where details are not readily searchable, landlords such as shopping centres might want to consider publishing rental tenancy information on their websites, where the tenant concerned gives their consent.

It is my understanding that landlords generally do not oppose disclosing such terms and conditions, and this could become a voluntary process on the part of individual landlords or indeed in the case of shopping centres, an industry wide code.

Such a code would in fact go a long way to avoiding further need for regulation in the sector.

Collective bargaining

And in the context of major shopping centres, I remain perplexed as to the unwillingness of centre tenants to engage in some form of collective bargaining with centre landlords – for surely this approach would offer a strengthened negotiating hand to tenants in their lease dealings.

You've already heard earlier today from the ACCC's Scott Gregson on collective bargaining, so I won't go into all the detail of the recent legislative

changes. What I will say however, is that I'm somewhat bewildered, and indeed frustrated, that small businesses have not yet taken advantage of the improvements to the collective bargaining system.

Not only has the ACCC vastly simplified accessibility to these provisions through streamlining of our processes for authorisation of collective bargaining arrangements, the recent changes to the TPA have also brought about a significant, new advantage to groups of small businesses.

The changes that were introduced on January 1 represent a remarkable opportunity for small businesses to gather together and strengthen their hand in negotiating with suppliers and customers – yet in the six months since they have come into force, they remain unused!

The ACCC has repeatedly stated in public that these changes provide a number of potential public benefits, including greater input by small businesses into their contract conditions and terms, which of course then leads to more efficient outcomes.

But the ACCC can only do so much – and it is frustrating for us, after constantly referring to the benefits of these changes, that they have until now basically been ignored.

Therefore my strong invitation to small business here today is to talk to us, find out about how these provisions can work for you and put them to use – they are designed to assist you, so take advantage of them.

Industry associations and reporting unconscionable conduct

Victimisation of small businesses, predatory pricing and other forms of unconscionable conduct are by their nature difficult to detect. Perpetrators are often aware their actions are in breach of the Trade Practices Act, and they can go to extreme measures to conceal their underhanded treatment of competitors and business customers and suppliers.

This makes our task of identifying and prosecuting offenders particularly difficult. Small businesses, while themselves the victims, are busy running their own company and often choose to suffer in silence or are unaware of what they can do. It is here that industry associations and representative bodies can step into the void and help bring this conduct to light.

Industry associations, through their grassroots links to members, are well positioned to act as a conduit between members and regulators where problems occur.

Those who doubt that their information will be taken seriously need only look at the outcome of the ACCC's case against a number of Jurlique cosmetics companies earlier this year. Thanks to the help and information of affected traders who were alleging resale price maintenance, the ACCC was able to put together a strong case that resulted in a record $3.4 million in penalties being handed down by the Federal Court. This is a win not only for the affected retailers, but all small businesses that see the law can, and does, work in this area.

Of course many industry associations already realise the important role they have to play in eliminating harsh and oppressive trading against their members, and we are currently working with COSBOA and the MTAA who have provided us with important information of alleged breaches of the TPA.

By educating their members, encouraging them to come forward and promoting awareness and compliance with the TPA, industry associations can play a key part in the process of keeping trading conditions fair for all participants.

Conclusion

When Australia looks at the achievements of its small businesses and the contribution they make to society and the economy it can be justifiably proud. We have one of the most open, accessible markets in the world, but I doubt we will ever reach a point where we can sit back and say, now the market is totally fair. Neither should we.

We are continually addressing areas of concern to small business, but there is more to be done, both by regulators and government, but also by businesses themselves.

As a regulator, we are making changes to the way we work to deliver more benefits to small businesses. This involves seeking out and prosecuting rouge traders where they exist, testing legal definitions such as for unconscionable conduct, through to educating businesses about how they can make themselves more competitive.

It is a joint task that requires commitment not just from those who enforce the laws, but also from those who are bound by them, as well as the associations and business groups that represent them.

By continually striving to stamp out unscrupulous behaviour, opening up opportunities for competition to grow in various sectors and working with industry to address its concerns, we can provide a fair go to everyone who wants to run or be part of a small business.

Once we do that, their success is up to them. I think Henry would approve.