



ACCC

briefing

April 2004

From the Small Business Commissioner

This edition of *ACCC briefing* reports on some important issues for future applications of the Trade Practices Act.

The Senate Committee report on Small Business and the Trade Practices Act, in March, supported reforms that will overcome deficiencies in the law and in the ACCC's powers. The reforms should improve the ACCC's ability to act against abuses of market power and unconscionable conduct.

ACCC Chairman, Graeme Samuel, has warned against unnecessary tinkering with merger assessment processes because the resulting inflexibility would harm the successful informal clearance process, through which the ACCC deals with 98 per cent of proposals.

In this edition we also report on:

- ACCC action on Telstra's pricing of broadband internet services in a manner considered anti-competitive
- the ACCC's report on public liability and professional indemnity
- ACCC initiatives to deal with internet scammers.

My recent public speeches have included presentations to the Post Office Licensees Association (POAAL) and the Australian Chamber of Fruit & Vegetables. Copies of the speeches are available on the ACCC website.

REPORTS

ACCC welcomes report on Trade Practices Act

The Senate Economic References Committee's report into the effectiveness of the Act in protecting small business unanimously acknowledged the need to amend the misuse of market power provision (section 46 of the Act). In particular, the committee acknowledged that the threshold of market power required for the section to apply is substantially higher than intended by parliament.

The ACCC was, however, disappointed that the Committee was not able to unanimously support clarifying what the section means, when it refers to a firm 'taking advantage' of market power. The Committee has also recommended amendments to the unconscionable conduct provisions of the Act. It has also unanimously supported the collective bargaining notification scheme that the ACCC originally proposed to the Dawson Committee. The ACCC believes, however, that this scheme needs to retain the \$3 million threshold, to limit it to collective bargaining undertaken by small businesses. The changes the committee has recommended to section 51AC should bolster the protection the section already gives small business.

MR 026 (02.03.04)

REPORTS

Report on food supply chain pricing

A report prepared for the Commonwealth Department of Agriculture, Forestry and Fisheries has concluded that the Australian retail food market is a highly competitive and contested market.

The report found that the diminishing proportion of final retail prices returning to the farm gate appears to be because of a combination of factors, including the international price levels charged for raw goods, and the shifts in costs and value-adding that takes place at various stages of the supply chain.

These findings are relevant to the review of the Retail Grocery Industry Code, as well as concerns about issues of transparency, trade practices and fair dealings at various points in the supply chain. (see internet site: www.daff.gov.au/foodinfo)

(MR)

Public liability/professional indemnity insurance

The ACCC released the second in a series of reports that monitors costs and premiums in public liability and professional indemnity insurance. The report assessed the impact on premiums of measures, including tort reform, taken by governments to reduce and contain legal and claims costs in the first half of 2003.

Information from insurers shows there was a 4 per cent increase in public liability premiums, and a 10 per cent decrease in the average size of claims. Professional indemnity premiums and the average size of claims continued to rise in 2003, by 5 per cent and 19 per cent respectively.

The ACCC will examine movements in costs and premiums for 2003 in its next report, when actual data for the full 12 months is available.

MR 017 (23.2.04)

Medical indemnity premiums assessed

The Australian Government has released the ACCC's *Medical Indemnity Insurance Monitoring Report*, December 2003. The first of three ACCC reports to monitor medical indemnity premiums, it focused on how premiums were derived by the five medical indemnity providers.

The report shows premiums were actuarially justified for four out of five current indemnity providers. The ACCC also found that premiums set by all five providers were commercially justified. This assessment recognised the need for insurers to raise adequate capital to meet new prudential requirements set by APRA. However, the medical indemnity industry is in a state of transition and it is too early to say whether recent regulatory and other reforms will strengthen competition and attract general insurers to the sector.

MR 018 (23.2.04)

ACCC hot spot---scams and spam

A new leaflet, *If it sounds too good to be true...*, has been produced by the ACCC. It contains tips on what to watch out for and how to protect yourself from internet scams and spam. It is freely available from the publications page of the ACCC website at www.accc.gov.au or in hard copy from the ACCC Infocentre on 1300 302 502.

