



Australian
Competition &
Consumer
Commission

update

QUARTERLY NEWS FROM
THE AUSTRALIAN COMPETITION
& CONSUMER COMMISSION

ISSUE 29 › OCTOBER 2010

International
cartels caught

Introduction of
Australian
Consumer Law

Unfair Contract
Terms explained

Inside mergers



DOLLARS & SENSE

DOLLARS & SENSE

‘This edition of Update provides information on some mass market and international scams, how to recognise them and how to avoid them.’

Money, Money, Money—

Making it, spending it, losing it—the ACCC has some involvement at all these levels and this edition of *Update* takes a look at some of them.

Scamming is insidious and increasing. Some scammers use sophisticated and mass-market tactics to rip off consumers. This edition of *Update* provides information on some mass-market and international scams, how to recognise them and how to avoid them. But it is not just overseas scammers who can take your money.

Cartels force us all to pay higher prices for everyday goods. The consequences of some recent ACCC work on international cartels and the story behind how those responsible were caught are covered in this edition.

This edition also provides more information on the new unfair contract terms laws which came into effect in July—laws which are designed to ensure you’re fully informed when you’re in the market for common goods and services.

Franchising is increasingly seen as an opportunity to get into a successful small enterprise and build the business. The ACCC oversees franchising relationships through the Franchising Code of Conduct. We take a look at changes to this landscape, outlining changes to the code that aim to improve information flow for this \$130 billion sector.

The ACCC’s role in assessing the impact on competition of proposed mergers often attracts widespread media attention. ‘Inside the ACCC’ in this edition of *Update* offers an insight into how the ACCC approaches merger assessments.

So the ACCC is involved at all levels every day in the business of keeping the money going round—making sure Australians can buy, sell and trade fairly and efficiently.



[Contents]



Australian Competition and
Consumer Commission
23 Marcus Clarke Street,
Canberra
Australian Capital Territory 2601

© Commonwealth of Australia
2010

This work is copyright. Apart
from any use as permitted under
the *Copyright Act 1968*, no part
may be reproduced without
prior written permission from the
Commonwealth available through
the Australian Competition
and Consumer Commission.
Requests and inquiries concerning
reproduction and rights should be
addressed to:

Director
Internal Communication
and Publishing
Australian Competition and
Consumer Commission,
GPO Box 3131
Canberra ACT 2601

or by email to
publishing.unit@accc.gov.au

ISSN 1443-0681

ACCC 09/10_29404

Print Post approved
PP255003/04404

www.accc.gov.au

Australian Consumer Law

8

- 4 Inside the ACCC—Mergers
- 6 ACCC enters new media
- 10 Better information on franchising
- 12 Globalisation leads to cooperation
- 14 Unfair contract terms explained
- 16 Not so sporting
- 19 Scams: Not if, when...
- 22 ACCC reaches out during Law Week
- 23 New publications
- 24 Contacts, subscription info

Inside the ACCC



As part of its role to promote competition and fair trade in the marketplace, the ACCC considers the potential outcomes when one company seeks to merge with or acquire another. In particular, the ACCC is concerned with whether a merger would result in a substantial lessening of competition in a market.

Mergers

Thousands of mergers and acquisitions take place every year in Australia. Two or more businesses may decide to join forces or one company may wish to take over another. Some of these activities make front page news but the majority of them don't receive attention outside of the industry the companies operate in.

Mergers that attract a lot of interest often involve companies with household names that are listed on the stock exchange. From a consumer point of view, some people are loyal to the company they bank with or the grocery chain they shop at and are concerned about a change in ownership.

There are also people who are apprehensive about multinational corporations or 'big business'—that is, large companies who appear to pervade many markets. This anxiety is often shared by small businesses, who fear being unable to compete against bigger players. In sectors with a small number of companies or where large number of consumers participate, such as banking and media organisations, the prospect of a merger attracts even greater public interest.

From an investor point of view, a merger may affect the share value of the companies involved. A merger can result in significant benefits, allowing companies to achieve greater efficiencies together than they could apart.

