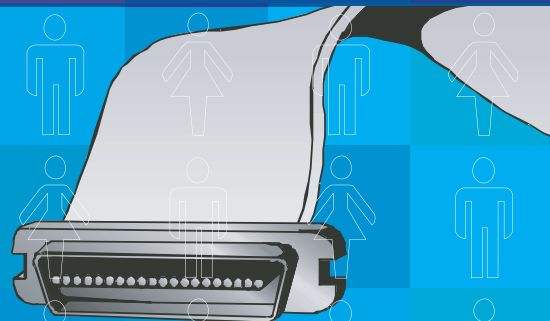




Australian
Competition &
Consumer
Commission

ACCC *update*

Issue 15, July 2004



Consumer protection and the
Trade Practices Act

Cyberscams, modem jacking
and internet dumping

What consumers do for
competition

Too good to be true?—caveat
emptor, buyer beware

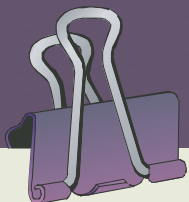


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From the Chair

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Consumer welfare is the watermark running through every page of the Trade Practices Act.

As the agency with the responsibility of administering the Act, the ACCC has two primary functions.

Firstly, to promote vigorous, lawful competition which involves taking action to prevent or halt anti-competitive conduct with the fundamental objective of providing a fair, competitive environment in which business—big, medium and small—have the opportunity to thrive and conduct their business in a manner consistent with the interests of the Australian public, the Australian consumer.

And secondly, to protect business and consumers against unconscionable and misleading and deceptive conduct in the marketplace.

2004 priorities

Consumer regulation is a never ending struggle and the ACCC's enduring priority is to enforce vigilant consumer protection. The ACCC continues to look for avenues to strengthen international cooperation between regulators as necessitated by the increasingly globalised marketplace.

In terms of misleading and deceptive conduct and unconscionable conduct, the ACCC is particularly addressing behaviour that targets and seeks to exploit disadvantaged and vulnerable consumers. We are also seeking to bring about a more responsible attitude on the part of the media outlets, to the publication of misleading and deceptive material.

We are currently improving online trading, working to secure competition in broadband internet and ensuring everyone involved in misleading or deceptive advertising is held responsible.

The ACCC also remains committed to fostering a competitive environment through detecting and busting open domestic and international cartels which have potential to do far more damage to our economy, to business and to consumers, than many of the worst consumer scams.

Graeme Samuel

ACCC Chair

Extract of the speech delivered to the National Consumer Congress in Melbourne, 15 March 2004. A complete copy of this speech is available at www.accc.gov.au

The Trade Practices Act—what's in it for consumers?

The objective of consumer protection law is to strengthen the position of consumers in their everyday dealings with the suppliers of goods and services. The Trade Practices Act governs practically all transactions entered into by consumers and businesses and holds important protections for consumers.

The consumer protection provisions of the Trade Practices Act target two broad categories of unfair market practices: unconscionable behaviour and misleading and deceptive behaviour.

Following is an overview of these two parts of the Act and the remedies that you or the ACCC can pursue when your consumer rights have been breached.

It's not on

Part IVA—Unconscionable conduct

A key aspect of modern commerce is the negotiating process that accompanies business transactions—generally, businesses and consumers are free to organise their affairs as they see fit, formalising their arrangements through contracts or agreements.

There are, however, limits on how far businesses can go in their dealings with consumers and other businesses. It's simply **not on** for businesses or corporations to use undue influence or pressure when supplying goods or services to consumers or other businesses. To do so may amount to unconscionable conduct.

Section 51AB of Part IV of the Act prohibits unconscionable conduct in consumer transactions. These sections set out a list of factors the court may take into account when determining whether a business has engaged in unconscionable conduct. These are:

- » the relative bargaining strengths of the business and the consumer
- » whether the business insisted the consumer comply with conditions that were not reasonably necessary to protect its legitimate business interests
- » whether the consumer knew about and understood any documentation that may have been used
- » whether the business used undue pressure or unfair tactics
- » the amount and terms on which the consumer could have acquired the same or similar goods elsewhere.

However, the court can take into account any other matter it considers relevant.

Special **disability** in the legal sense can include poverty—or need of any kind—sickness, age, gender, infirmity of body or mind, drunkenness, illiteracy or lack of education.

Case study—finance company repossesses vehicle

A finance company advanced \$15 000 to a consumer, with the amount secured by a chattel mortgage over a motor vehicle.

From time to time the customer defaulted on the repayments and by April 2000 the arrears exceeded \$1800. The finance company issued a notice requiring the customer to pay the arrears.

On 20 June 2000 the finance company repossessed the vehicle. By then, the outstanding amount was \$2180. The finance company instructed its agents to seize the vehicle, on the condition that they would not be paid unless they successfully took possession of it or secured full payment of the arrears.

After the agents repeatedly visited the customer's home and his wife's work place, six people went to the customer's home to seize the vehicle. They entered the property without permission and one of them jumped a gate to unlock a garage where the vehicle was parked.

After threatening to use force to protect his property, the customer was pinned to the ground while the vehicle was towed away.

The court declared, by consent, that the finance company had engaged in unconscionable conduct by:

- » serving a notice of demand on a consumer that conveyed that it could not lawfully repossess a vehicle without a court order, and then repossessing the vehicle without obtaining the order
- » failing to withdraw its instructions to its agents to repossess the vehicle when they had reasonable cause to believe a physical confrontation may occur if the instructions were carried out.

