



Trade Practices Legislation Amendment Act 2008

No. 116, 2008

**An Act to amend the law in relation to trade
practices, and for related purposes**

Note: An electronic version of this Act is available in ComLaw (<http://www.comlaw.gov.au/>)

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No. 116, 2008

An Act to amend the law in relation to trade practices, and for related purposes

[Assented to 21 November 2008]

The Parliament of Australia enacts:

1 Short title

This Act may be cited as the *Trade Practices Legislation
Amendment Act 2008*.

2 Commencement

This Act commences on the day after it receives the Royal Assent.

3 Schedule(s)

Each Act that is specified in a Schedule to this Act is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this Act has effect according to its terms.

Schedule 1—Misuse of market power by corporations

Trade Practices Act 1974

1A After subsection 46(1)

Insert:

- (1AAA) If a corporation supplies goods or services for a sustained period at a price that is less than the relevant cost to the corporation of supplying the goods or services, the corporation may contravene subsection (1) even if the corporation cannot, and might not ever be able to, recoup losses incurred by supplying the goods or services.

3 Subsections 46(3), (3A) and (3C)

Omit “Court”, substitute “court”.

4A Subsection 46(4A)

Omit “Court” (wherever occurring), substitute “court”.

5 After subsection 46(6)

Insert:

- (6A) In determining for the purposes of this section whether, by engaging in conduct, a corporation has taken advantage of its substantial degree of power in a market, the court may have regard to any or all of the following:
- (a) whether the conduct was materially facilitated by the corporation’s substantial degree of power in the market;
 - (b) whether the corporation engaged in the conduct in reliance on its substantial degree of power in the market;
 - (c) whether it is likely that the corporation would have engaged in the conduct if it did not have a substantial degree of power in the market;
 - (d) whether the conduct is otherwise related to the corporation’s substantial degree of power in the market.

This subsection does not limit the matters to which the court may have regard.

7 Subsection 86(1A)

After “arising under”, insert “section 46,”.

Schedule 2—Misuse of market power by persons

Trade Practices Act 1974

1A After subsection 46(1) of the Schedule

Insert:

- (1AAA) If a person supplies goods or services for a sustained period at a price that is less than the relevant cost to the person of supplying the goods or services, the person may contravene subsection (1) even if the person cannot, and might not ever be able to, recoup losses incurred by supplying the goods or services.

3 Subsections 46(3), (3A) and (3C) of the Schedule

Omit “Court”, substitute “court”.

4A Subsection 46(4A) of the Schedule

Omit “Court” (wherever occurring), substitute “court”.

5 After subsection 46(6) of the Schedule

Insert:

- (6A) In determining for the purposes of this section whether, by engaging in conduct, a person has taken advantage of the person’s substantial degree of power in a market, the court may have regard to any or all of the following:
- (a) whether the conduct was materially facilitated by the person’s substantial degree of power in the market;
 - (b) whether the person engaged in the conduct in reliance on the person’s substantial degree of power in the market;
 - (c) whether it is likely that the person would have engaged in the conduct if the person did not have a substantial degree of power in the market;
 - (d) whether the conduct is otherwise related to the person’s substantial degree of power in the market.

This subsection does not limit the matters to which the court may have regard.

Schedule 3—Other amendments

Australian Securities and Investments Commission Act 2001

1 Subsection 12CB(2)

Omit “Court” (wherever occurring), substitute “court”.

2 Paragraphs 12CB(4)(a) and (b)

Omit “Court”, substitute “court”.

3 Subsections 12CC(2) and (3)

Omit “Court” (wherever occurring), substitute “court”.

4 Paragraphs 12CC(5)(a) and (b)

Omit “Court”, substitute “court”.

5 Subsections 12CC(8), (9) and (10)

Repeal the subsections.

6 Application of item 5

The amendments made by item 5 of this Schedule apply in relation to conduct engaged in after the commencement of that item, including conduct in relation to contracts for the supply or acquisition of goods or services whether made before or after that commencement.

Trade Practices Act 1974

7 After subsection 10(1A)

Insert:

- (1B) Before the Governor-General appoints a person as a Deputy Chairperson, the Minister must be satisfied that, immediately after the appointment, there will be at least one Deputy Chairperson who has knowledge of, or experience in, small business matters.

8 Subsection 51AB(2)

Omit “Court” (wherever occurring), substitute “court”.

9 Paragraphs 51AB(4)(a) and (b)

Omit “Court”, substitute “court”.

10 Subsections 51AC(3) and (4)

Omit “Court” (wherever occurring), substitute “court”.

11 Paragraphs 51AC(6)(a) and (b)

Omit “Court”, substitute “court”.

12 Subsections 51AC(9), (10) and (11)

Repeal the subsections.

13 Application of item 12

The amendments made by item 12 of this Schedule apply in relation to conduct engaged in after the commencement of that item, including conduct in relation to contracts for the supply or acquisition of goods or services whether made before or after that commencement.

13A Subsection 86(1A)

Omit “or the Commission”.

14 After subsection 155(3A)

Insert:

- (4) A member of the Commission may exercise, or continue to exercise, a power under subsection (1) in relation to a matter referred to in that subsection until:
 - (a) the Commission commences proceedings in relation to the matter (other than proceedings for an injunction, whether interim or final); or
 - (b) the close of pleadings in relation to an application by the Commission for a final injunction in relation to the matter.

15 Application of item 14

- (1) Item 14 applies in relation to a matter referred to in subsection 155(1) of the *Trade Practices Act 1974* whether the matter arose before or after the commencement of that item.

Schedule 3 Other amendments

- (2) Without limiting subitem (1), item 14 of this Schedule applies even if an interim injunction has been granted in relation to the matter.
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*[Minister's second reading speech made in—
House of Representatives on 26 June 2008
Senate on 2 September 2008]*

(140/08)
