
Policy developments

New deal for small business

Introduction

On 30 September 1997 the Minister for Workplace Relations and Small Business, the Hon. Peter Reith, announced significant amendments to the Trade Practices Act for small business. The amendments, foreshadowed by the Trade Practices Act Amendment (Fair Trading) Bill 1997, were announced in the Minister's statement entitled 'New Deal — Fair Deal — Giving Small Business a Fair Go'.

'New Deal — Fair Deal' is the Government's response to the report on the fair trading inquiry by the House of Representatives Standing Committee on Industry, Science and Technology, chaired by the Hon. Bruce Reid MP. The inquiry report is titled *Finding a Balance — Towards Fair Trading in Australia*.

Background

Established on 26 June 1996, the Reid Committee was given broad terms of reference to examine small business conduct issues and to develop strategies and options for addressing small business concerns. In particular, the committee was requested to pay close attention to concerns expressed by members of the franchising and retail tenant groups.

By the conclusion of its work, the Reid Committee had received over 200 submissions from business and professional groups, and over 50 submissions from private individuals.

The Reid Committee delivered its report on 26 May 1997. The report recommended reform in seven areas of small business conduct:

- unfair conduct
- franchising
- retail tenancy
- misuse of market power
- small business finance
- education
- access to justice

This last area included a recommendation for enhanced powers for the Commission.

The Government has acted upon recommendations for reform in these areas by foreshadowing significant amendments to the Trade Practices Act.

Fair trading amendments

Introduced into the House of Representatives on 30 September 1997, the Fair Trading Amendments Bill contains two schedules which will introduce amendments relating to industry codes of practice and unconscionable conduct in relation to small business.

Schedule 1, dealing with industry codes of practice, is to begin on the date the Bill receives Royal Assent.

Schedule 2, concerning small business and unconscionable conduct, will not begin before 1 July 1998. If Royal Assent is given before 1 January 1998, then Schedule 2 will commence on 1 July 1998. If Royal Assent is given after 1 January 1998, then Schedule 2 will commence on a day after 30 June 1998 that is to be fixed by proclamation. If that date has not been proclaimed within six months of Royal Assent, then Schedule 2 will commence on the first date after that six-month period.

Set out below is a brief overview of these proposed reforms.

1. Unfair conduct

Unconscionable conduct

Finding a Balance said that small businesses are entitled to be protected against unfair conduct by larger corporations in much the same way as consumers are already protected.

The Fair Trading Bill proposes to insert a new s. 51AC into Part IVA of the Trade Practices Act. Section 51AC is concerned with unconscionable conduct in business transactions. While it mirrors s. 51AB, which covers unconscionable conduct in consumer transactions, it includes several other factors which the courts are to consider in assessing whether conduct is unconscionable, including:

- the extent to which the supplier's conduct was consistent with other transactions involving similar business consumers;
- the requirements of a prescribed code of practice with which the business consumer reasonably expected the supplier would comply;
- the extent of disclosure of intended conduct and any unforeseen risks that conduct may pose to the business consumer;
- the supplier's willingness to negotiate; and
- the good faith of both parties.

Consistent with its small business orientation, s. 51AC will apply only to transactions under \$1 million. In addition, publicly listed companies will not be able to institute proceedings under the new provision.

Codes of conduct

The Fair Trading Bill proposes to insert a new Part IVB into the Trade Practices Act which will enable either the whole, or part, of an industry code of practice to be underpinned by the Trade Practices Act as either a voluntary or mandatory code. These codes will regulate the behaviour of industry participants toward each other and toward consumers, and they will be prescribed by the regulations to the Act.

A new s. 51AD provides that a corporation must not in trade or commerce contravene an applicable industry code. It is intended that a person who suffers loss or damage as a result of a contravention of a prescribed industry code will be able to apply for remedies under the Act without having to establish a contravention of a substantive provision of the Act, such as s. 52.

Prescribed codes may be either voluntary or mandatory. Prescribed mandatory codes will bind all participants in the industry to which the code applies. Prescribed voluntary codes will bind only those that agree to be bound.

2. Franchising

The Government has accepted the *Finding a Balance* recommendation that an effective and mandatory Franchising Code of Practice be re-established as a matter of urgency.

Accordingly, a new nine-member body, the Franchising Policy Council, will be established to advise and report to the Government on the recommended terms of a new mandatory code for the franchising industry. An exposure draft of the new code will be released for comment when it is formulated. The Council will have an ongoing role in reporting to the Government on the recommended terms of codes of conduct which are to be prescribed under the regulations of the Act.

