

Local Newspapers and Predatory Pricing

Gina Cass-Gottlieb and Mark Dorney examine a recent Trade Practices case on newspaper advertising

In the recent decision of *Eastern Express Pty Ltd v. General Newspapers Pty Ltd* the Federal Court of Australia held that when the publishers of the *Wentworth Courier* reduced its display advertising rates so as to attract real estate advertising away from a competing local newspaper, they had engaged in lawful price cutting. In the circumstances of the case, the reduction in display advertising rates to a level which still permitted the *Wentworth Courier* to make a profit was not predatory pricing contrary to s46 of the *Trade Practices Act* ('the Act'). The case also contains interesting observations on what is the relevant market when competition for the advertising of local real estate in newspapers is at issue.

The Facts

The *Wentworth Courier* is a free newspaper published and distributed in the Woollahra and Waverley areas of Sydney since 1961, funded entirely by advertising revenue. Evidence was given that, for most of its history, the *Wentworth Courier* enjoyed a virtual monopoly over the advertising of real estate situated in those areas.

After the *Eastern Express* entered the market in February 1990, the publishers of the *Wentworth Courier* dramatically reduced its advertising rates. Notwithstanding the price cuts, the *Wentworth Courier* was not published at a loss.

Trade Practices Claim

The publishers of the *Eastern Express* alleged that the publishers of the *Wentworth Courier* had breached s46(1)(a) of the Act (misuse of market power). The alleged contravening conduct was the cutting of the price of display advertisements in the *Wentworth Courier*.

The Relevant Market

The market in issue was held to be the market in which eastern suburbs real estate agents acquired real estate display advertisements in local newspapers circulating in that area.

The test of "market power" applied

was "the ability of a firm to raise prices above the supply cost without rivals taking away customers in due time, supply cost being the minimum cost an efficient firm would incur in producing the product". This test was extracted from the High Court decision in *Queensland Wire Industries Proprietary Limited v. The Broken Hill Proprietary Company Limited*.

The test of "substantial" market power was held to be power in the relevant market "which is more than trivial or minimal, which is real and of substance". Although market share is conceptually different to market power, there is often an evidentiary relationship between the two. The *Wentworth Courier* was found to enjoy, even after the entry of the *Eastern Express*, a substantial share of the market and commensurate market power.

Wilcox J. found that, prior to the entry of the *Eastern Express*, the *Wentworth Courier* could charge for its display advertising up to the point where vendors would decide to dispense altogether with local advertising. It could do so because it had a substantial reputation within the eastern suburbs community, significant reader loyalty and strong support from advertisers (especially among local real estate agents), access to substantial vertically integrated resources (eg publishing, printing and distribution), and economies of scale. These factors were found to constitute formidable barriers to entry, a key component of market power. Even after entry of the competition, the above advantages were found to give the *Wentworth Courier* substantial market power.

Was there a misuse of market power

The Court held that mere competitive activity (such as price cutting), which results in one competitor inflicting commercial damage on one or more other competitors, is not in itself a breach of s46 of the Act. The fact that prices are fixed with the intention of diverting custom from a competitor to the price cutter is not itself a prohibited purpose. This conduct was found to be a normal part of commercial activity "the very stuff of

competition, the result that Part IV (of the Act) seeks to achieve."

'Predatory pricing' is the deliberate lowering of prices to levels which will drive competitors out of the market and enable the predator to then raise prices to levels unconstrained by competition. The Court held that it is this purpose which distinguishes predatory pricing, which is anti-competitive conduct contrary to s46, from mere price-cutting, which is pro-competitive and lawful.

Predatory Pricing

The trial judge outlined the following indicia of predatory pricing: the price is below cost and the price cutting is temporary or sporadic. The critical question is not the fact of sales at a loss but the purpose lying behind those sales. The determination of the purpose underlying the fixing of the price levels is assisted by a two stage enquiry. If the defendant's prices are below average total cost but above average variable cost, the onus is on the plaintiff to show that the defendant's pricing is predatory. However, if the plaintiff proves that the defendant's prices are below average variable cost, the plaintiff has established a prima facie case of predatory pricing and the onus shifts to the defendant to prove that the prices are justified without regard to any anticipated destructive effect they may have on competitors.

Gina Cass-Gottlieb and Mark Dorney are solicitors in the Sydney office of Blake Dawson Waldron, Solicitors.

For a full review
of recent
developments see
Communications News
at page 32