The ACCC becomes involved if a merger or acquisition is likely to lessen competition in the marketplace by altering the structure of the industry and reducing the ability of, or incentives for, firms to behave competitively.

In assessing the likely effects of a merger, the ACCC is bound by provisions in the *Trade Practices Act 1974* (the Act). In addition, a set of guidelines have been developed that outline the analysis and processes the ACCC follows. These frameworks are designed to provide the business community, its advisers and the public with an enhanced level of predictability and certainty. The ACCC's guidelines are available at www.accc.gov.au/mergers.

How the merger process works: Frequently asked questions

What is the law the ACCC applies in relation to mergers?

Under section 50 of the Act, a company cannot acquire the shares or assets of another company if doing so would, or would be likely to, substantially lessen competition in a market. For example, a merger will be considered to substantially lessen competition if it results in the merged firm being able to significantly and sustainably increase prices.

In assessing whether a merger would be likely to result in a breach of section 50, the ACCC must consider a wide range of issues, including factors set out in legislation, which include: competition from imports, barriers of entry to the market, the level of concentration in the market and the likelihood of the merged entity being able to charge higher prices.

How does the ACCC become aware of a merger or acquisition?

There is no legal requirement for a company to inform the ACCC that it plans to merge with or acquire another company. However, many merger parties voluntarily consult with the ACCC to gauge whether their proposed merger would be considered likely to result in a substantial lessening of competition in a market and hence breach section 50 of the Act. The ACCC also receives references from other regulators such as the Foreign Investment Review Board and Australian Prudential Regulation Authority and initiates reviews based on its own intelligence surveillance of merger activity.

What is the ACCC's approach to merger reviews?

The ACCC encourages merger parties to talk with or write to its mergers staff when they are considering joining forces or acquiring another business—it's an interactive approach.



Staff set out a timeframe for public merger reviews and allow interested parties to raise concerns throughout an assessment. The ACCC's approach is consistent with the International Competition Network guiding principles and recommended practices of providing timely, consistent and transparent assessments of mergers.

What types of reviews are conducted?

ACCC merger assessments can be conducted on either a confidential or a public basis. Confidential reviews may be attractive to some companies who don't want to reveal their merger proposal to the market and, in some cases, the target. They do mean, however, that any view provided by the ACCC will be qualified and, in some cases, no view can be provided until a public review is conducted. Alternatively, the ACCC's views can be sought on a public merger proposal, which may involve a public market inquiry process. Additionally, applications may be made by acquirers under a specific formal merger clearance process prescribed under the legislation—to date, the ACCC has not received any applications under this process.

What is the process for public reviews?

A review will begin once sufficient information has been provided to the ACCC. Details of public reviews are posted on the ACCC website and include an indicative timeline, relevant staff contacts and market inquiry details.

Following market inquiries, a merger may be cleared. Alternatively, the ACCC may decide to release a Statement of Issues if it has come to a preliminary view that a proposed merger raises competition concerns that require further investigation. At this point, a secondary timeline will be established to enable the ACCC to obtain further information that may either alleviate or reinforce these competition concerns. In some cases, this will result in the merger parties submitting undertakings to resolve the concerns.

The ACCC lists all public merger decisions in the Mergers Register on its website, along with a summary of the reasons. In addition, a Public Competition Assessment is published on key merger decisions to provide the market with a better understanding of the ACCC's analysis of competition issues.

... the ACCC is concerned with whether a merger would result in a substantial lessening of competition in a market.

ACCC enters **new**media

The consumer watchdog now tweets like a bird. The ACCC has entered the web 2.0 world and is actively exploring how web 2.0 can assist it in promoting competition, fair trading and consumer protection, including 'tweeting'.

Web 2.0 technologies allow the ACCC to engage in a collaborative manner, target and tap into new audiences, and communicate important information, such as product recalls, in real time.

