
Small business

Small business amendments to the TPA

In September 1997 the Government released its report *New Deal, Fair Deal*, setting out proposals to provide small business with much improved legal protection against unfair trading and access to effective enforcement mechanisms. Details are included in the Commission's *Small Business Report: new deal — fair deal*, which is available from Commission offices and from its website.

Legislation amending the Trade Practices Act was passed in April 1998.

The amendments to the Act

The Trade Practices Amendment (Fair Trading) Act 1998 inserted new provisions in the Trade Practices Act:

- s. 51AC, which is designed to protect small business from unconscionable commercial conduct; and
- Part IVB, which provides for industry codes to be enforceable under the Act.

Unconscionable conduct

The new unconscionable conduct provision (s. 51AC) prohibits a stronger party dealing with a disadvantaged party in a harsh or oppressive manner.

It is intended to provide meaningful protection for small business against exploitative business conduct. It prohibits a stronger party exploiting its bargaining advantage to impose contractual terms, or engage in conduct, that would be unreasonable in the context of a particular commercial relationship.

It gives small business the same strong legal protection that is available for consumers under the Act. However, it applies only to transactions of less than \$1 million.

Under the new provision the court may take into account a range of circumstances in determining whether a business has been subjected to unconscionable conduct. It may consider the parties' relative commercial strengths, whether undue influence was exerted, whether the contract exceeded what was reasonably necessary for the legitimate interest of the supplier, the requirements of any applicable industry code, and whether there was evidence of disclosure, good faith and willingness to negotiate.

Codes of conduct

The Government accepted that several areas are particularly vulnerable to unfair treatment in commercial dealings, including retail tenancy, franchising and petroleum retailing.

Franchisees and petroleum retailers have been regulated by voluntary industry codes of conduct which went some way to providing small business rights in the marketplace. However, the Government noted that, overall, voluntary industry codes were ineffective in shielding small business from unfair conduct because they were not enforceable or because they carried ineffective sanctions, and it accepted that these codes should be underpinned by legislation to give them real force and effect.

The new s. 51AD of the Trade Practices Act provides for codes of conduct to be enforceable under the Act. The Franchising Code of Conduct is the first to be prescribed under the terms of this new provision.

Franchising Code of Conduct

The Franchising Code of Conduct was launched by the Hon. Peter Reith, MP, the Minister of Workplace Relations and Small Business, on 19 June 1998. Copies are available free from Commission offices.

The first stage of the Franchising Code of Conduct came into effect on 1 July 1998 and is mandatory for franchising industry participants.

It includes a provision ensuring that franchisees have the right to associate, and requires franchisors to provide a copy of any lease to franchisees and to prepare financial statements for marketing and cooperative funds.

The second stage, including disclosure and dispute resolution provisions, came into effect on 1 October 1998. This transition period provided franchisors with three months in which to establish compliance systems.

The code will regulate the conduct of industry participants toward each other and aims to bring about cultural change in the sector. It aims to:

- raise the standard of conduct without endangering the vitality and growth of franchising;
- reduce the cost of resolving disputes;
- reduce risk and generate growth by increasing the level of certainty for all participants; and
- address the imbalance of power between franchisors and franchisees.

A key element of the code is disclosure. Under the code, franchisors are required to disclose, to franchisees and prospective franchisees, information relevant to the operation of the franchise business. Franchisors are also required to provide relevant information, such as details of a change of ownership or changes to certain financial circumstances, to franchisees during the course of the agreement.

The code imposes an obligation on a franchisee transferring/selling a franchised business to provide a disclosure statement to the person purchasing the business.

Other requirements of the code include obligations on franchisors to provide a cooling-off period for prospective franchisees. Franchisors may not prevent franchisees from associating with each other for a lawful purpose and may not seek a general release from liability on entering the franchise agreement. The code also deals with termination of a franchise agreement and sets guidelines for mandatory mediation where a dispute arises that cannot be resolved within the franchise system.

The operation of the code will be monitored closely by the Franchising Policy Council.

