

BORAL and the High Court – a message that will be heeded

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Until regulatory law is tested its force often rests as much on moral suasion and perception, as on the black letter.

That is why the character and style of the Chairman of the ACCC is so important, because threat and posture do help keep companies on the straight and narrow.

Once the law is tested it is a different matter.

As they did with the Hughes/Wakim and Mabo cases, by exposing serious deficiencies in the law, first in Melway and now in Boral, the High Court has told Parliament a key part of competition law is ineffective.

Academic and small business experts have long complained that Section 46 of the *Trade Practices Act* (which prohibits predatory pricing) was weak. They were right.

Far from doing small and medium business a disservice the High Court has done them a favour. This case will pressure the Parliament to tighten up the TPA regime.

The Dawson Committee Report into the TPA was submitted to the Government last month. Its views on Section 46 will have to be borne in mind, but the Boral case guarantees that Parliament will seek to strengthen Section 46 regardless.

Predatory pricing is a big problem for small and medium businesses, both up and down stream.

From a public policy point of view the issue is that the destruction of competitors, if taken to its logical conclusion, can result in the destruction of competition. That is why market power has to be regulated and constrained.

What the Boral case says is that conduct by a powerful competitor that is predatory in economic terms and anti-competitive in nature, may not be caught under Section 46 of the Act.

Despite its powerful market position, Boral was deemed by the High Court to lack the necessary market power—the ability to ‘give less and charge more’.

The Court made a distinction between monopolistic power prior to predatory pricing (which would be an abuse), and the monopolistic power that results from successful predatory pricing.

The problem is that if you let the latter happen, the regulator has failed.

That is why Section 46 must be toughened up to prevent companies achieving such monopolistic power.

A business alleging another business has engaged in anti-competitive conduct must presently show there was an intention to eliminate competition. Proving that intention is notoriously difficult because it is so hard to get behind the big corporate shield and find the smoking gun.

Two possible measures could overcome this difficulty and still maintain fairness.

The first is to remove the requirement to show intention and to instead show that the actions of the alleged perpetrator have had the effect of damaging competition.

The second is to change the onus of proof where the ACCC pursues the matter. The onus would fall on the defendant not the applicant to show that there was no purpose of eliminating competition.

A system of protecting and rewarding whistleblowers who provide evidence about collusive and anti competitive conduct should also be considered.

The ACCC should be given a power to grant 'cease and desist' orders against companies involved in anti-competitive behaviour. Such a power would allow intervention on behalf of small firms who are being harmed by the behaviour of a large competitor.

Rather than wait years for a court to determine the legality of a firm's behaviour, a cease and desist power would allow early intervention, before the competitor is driven out of business.

In many respects Australia's approach to the TPA is similar to that of other OECD countries. In other ways it is not.

Missing from the TPA are a number of elements that are successfully implemented in foreign jurisdictions, such as the US Anti-Trust laws and the UK scale or complex monopoly mechanisms.

The UK Fair Trading Act uses a figure of 25% as constituting a fair market power measure. Boral with at least 30% of the market would have officially been under 'market watch' in the UK, a measure that usefully ensures better market behaviour.

The point of the US anti-trust laws, as interpreted by the US courts, is to prevent unreasonable and unfair methods being employed by companies establishing a position of substantial market power.

Big business roar approval at the dynamism of the American market, but fiercely condemn a major contributor to that dynamism – the effects of anti trust laws.

We need them in Australia.

A practice should be deemed illegitimate if it restricts competition in a significant way, or is likely to harm consumers through increased prices, reduced availability of goods or services, lowered quality or service, reduced diversity, or stifled innovation.

A stronger TPA will be good for Australia. It is time the bullies were put in their place.

(784 Words)

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