The ACCC's foray into new media was prompted by the 2009 Product Safety Recalls Review, which found that, in many cases, traditional print media recall notices are not an effective way

of reaching consumers. New methods more appropriate to the preferences of different audiences were needed. Now the Product Safety Branch is:

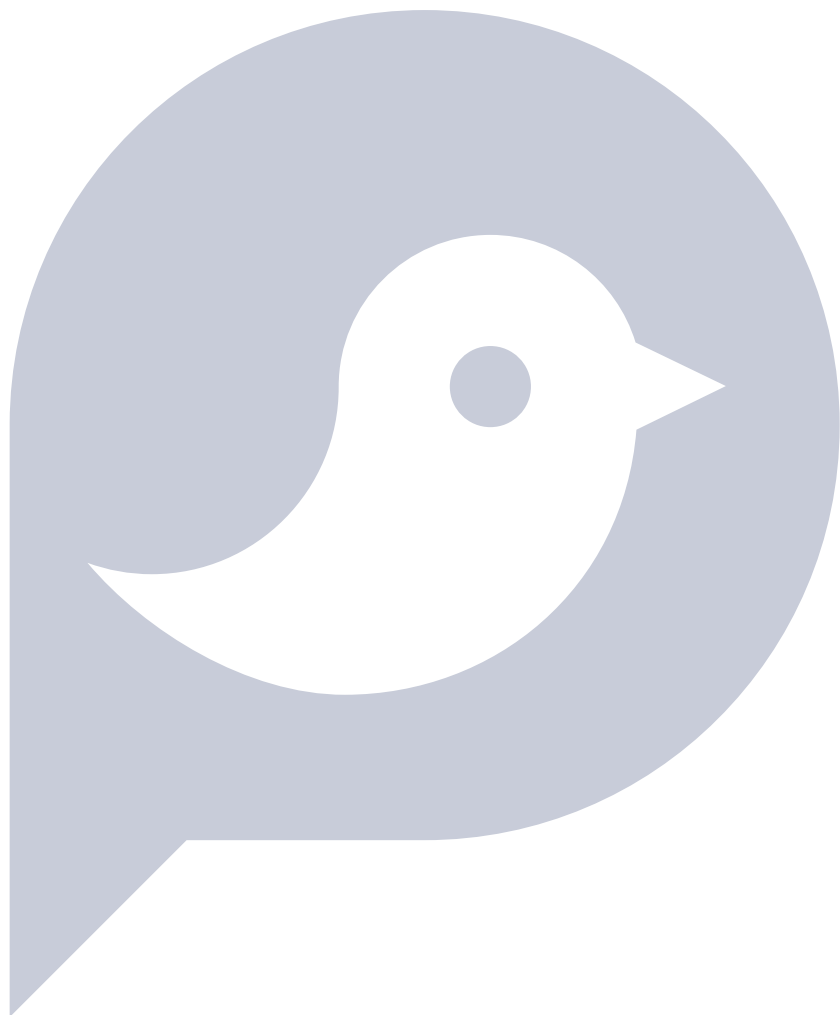
blogging—on specific community forums (for example, about products for babies and children)