Some items in *ACCC briefing* refer to news releases and their dates e.g. MR (12.02.04). These can be found on the ACCC website <www.accc.gov.au>. Subscribe to *ACCC briefing* by emailing small.business@acc.gov.au.

CONSUMER AND SMALL BUSINESS PROTECTION

Internet scammers still rife

More than 3200 Australian internet sites were scrutinised over three days during the International Internet Sweep. The ACCC led consumer protection agencies from 24 countries in uncovering shonky websites which mislead consumers. The Sweep was a great success, with domestic participation by the Australian Securities and Investment Commission, Treasury, and a number of state and territory fair trading agencies.

The ACCC examined Australian websites that made claims which appear 'too good to be true', such as misleading health claims, or promises consumers could make thousands of dollars with minimum work. The ACCC is now evaluating the suspect sites and conducting further investigations. Traders that made misleading statements on their websites will be put on notice and enforcement action will be taken where necessary.

MR 013 (16.2.04)

Misleading ads – role of advertising agencies

An advertisement depicting a woman nursing a new born baby, made a false representation guaranteeing 'free delivery... no matter how advanced your pregnancy is' to entice consumers to transfer or join NRMA health insurance. The advertising firm that created the ad for NRMA, Saatchi and Saatchi, consented to orders for misleading advertising. However, the court has decided that the mere preparation by an advertising firm of a misleading advertisement does not constitute making a misleading statement. What is required is something additional, such as actual publication by the advertising agency.

When an advertising agency's involvement goes beyond merely preparing an advertisement, the ACCC will again consider taking action for primary liability. The ACCC can and will pursue advertising agencies if they are knowingly concerned or party to preparing advertisements that make false representations.

MR 021 (25.2.04)

Anti spam legislation

Spam is unsolicited electronic junk mail—amounting to at least 50 per cent of all emails. Australia has joined other countries in introducing legislation to try to combat spam. The Australian *Spam Act 2003* is effective from 11 April 2004 and will be enforced by the Australian Communications Authority.

Under the Act it is illegal to send unsolicited commercial electronic messages that have an Australian link. The Act covers emails, SMS (mobile phone text messages) and instant messaging, but it does not cover fax or telemarketing.

Certain messages may be exempt from the Act. These include messages from government bodies, registered political parties, charities, religious organisations and educational institutions contacting current and former students.

Small businesses are being asked to become familiar with the Act if they use emails as a marketing tool. Businesses will still be able to take out genuine advertising that complies with the Act.

Two new publications are available from www.aca.gov.au or www.nioe.gov.au:

Spam Act 2003: an overview for business

Spam Act 2003: a practical guide for business

CONSUMER AND SMALL BUSINESS PROTECTION

Refunds for consumers—court difficulties

The ACCC is concerned about difficulties in obtaining court ordered refunds in some consumer protection cases, as shown in

a recent judgment in *Danoz Direct*. The Federal Court declared that a range of claims made by Danoz, about its Abtronic Fitness System were misleading or deceptive to consumers. Danoz also admitted that certain other claims breached the Trade Practices Act.

The Abtronic sold for \$165 and 94 000 of these were sold in Australia before the ACCC could stop them—so, in total, consumers spent about \$15.5 million. The ACCC sought refunds for consumers.

The court held that it did not have the power to order Danoz Direct to provide consumer refunds. Under section 80 (injunctions), section 82 (damages) and section 87 (other orders), the ACCC cannot seek a court order to pay damages or compensation for consumers unless they are a party to the court action or have given the ACCC written consent to sue on their behalf. The ACCC is currently considering remedies for this problem.

MR 023/04 (26.02.2004)

Misleading advertising—electrical rentals

The Federal Court has found that Thorn Australia P/L (trading as Radio Rentals outside of South Australia) engaged in misleading and deceptive conduct in its 'Rent Two, Get One Free' advertising campaign. In October/November 2002 Radio Rentals ran a national campaign which included extensive television advertising, claiming that consumers could rent any two Radio Rentals products and get a third product rent free. However, Radio Rentals failed to sufficiently disclose that several important terms and conditions were attached to the contracts.