Policy responsibility for declaring codes will rest with the Minister for Customs and Consumer Affairs in conjunction with a Codes Policy Unit to be established within the Department of Industry, Science and Tourism.

In addition, the Government intends to prescribe a mandatory OilCode which will strengthen the position of small business franchisees in the oil industry.

3. Retail tenancy

The *Finding a Balance* report noted that the imbalance in bargaining power in retail tenancy relationships has often resulted in harsh outcomes for small business.

Although the Commonwealth Government does not have a general constitutional power to

regulate retail tenancies, it proposes to facilitate national negotiations between State and Territory Governments and core representatives of retail tenants with a view to implementing a national set of retail tenancy principles. These principles will be designed to provide a minimum standard for nationally consistent retail tenancy laws. It is proposed that the agreed set of principles will cover matters such as:

- providing adequate disclosure of important information at the time retail tenancies are being offered to small business;
- ensuring fair rents by facilitating independent review and outlawing ratchet clauses;
- ensuring access to a speedy and economical process of mediating disputes; and
- ensuring landlords compensate retail tenants for reasonable costs incurred where relocation is required during the term of the lease.

4. Misuse of market power

The *Finding a Balance* report recommended that the Trade Practices Act be amended to allow the Commission to take representative actions on behalf of small businesses under Part IV of the Act generally, and in relation to allegations of misuse of market power particularly.

The Government has accepted this recommendation and, in consultation with State and Territory Governments, proposes to amend s. 87(1B) of the Act to allow the Commission to take representative actions on behalf of small businesses.

5. Small business finance

The Government has recognised that while access to finance is crucial to small business growth, significant hurdles exist in terms of the cost of finance and access to effective dispute resolution procedures.

Accordingly, the Government has, in principle, accepted the recommendation that the Australian Banking Industry Ombudsman

Scheme and the Banking Code of Practices be extended to include incorporated small businesses. It is also anticipated that small businesses will be able to utilise the proposed s. 51AC in relation to unfair conduct by financial institutions.

6. Education

The Government proposes to develop a variety of information packages relevant to fair trading issues. These packages will be incorporated by industry associations and small business representative groups in training curricula and other information services.

These packages will deal with topics such as franchising, starting a business, contract responsibilities, tenancy and the role of the Commission. The training packages will be coordinated in conjunction with State and Territory Governments and private sector industry associations.

7. Access to justice

The *Finding a Balance* report noted that small businesses often face significant hurdles in taking a matter to court. The Committee found that a key factor in making the legal system more accessible for small business is ensuring that enforcement bodies are in a position to assist when disputes arise.

In this context, the Committee found that although the Commission was the body best able to take action on behalf of small business, it did not have adequate powers to pursue allegations of unfair conduct on behalf of small business.

Accordingly, the Government proposes to enhance the resources of the Commission to assist small businesses when a dispute arises and complaints are actionable.

A number of structural changes to the Commission are anticipated.

- Two new Associate Commissioners responsible for small business issues will be appointed. These new Commissioners will provide a focus for the Commission's existing small business functions and policy.

- Section 7(4) of the Trade Practices Act will be amended to ensure that, in the future, at least one of the Commissioners will have knowledge of, or experience in, small business.
- A small business case officer will be appointed to each State office to provide a focus for small business enforcement and education activities.
- A Codes of Conduct Enforcement Unit will be established to administer and enforce the provisions of industry codes prescribed under the regulations to the Trade Practices Act. The Government intends this unit to initially involve itself with the proposed Franchising and Oil Codes.

In addition, the Government intends issuing a direction under s. 29 of the Trade Practices Act requiring the Commission to initiate test cases under the new unconscionable conduct provisions at the earliest opportunity. It is anticipated that these test cases will allow the Commission to determine the scope of existing and new provisions of the Act. The Government intends allocating an additional \$480 000 per annum to the Commission to assist in the conduct of this new test litigation.

The Government will release a discussion paper proposing further amendments to the Act to further improve its effectiveness in protecting consumers and small business. The proposed amendments are intended to ensure appropriate compensation for those who suffer loss or damage as a result of contraventions of the Act. They arise from the recommendations of the Australian Law Reform Commission's Report No. 68 on compliance with the Act. The Minister for Customs and Consumer Affairs has invited comment on the proposals by 14 November 1997.