



FOR MEDIA

**The Hon Chris Bowen MP
Assistant Treasurer
Minister for Competition Policy and Consumer Affairs**

**The Hon Craig Emerson MP
Minister for Small Business, Independent Contract and the
Service Economy**

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RUDD GOVERNMENT ACTS TO STRENGTHEN LAWS TO PROMOTE FAIR COMPETITION

The Rudd Government today announced a package of measures aimed at promoting competition and cracking down on anti-competitive behaviour by powerful businesses.

The Government will move to further defend small business from predatory pricing and give it a permanent voice in the competition watchdog the Australian Competition and Consumer Commission (the ACCC), amongst other key reform to the *Trade Practices Act 1974*.

Small business and consumers demand nothing less than an effective trade practices regime.

Reforming the Trade Practices Act to bring it into the 21st century has been an article of faith for this Government.

This package will ensure genuine competition for the benefit of consumers and small businesses:

1) Cracking down on anti-competitive behaviour by powerful businesses

The Government's changes to the Trade Practices Act will promote fair competition.

The new rules will make it easier to prosecute businesses engaging in anti-competitive behaviour.

The Government's amendments will:

- ensure that victims of predatory pricing will not need to prove that the predator has the ability to recoup losses after participating in an anticompetitive below cost pricing strategy.

- clarify the meaning of the term 'take advantage' in section 46 in response to concerns raised by businesses and the ACCC that the present meaning of that term has prevented section 46 from capturing anticompetitive behaviour.
- remove the unnecessary uncertainty that has arisen following the 'two track' process for predatory pricing that developed under the previous government. The ACCC has said that the dual track process has "caused considerable confusion" because they focus on the "fundamentally different concepts" of market power and market share.

The ACCC Chairman Graeme Samuel has stated:

'The uncertainty surrounding the operation of the provision [Birdsville amendment] has the potential to dampen legitimate competitive behaviour.' *

The reforms will also strengthen the role of the ACCC by enabling it to fully investigate suspected breaches of the law by enhancing its information gathering powers. The Government will also extend the reach of the ACCC by removing the arbitrary monetary threshold currently applicable to allegations of unconscionable conduct, enhancing the protection of small business from transactions involving such things as undue influence.

These amendments will deal with predatory pricing while allowing businesses to engage in genuine competition and discounting to the benefit of consumers.

2) Giving small business prominent and permanent representation on the ACCC

Small business will now have a permanent voice in the ACCC, with a requirement for at least one ACCC Deputy Chairperson to have small business expertise.

Giving small business a permanent voice within the ACCC will improve understanding of the special circumstances confronting small businesses and the difficulties they face in dealing with anti-competitive behaviour by more powerful businesses.

3) Giving small business cheaper and more efficient judicial access

Small and medium business to save significant costs by allowing cases involving a misuse of market power to be heard in the Federal Magistrates Court rather than in the Federal Court, in appropriate circumstances.

As a whole, this package of reforms is a big boost to the competitive position of small business.

The new rules will help ensure genuine competition to the benefit of consumers.

The Assistant Treasurer will write to the States and Territories seeking their approval for the proposed amendments.

The Australian Government's proposals are outlined in detail in the attached statement.

** Letter from Graeme Samuel to Minister Bowen outlining the ACCC's position on misuse of market power, 11th April 2008*

PROPOSED AMENDMENTS

The Government's amendments would:

- clarify that in determining whether a corporation has taken advantage of its market power under section 46 of the *Trade Practices Act 1974* ('the Act'), the court may have regard to whether the corporation's conduct was:
 - materially facilitated by its substantial degree of market power;
 - engaged in, in reliance on its substantial degree of market power;
 - likely to have been engaged in if the corporation lacked a substantial degree of market power; or
 - otherwise related to its substantial degree of market power;
- clarify that a corporation can have a substantial degree of market power under section 46 of the Act even though there is no proof that the corporation is able, or will be able, to recoup losses incurred from pricing below cost;
- amend subsection 46(1AA) of the Act so that, rather than prohibiting a corporation with a substantial share of a market from engaging in sustained below-cost pricing for a prohibited purpose, it would prohibit a corporation with a substantial degree of power in a market from taking advantage of that power in any market by supplying, or offering to supply, goods or services for a sustained period below cost, where the conduct is engaged in for one or more of the anti-competitive purposes presently prescribed in subsection 46(1AA);
- amend section 86 of the Act to extend the jurisdiction of the Federal Magistrates Court to include matters arising under section 46;
- amend section 155 of the Act to enable the Australian Competition and Consumer Commission (ACCC) to use, or continue to use, its powers under that section after applying for an injunction to stop suspected breaches of the Act, and to clarify that it may continue to utilise such powers until it commences substantive proceedings.
- amend the Act to require that at least one of the Deputy Chairperson positions at the ACCC must have knowledge of, or experience in, small business matters; and
- repeal the \$10 million threshold that applies to actions under section 51AC of the Act for unconscionable conduct in business transactions, with duplicate amendments made to the equivalent provisions of the *Australian Securities and Investments Commission Act 2001* ('the ASIC Act') which apply to transactions involving financial services