The finance company also conceded that it had engaged in unconscionable conduct when its agents:

- » entered the customer's property and jumped the gate to gain access to the garage
- » failed to discontinue the repossession when they had reasonable cause to expect that a physical confrontation may occur if the seizure continued.

Fair go

Part V—Fair trading

The Act prohibits conduct that is misleading or deceptive or which is likely to mislead or deceive. Other provisions of this Part specifically outlaw particular types of false or misleading representations or claims about the value, price or quality of a product or service.

Advertising statements made by sellers about goods and services—their standard and quality and even the future supply and use of goods and services—must be true and accurate. Advertising and selling is more than traditional print, television or other media advertising. It embraces a wide range of marketing activities including door-to-door selling, telemarketing, direct mail and signage.

What are misleading advertising and selling practices?

Any kind of conduct or behaviour that could give consumers the wrong impression may potentially breach the Act. It doesn't matter whether the representation is deliberate or accidental. What does matter is the impression that is left in the mind of the customer.

Various sections of Part V of the Act target specific types of trader behaviour:

- » false representations in the sale of land, for example, about sponsorship or price (section 53A)
- » misleading conduct about the nature, availability, terms and conditions or any other matter relating to employment (section 53B)
- » failing to specify the full cash price when advertising the price of goods or services, for example, the deposit or the terms of payment (section 53C)
- » false offers of prizes, gifts or other free items by corporations when supplying goods or services if there is no intention to provide them as offered (section 54)
- » misleading the public about the nature, characteristics, manufacturing process, quantity or the suitability of any goods or services (sections 55 and 55A)
- » bait advertising which entices customers into a store by advertising specified prices for goods or services which aren't really available (section 56)
- » referral selling where consumers are persuaded to buy a product by promises about rebates, commissions or other benefits they will receive once they introduce other buyers to the product (section 57)
- » accepting payment without intending to supply—traders should not accept payment if they know, or should know, that they cannot provide the kinds of goods or services promised (section 58)

- » making false and misleading statements about work-at-home schemes (section 59)
- » coercion or undue harassment or physical force in the supply, or possible supply, of goods or services or the payment for them (section 60)
- » sending people unsolicited debit or credit cards (section 63A)
- » demanding payment for unsolicited goods or services, including advertising and directory entries (section 64).

Part VC of the Act was introduced in 2001. The provisions in Part VC mirror Part V, Division 1 of the Act (with the exception of s. 52) for the purpose of providing for criminal prosecution of those who breach the relevant provisions.

Remedies

Monetary penalties of up to \$220 000 for individual traders and \$1.1 million for companies currently apply for many offences under Part VC.

Individuals and the ACCC can bring civil actions in the Federal Court for unconscionable conduct seeking monetary compensation, variation or cancellation of contract, or refund depending on the circumstances.

For further reading on the consumer protection provisions of the Act, *Summary of the Trade Practices Act 1974* and *Advertising and selling*, are available from the ACCC Publishing Unit (\$10 each), phone 1300 302 502 or online at www.accc.gov.au

ACCC Infocentre 1300 302 502

ACCC bags manufacturer over claims

The Australian, 1 April 2004

ACCC wins web names class action

The Financial Review, 13 April 2004



Media headlines such as these announce a positive result for consumers and competition law in Australia. What they don't disclose is the crucial role consumers play in both informing and participating in the regulatory processes. Yet each of the cases trumpeted above arose from investigations prompted by a single consumer inquiry to the ACCC Infocentre.

The Infocentre is the public's primary point of contact with the ACCC. Staffed by professional problem solvers able to assist consumers and businesses with questions about fair trading and consumer protection, the Infocentre has become a cornerstone of the national watchdog's compliance education strategy.

Originally established in 2000 to provide advice on price exploitation and the implementation of the new tax system laws (GST), the Infocentre registers an annual average of 75 000 inquiries on issues ranging from consumer warranties and refunds to business codes of conduct, debt collection, product safety and scams.

'The Infocentre monitors and responds to what is happening at every level in the marketplace', says Lynne Modrak, Team Leader with the centre. 'We receive calls from a vast cross section of the community including small business operators, large corporations, consulting firms, other government agencies and a wide variety of general consumers.'

While the Infocentre does not take on individual case work nor directly spearhead investigations, its 14 telephone operators and two email correspondents provide accurate advice on the protections offered by the Trade Practices Act and other related legislation. 'We have a definite role to play in educating the public about their consumer protection rights under the Trade Practices Act', said Lynne, 'and in advising consumers and businesses on how they can resolve their problems.'

In appropriate cases, Infocentre staff will help consumers and businesses work out a strategy to find a satisfactory resolution to their problem and where appropriate refer callers to secondary or specialist organisations, such as the Telecommunications Industry Ombudsman, or state and territory fair trading offices.

The Infocentre also serves as an information gathering hub for the ACCC. Every call and email received is entered in the ACCC complaints database. This resource is available to all ACCC research and investigative staff and is supported by weekly reports prepared by Infocentre analysts. Spikes and peaks in complaint areas may trigger investigations, or a single complaint can alert the centre's staff to escalate a matter for further investigation.

Consumers and businesses should never be shy about using the Infocentre to keep informed of their rights and responsibilities. The public has a powerful ally in the ACCC, but it's a two-way street. If the Trade Practices Act is to work effectively towards its stated aims it must be both widely understood and widely applied. The public—as consumers and business operators—has a central role to play in ensuring the ACCC does its job in rigorously applying the Act.

Contact the ACCC Infocentre by telephone
1300 302 502 or email using the link on
our website www.accc.gov.au