



## ACCC's payday from Cabcharge — Federal Court orders pecuniary penalties of \$14 million for misuse of market power

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- Landmark case settled in which a company conceded ACCC claims that it had misused market power and agreed to pay significant fines and costs
- Amendments to the Trade Practices Act in recent years make it easier for the ACCC show that a company has taken advantage of its substantial market power
- Companies with dominant market shares should ensure relevant staff and management are trained to minimise the risk of breaching the Trade Practices Act

**A new record has been set in Australia for fines for misuse of market power. Some are saying a new era of enforcement has dawned in misuse of market power prosecutions.**

This is an about face from the not too distant days in which the Australian Competition and Consumer Commission (ACCC) had to fight misuse of market power prosecutions all the way to the High Court, and then more often than not lost at the last hurdle.<sup>1</sup>

Section 46 of the *Trade Practices Act 1974* (TPA) is the provision that outlaws misuse of market power. It is complex, and has been amended several times since 2007 to increase penalties, and to improve the ACCC's chances of success in bringing prosecutions under it. Most recently, changes in late 2008 made it clear that, in a predatory pricing case, the prosecution does not have to prove that the

company expected to be able to recoup its losses in subsequent trading. Those changes also introduced a list of factors to which the court may have regard when determining whether a company has taken advantage of its market power. It is early days, but this result suggests the amendments may now be having the desired effect.

In a nutshell, a company that has a substantial degree of power in a market breaches s 46 when it takes advantage of that power in that, or any other market, for the purpose of:

- eliminating or substantially damaging a competitor
- preventing the entry of a person into a market or
- deterring or preventing a person from engaging in competitive conduct in the market.

The ACCC has been after Cabcharge for a while now. Cabcharge has built up and enjoyed for over 30 years a position of market leadership in the Australian market for meters and payment facilities in taxi cabs. The ACCC has been concerned that Cabcharge had begun to use its market power for the purpose of eliminating or at least deterring potential competitors.

### Refusal to supply and below-cost pricing

The regulator was particularly concerned with two aspects of Cabcharge's behaviour.

1. It refused to deal with a Western Australian based competitor, Travel Tab/Mpos, in relation to allowing its Cabcharge Instruments to be accepted and processed on the Travel Tab/Mpos system, in 2005 and 2008.
2. It supplied at least 6,178 units of the Cabcharge XUS 6000 taxi meter between September 2004 and November 2007 either

free of charge or at a price that was \$150 below cost price, and supplied free schedule updates for taxi fare rate changes for taxis using their meters.

In September 2010 the ACCC settled its case against Cabcharge for breaches of ss 45 and 46 of the TPA, commenced in June 2009.

Originally, the ACCC's case against Cabcharge included a claim that Cabcharge had breached s 45 of the Act in its arrangements with Townsville Taxis to acquire its payments system, in order to replace it with the Cabcharge system and so consolidate their position as the dominant supplier of these services in Queensland. The claims in relation to s 45 were dropped, and in fact Cabcharge effectively conceded to three out of 11 original charges, two in relation to the refusal to deal with Travel Tab/Mpos in 2005 and 2008, and one in relation to the predatory pricing described above.

The judge in this case has yet to release reasons for judgment, but the approved consent orders are interesting for the following reasons.

### The writing on the wall

Far from fighting all the way to the High Court, which has been the pattern in these types of cases for many years, Cabcharge has copped a plea, and to a record multimillion dollar set of fines.

The ACCC had prepared a massive case with scores of affidavits filed and 52 witnesses. The case was expected to take up several weeks of hearing time.<sup>2</sup> Cabcharge was unsuccessful in an interlocutory bid to have the case moved to Sydney<sup>3</sup> and partially unsuccessful in amending its defence to put in issue several matters which it had previously admitted.<sup>4</sup>

This result is likely to encourage the ACCC to prosecute more of these types of cases, particularly as part of the settlement included a \$1 million contribution towards the ACCC's legal costs.

From Cabcharge's point of view, it will be interesting to see whether in pleading guilty it will have opened the floodgates to civil claims from customers and/or competitors and will face possible class action suits such as were brought in the wake of the exposure of the Amcor/Visy cartel.<sup>5</sup> Cabcharge has been careful to state that all admissions made by it were for the purposes of these proceedings only, and

has also denied any loss or damage was caused to consumers or competitors.<sup>6</sup>

### Counting the costs

The total amount (\$14 million) of the penalties ordered are impressive. The maximum penalties for this type of conduct were increased by amendments to the TPA in January 2007 to the highest of \$10 million, three times the value of the benefit obtained from the conduct, or ten per cent of the annual Australian turnover of the corporation involved, for each act or omission, instead of simply a maximum fine of \$10 million. The result in this case suggests that the ACCC is pursuing significant penalties, and that the Federal Court is prepared to approve them.

The breakdown of the penalties approved were:

- (a) \$2 million for the refusal to deal in 2005
- (b) \$9 million for the refusal to deal in 2008
- (c) \$3 million for the predatory pricing.

Note the \$7 million difference between the penalties for what was essentially the same conduct in 2005 and 2008. This can only be explained by the introduction of the new penalty regime referred to above.

### Implications for companies with dominant market power

Market dominant players will be examining the reasons for judgment in this case closely, but they would be well advised to lose no time in reviewing their compliance systems and processes to ensure that the risk of the company using its position of market dominance for an unlawful, anticompetitive purpose in its, or any other market, is minimised.

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### Notes

- 1 See for example, *Boral Besser Masonry Limited v ACCC* [2003] HCA 5
- 2 *ACCC v Cabcharge Australia Ltd (No 2)* [2010] FCA 837
- 3 *ACCC v Cabcharge Australia Limited* [2010] FCA 731
- 4 *op cit*, note 2
- 5 See also McHugh N and Pengilly W, 2008, 'Lessons from the Visy case', *Keeping good companies*, Vol 60 No 1, pp 36–38
- 6 Cabcharge press release, 24 September 2010 ■