These included:

- the price and offer was based on an 18-month consumer rental agreement on selected stock
- the offer was available only while the consumer continued to rent the other two items
- the free rental for the third item was for the item with the lowest monthly rental.

Failing to give due prominence in advertisements to the terms and conditions of an offer can be a costly exercise when a business has to correct the ad. The ACCC will continue to monitor advertisements and take necessary action to ensure advertisers are upfront about important terms and conditions.

MR 025/04 (01.03.04)

Consumer refunds—electronic pest repellents

Consumers who bought electronic pest repellents through the Danoz group of companies may get refunds after allegations of misleading claims about its Pest Contro and Pest Offense devices. Claims made on packaging, television commercials and in catalogues include, in various instances, that the device:

- is environmentally safe and eliminates the need to use unhealthy and expensive chemicals to stop unsightly and unhealthy pests and rodents
- produces an electromagnetic disturbance and an ultrasonic barrier, causing an irritating pulsation that drives pests out of a home
- will disrupt the nests of pests inside walls
- covers a 2500sq ft area
- has been approved in Europe, America, Canada and Japan and has won the Royal Smithfield award for innovation in the United Kingdom
- is the environmentally safe and effective way to get rid of pests.

Over 240 000 devices, in various models, have been supplied to consumers or wholesalers since 1997.

The ACCC believed there was little evidence to demonstrate that the devices worked to the extent that Danoz stated or implied, or that the devices had the sponsorship or approval to the extent that Danoz stated or implied. In cooperating with the ACCC to resolve the matter, Danoz provided court enforceable undertakings, including that refunds would be offered to customers who had bought the product since July 1997 and who believed they were misled.

This case should alert traders that when they make claims about the operation of devices, they should ensure that they have a proper basis for such claims.

MR 033 (11.03.04)

Media outlets—misleading advertising

Australian media outlets have been placed on notice of an ACCC crackdown on misleading advertising.

Addressing a consumer law congress in Melbourne on National Consumers Day in March, ACCC Chairman, Mr Graeme Samuel, warned that the ACCC's priority in the year ahead was to enforce the trade practices law to protect consumers quickly and with vigilance. The ACCC strongly believes that advertising agencies and media outlets have a responsibility to ensure that they do not engage in misleading or deceptive conduct in relation to advertising and promotions prepared and published by them.

In terms of misleading and deceptive conduct and unconscionable conduct, the ACCC will be on the look out for conduct that targets and seeks to exploit disadvantaged and vulnerable consumers.

MR 034 (15.03.04)

MERGERS AND ACQUISITIONS

Chairman recommends no change to merger laws

ACCC Chairman Graeme Samuel has suggest that the Federal Court 'safety valve', used by AGL to clear its minority acquisition in Loy Yang, showed there is no need for change to Australia's current merger laws. AGL sought and received a declaration that its Loy Yang acquisition would not breach the Trade Practices Act.

While the ACCC was disappointed by the decision, the case shows that, for those parties dissatisfied with the outcome of the ACCC's informal process to assess merger proposals, the safety valve is already in place. Companies can apply to the courts for a declaration and hold the ACCC accountable.

About 98 per cent of merger proposals submitted informally to the ACCC receive approval. However, some have argued for a more formal process to deal with the 2 per cent of mergers that are refused. This was considered by the Dawson Committee, which recommended the development of a voluntary formal clearance process, to operate in tandem with the current informal process. It also recommended a tight time frame which would see any merger not approved within 40 days by the ACCC, as a rejection.

The ACCC has warned that the rejection rate was likely to rise if a more formal merger assessment process was introduced.

MR 020 (25.2.04)

First Data to acquire Cashcard

The ACCC will not oppose the proposed acquisition by First Data Resources Asia Pacific, of 100 per cent of Cashcard Australia's shares. The ACCC considered the competitive impact of the proposal in various markets, and conducted extensive market inquiries, consulting with interested parties,

and found that the presence of other strong competitors in the markets is likely to operate as an effective competitive constraint on the merged entity, thereby constraining attempts to raise prices to consumers. In fact, it may intensify competition. The ACCC concluded that the proposed alliance would be unlikely to result in a substantial lessening of competition.