Raising the level of awareness of the rights and obligations of participants in the franchising

sector is essential for significant behavioural improvement to be achieved in the sector. To that end, the Commission has launched an extensive information dissemination and education campaign, including widely advertising the availability of the code via national and regional newspapers, leaflets and seminars. It has also published *The Franchisee's Guide*, a plain English guide to the code specifically for franchisees, available free from Commission offices and from its website.

To help franchisors comply with the code the Commission, together with the Department of Workplace Relations and Small Business, has produced a compliance manual which is available for \$130 from Commission offices.

As part of the package of measures designed to help the franchising sector a Franchising Code of Conduct Mediation Adviser was appointed in early October 1998. The Mediation Adviser's role is to help businesses find an experienced mediator to facilitate resolution of commercial disputes. The adviser may also appoint a mediator if requested by one of the disputants. The adviser's hotline is 1800 150 667.

ACCC small business enforcement policy

The Commission's policy on compliance with the Trade Practices Act, as it relates to small business, includes educating and informing small business, as well as others, about their rights and responsibilities under the Trade Practices Act. The Commission is undertaking, or is planning, a considerable amount of activity in this area including seminars, publications and liaison with relevant government and other organisations. The Commission's Small Business Unit is also developing strategies to ensure that information reaches the target group. It is hoped that over time this strategy will reduce the number of complaints by and about small business in relation to breaches of the Trade Practices Act.

The Commission's usual enforcement priorities in relation to anti-competitive conduct are weighted towards:

- anti-competitive agreements, particularly price collusion;
- mergers which would, or would be likely to, substantially lessen competition in a substantial market, mainly in the non-traded;

- misuse of market power;
- resale price maintenance;
- conduct in breach of the Act which inhibits micro-economic reform;
- exclusive dealing where it significantly affects consumers or business; and
- serious secondary boycott conduct.

It is more likely that small business will be a victim than a perpetrator in any of these breaches. Nevertheless, there are times when small business will, for instance, engage in price fixing and it will be necessary for the Commission to decide whether to be more lenient towards small business than it is towards big business and, for instance, accept s. 87B undertakings for price fixing conduct.

In relation to consumer protection enforcement the Commission aims to give priority to consumer protection matters of national significance or those which adversely affect large numbers of people.

It will have regard to key issues in its operating environment and whether or not the conduct:

- is multi-State, national or international;
- involves significant consumer detriment;
- warrants Commission involvement for a worthwhile national educative or deterrent effect;
- involves a significant new market, such as one arising from economic or technological change;
- causes detriment to small business and/or the competition process;
- involves an opportunity to test the law in appropriate circumstances.

The focus of the Commission's work over the next 12 months will be in the area of unconscionable conduct and codes under Parts IVB, C and D of the Trade Practices Act. The Commission's enforcement efforts will also be directed at s. 51AC. There will be a considerable amount of public interest, and high expectations about enforcement action, in relation to this new provision of the Act. As the largest number of complaints which may fit under this section are in the retail tenancy and franchising areas, these will be the areas of highest priority.

With respect to the enforcement of s. 51AD the Commission has developed the following hierarchy of behaviour which would attract education and/or enforcement action:

1. From 1 July 1998 to 1 October 1998 the Commission has followed a course of educating franchisors about their responsibilities and employed a cooperative approach to averting any potential breaches of the Act, while developing market intelligence on the extent of compliance and non-compliance with the Franchising Code of Conduct.
2. The requirement for franchisors to provide a disclosure document to prospective franchisees and franchisees wishing to extend or renew current franchise agreements came into effect on 1 October 1998. Minor and technical breaches, in relation to the disclosure document, will normally be considered a low priority for action by the Commission.
3. Where a breach is blatant and provocative, it will be enforced vigorously by the Commission.
4. If there is a failure to meet key requirements of the code after 1 October 1998:
 - in a one-off situation, education will be the preferred form of action;
 - continuing breaches will attract legal action.
5. Small business will continue to be affected by breaches of existing sections of the Trade Practices Act. When this occurs the Commission will give additional weighting to contraventions of the code when determining its course of action.
6. Where small business is responsible for a breach of the Trade Practices Act the Commission, in determining the appropriate enforcement action, will consider the direct effect of such action on the circumstances of those involved.

The Commission will actively monitor and review this policy.