First Data Corporation is a US company involved in secure electronic commerce and payment services. Cashcard is a privately owned unlisted company that provides high volume payment services across the consumer electronic payments spectrum, including ATM and EFTPOS, Direct Entry and BPAY, Telephone and Internet payments.

MR 012 (13.2.04)

Proposed acquisition of Peoplesoft by Oracle

The ACCC has concerns that the proposed acquisition of Peoplesoft Inc. by Oracle Corporation may substantially lessen competition, thereby breaching the Trade Practices Act.

The ACCC has contacted many Australian organisations, both public and private, which use enterprise application software. Many of these organisations have stated that the proposed acquisition will restrict their choices significantly and lower the level of competition, especially in complex financial management software and human resource management software.

The ACCC's concerns are consistent with the recent decision by the US Department of Justice to oppose the acquisition. Oracle has stated that it will challenge the decision.

Given that the matter is likely to be considered by the US courts, the ACCC will not be taking action at the moment. The ACCC recognises that the proposed acquisition has wide ranging international consequences.

MR 037 (18.03.04)

RESTRICTIVE TRADE PRACTICES

Sideshow alley

The ACCC alleges the Showmen's Guild of Australasia, along with two corporations and eight individual members, engaged in exclusionary conduct and has instituted proceedings in the Federal Court. The guild represents showmen operating sideshow amusements in the ACT, New South Wales, the Northern Territory and Queensland.

The ACCC alleges that on three occasions the Showmen's Guild and certain individual members and their affiliated corporations entered into an agreement, arrangement or understanding with one another not to supply amusement services to particular independent organisers.

On 22 December 2003 the ACCC granted the guild authorisation for its code of conduct, membership rules and collective negotiation agreements, but did not allow it to engage in any other type of anti-competitive conduct. The ACCC is seeking declarations, injunctions, monetary penalties and court orders that the guild notifies all its members of the action.

MR 014 (19.2.04)

Catholic health facilities to collectively bargain

The ACCC has authorised a network of Catholic health facilities to collectively bargain with health funds, the Repatriation Commission, and other suppliers, via a common agent. The ACCC is satisfied that allowing the eight private hospitals in the network to negotiate through a common agent would reduce the cost of negotiating agreements with health funds and the Repatriation Commission. It is also satisfied that the effect on competition would be minimal.

The healthcare facilities are owned by the Sisters of Charity, Mercy Health and Aged Care or Holy Spirit Care Services, and are located in Queensland, New South Wales, Victoria and Tasmania. Some are jointly owned.

However, the ACCC has only authorised five private hospitals in the network to collectively boycott health funds and the Repatriation Commission.

The decision and further information will be available on the ACCC's website, www.accc.gov.au.

MR 031 (05.03.04)

AUTHORISATIONS AND NOTIFICATIONS

Mortgage industry rules

The ACCC has authorised the Mortgage Industry Association of Australia's disciplinary rules. The rules are likely to help member mortgage brokers to act ethically and professionally in the industry, resulting in a net public benefit.

The rules set out standards of conduct for the industry, and a process for an independent tribunal to hear allegations of misconduct against members. The tribunal would have the power to sanction or expel a member found guilty of misconduct.

The MIAA, an industry association for mortgage brokers, has been encouraged to adopt some of the governance proposals made by interested parties. Several have called for the governance regime to be subject to an external review, and for tribunal decisions to be publicly available.

MR 015 (19.2.04)

Plan to reduce queue at port of Newcastle

Interim authorisation (allowing the parties to engage in certain conduct while the ACCC considers the merits of the application) has been granted to a plan by Port Waratah Coal Services to reduce the queue of vessels waiting to load coal at the Port of Newcastle.

Essentially the plan reduces the amount each producer can export through the port on a pro rata basis so that the overall amount handled by the port better matches the amount that can be delivered by the rail system.

The ACCC recognises that the current situation is urgent, as around 40 vessels are currently sitting off the port. This results in a substantial cost to the industry because coal producers must pay demurrage fees to vessel owners while their vessels are sitting in the queue. Without this solution in place, PWCS estimates that producers could be paying up to A\$200 million this year in demurrage.

It is important to note that this interim decision does not necessarily anticipate the ACCC's final decision on the matter, and that the ACCC will continue to consult with interested parties.

Contact the ACCC



Infocentre: 1300 302 502

Website: www.accc.gov.au

REGULATED SERVICES

Airport price monitoring

The prices airports charge airlines for airport services such as use of runways, parking aprons and terminal facilities, have increased considerably in the past two years, according to the

ACCC's airport monitoring report. The *Airports Price Monitoring and Financial Report 2002–03* reviewed the prices charged by Adelaide, Brisbane, Canberra, Darwin, Melbourne, Perth and Sydney airports. It shows that in the two years from 2000–01 to 2002–03 average prices have increased substantially at all major airports, with greater security requirements since 11 September 2001 a major part of the increase.

Price caps and price surveillance were removed from these airports between October 2001 and June 2002 and replaced by price monitoring to be conducted for the next five years. This meant that airports are no longer required to notify the ACCC before lifting charges for aeronautical services.

MR 019 (24.2.04)

Broadband take-up figures—September 2003

An update of the ACCC's Snapshot of Broadband Deployment shows that, as at the end of September 2003, there were 610 800 broadband services connected across Australia—an increase of 94 000 since June 2003.

Current and previous ACCC Broadband Snapshot reports are available on the ACCC website.

MR 027 (04.03.04)

Australia Post monitoring

The ACCC has released for comment draft record keeping rules that will establish a regulatory accounting regime for Australia Post. The accounting framework established by the rules is intended to increase the transparency of Australia Post's accounting with reference to any allegation of cross subsidisation between 'reserved' and competitive services.

The ACCC is seeking the input of other interested parties as well as Australia Post before finalising the record keeping rules. The draft rules and an accompanying issues paper can be obtained from the ACCC's website.

MR 036 (17.03.04)

ACCC action against Telstra—broadband pricing

The ACCC issued a competition notice to Telstra for the pricing of its broadband internet services.

The ACCC believes that Telstra was engaged, or is engaging, in anti-competitive conduct in its wholesale pricing of high speed internet services in light of its retail offerings.

The ACCC was aware that negotiations between Telstra and its wholesale customers had been under way since the ACCC issued a consultation notice to Telstra.

The ACCC expected these negotiations to take place as a matter of urgency. Telstra needed to reach agreement on its competitive wholesale rate structure quickly with its wholesale customers.

The ACCC will decide whether or not further action is appropriate, being guided by the results of its continuing investigation and the progress of negotiations between Telstra and wholesale access seekers.

MR 039 (19.03.04)

Gas access regime benefits—ACCC submission

The ACCC has provided a submission in response to the Productivity Commission's draft report on the National Gas Access Regime.

The submission endorses the Productivity Commission's findings that gas pipelines possess special economic characteristics that warrant their continued regulation through an industry specific regime. However, the ACCC does not support the Productivity Commission's finding that the current regime should be scaled down. The ACCC submission provides evidence indicating the access regime has delivered substantial

benefits to the Australian economy which are likely to increase in the future, and that by international standards, the regime provides competitive incentives for investment in gas pipelines. The findings in the ACCC's submission are based on a quantitative and market-based assessment by ACIL Tasman. The ACIL report estimates that the current gas framework could increase Australia's gross domestic product by up to \$1.1 billion over the next decade. The gas regime also has the potential to stimulate additional gas consumption equivalent to the size of the combined NSW and ACT markets.

The ACCC submission outlines refinements that could be undertaken to improve the operation of the current regime while protecting the substantial benefits on offer.

MR 040 (19.03.04)*

Electricity transmission investment—ACCC discussion paper

The ACCC has issued two papers discussing the framework for transmission expansion in the national electricity market. The papers are directed at providing greater certainty for new investment while also improving the checks and balances on investments for the benefit of consumers.

The first paper is a draft decision relating to the ACCC's current review of the regulatory test (a cost-benefit test used by transmission and distribution businesses to assess the economic efficiency of network investments). The draft decision discusses ways of including competition benefits in the cost-benefit analysis.

The second paper, looking at new investment, forms part of the ACCC's Statement of Regulatory Principles which sets out the way the ACCC regulates electricity transmission businesses.

The ACCC invites interested parties to comment on both papers by April. It aims to finalise its review of the regulatory test in June. The capital expenditure framework forms part of the Statement of Regulatory Principles, on which a draft decision is expected in May.

MR 041 (22.03.04)

ACCC hot spot—telecommunications guidelines

A free 27-page document which provides an overview of the competition notice regime in the telecommunications industry is available on publications page of the ACCC website at www.accc.gov.au.

ACCC State Briefing

QLD

The ACCC small business manager in Queensland, Paul Jones, has been presenting information about the Trade Practices Act to HIA members in south east Queensland. As part of 'improving knowledge for builders', the 2-month seminar program has brought together over 290 building contractors to learn about Trade Practices Act protection for small business and their obligations under the Act.

In conjunction with the Aboriginal Coordinating Council, Paul has also met with community leaders and the CEOs of four far-north Queensland indigenous communities, discussing prospective growth of Storecharter and consumer protection issues that are specifically relevant to these remote communities.

Both projects are continuing.

SA

The South Australian office recently hosted the inaugural meeting of its Regional Consultative Forum. Members of the committee include Business SA, the SA Farmers Federation, Motor Trade Association, Eyre Regional Development Board, South East Area Consultative Committee, with participation from state government agencies. Discussions focused on the effectiveness of the ACCC's outreach efforts in reaching a wide audience, and whether the business community was sufficiently alert to risks and aware of the law.

The feedback on the ACCC's current communication strategy was positive, with many useful suggestions put forward on how to improve participation by the small business community. The next meeting is scheduled for August.

NSW

Once again, the ACCC took part in the Franchising and Business Opportunities Expo recently held at Darling Harbour in Sydney. The ACCC gave away thousands of publications to potential franchisees and franchisors regarding their rights and obligations under the Trade Practices Act, particularly the Franchising Code of Conduct. Given the recent Federal Court decisions in Lawson's Trading Co Pty Ltd and Synergy in Business Pty Ltd (in Liquidation), the most common question asked of ACCC officers at the Expo was "*what is the difference between a franchise and a licence?*". If you require information regarding your rights and obligations in relation to the Franchising Code of Conduct, contact the NSW Small Business Manager or NSW Regional Outreach Manager.

WA

Wagin Woolorama 5 & 6 March 2004

Wagin Woolorama, the premier sheep show in Western Australia which is run in conjunction with the Wagin Agricultural Show, was home for an ACCC information booth as part of the Rural and Regional Program. Over 27,500 visitors enjoyed the warm weather, the enhanced facilities, a revised program and a comprehensive show and trade fair. Visitors to the information booth were offered an ACCC "show bag" to take home and it proved popular with callers and the must have bag for agricultural college students. Staff visited business exhibitors at their stands for brief chat and to distribute information packs which were well received.

TAS

The ACCC's Tasmanian Regional Director attended the Electricity Customer Consultative Committee (ECCC) on 24 February. The committee meets quarterly to provide the Electricity Regulator with input on matters affecting Tasmanian electricity customers. The ECCC is an important part of the regulatory framework for the electricity supply industry. It ensures that groups representing customer interests including householders, small businesses and rural consumers are informed as to developments in the industry and that the Regulator is informed of issues from the perspective of those groups. At the latest meeting a discussion paper on the electricity retailer's credit policy was considered and a report from the Electricity Ombudsman was provided. The ECCC will merge with the Gas Customer Consultative Committee to provide members with a greater understanding of the wider energy issues in Tasmania.