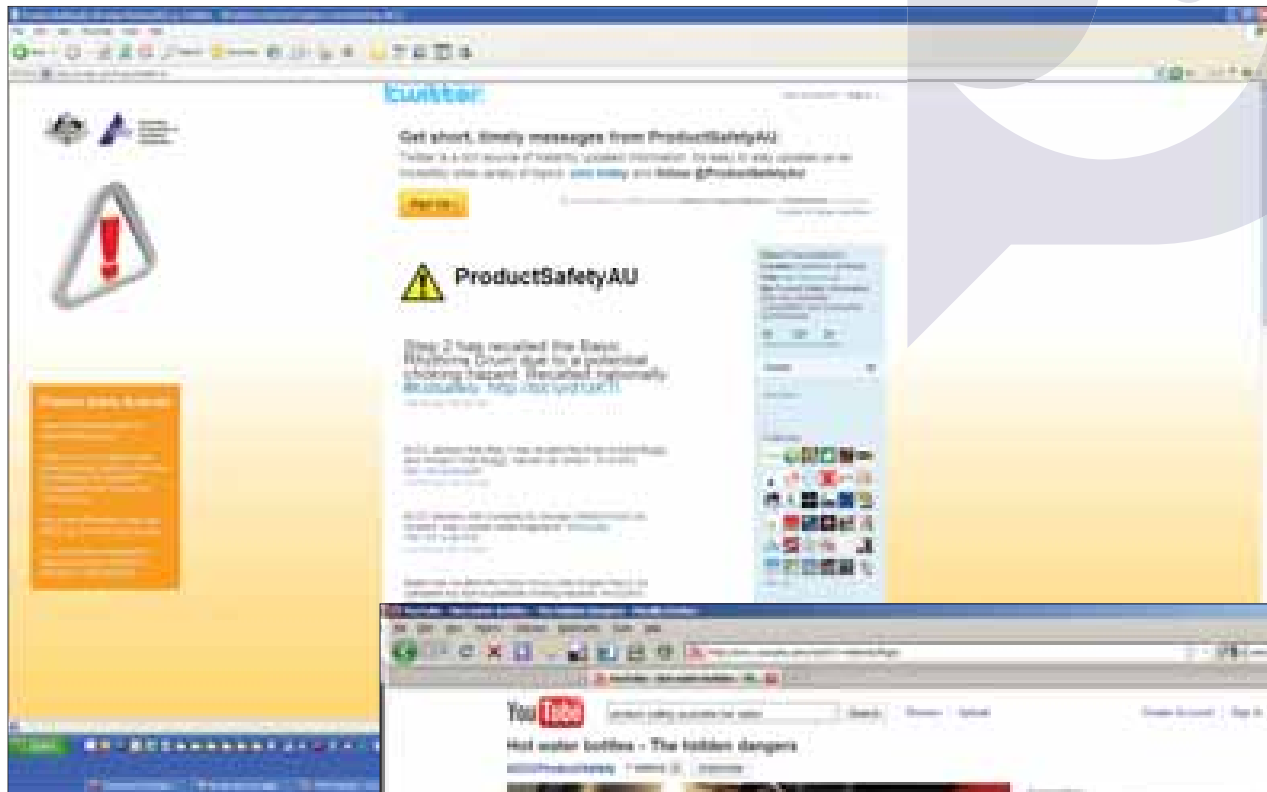
appearing on YouTube—with a hot water bottles safety video

tweeting—@ProductSafetyAU, providing real-time, frequent advice and information to an eager audience. The ACCC's first tweets hit 101 714 people. So far, the ACCC is averaging more than one tweet a day, and each tweet adds new followers.

This is in addition to SCAMwatch, which has an important and growing online presence. SCAMwatch features radar alerts, which provide real-time warnings to consumers about new and emerging scams—for example, during the 2010 World Cup, FIFA referred consumers around the globe to the ticketing scam alert posted on SCAMwatch.

Web 2.0 technologies allow the ACCC to engage in a collaborative manner





Australian Consumer Law



The transition from the *Trade Practices Act 1974* to the new *Competition and Consumer Act* is almost complete with changes marking the biggest reforms to federal consumer law since the *Trade Practices Act* was introduced 36 years ago.

Collectively known as the Australian Consumer Law (ACL), the reforms will give Australians modern, flexible and responsive national regulation for consumer protection. They are also designed to ease burdens for business, increase efficiency and simplify trading across state and territory borders.

... the reforms will give Australians modern, flexible and responsive national regulation for consumer protection.

Tranche 1 of the ACL was introduced in February this year and tranche 2 in March. The new provisions have different commencement dates but the law will be fully implemented by 1 January 2011.

Enforcement will be shared between the territories, states and the ACCC—agencies will work together to ensure consistent outcomes. The Australian Securities and Investments Commission will enforce the ACL in relation to financial services.

Significantly, the ACCC will get new powers under the ACL, which will increase the range of tools available to encourage compliance or, when necessary, impose sanctions. The new measures include:

- › civil pecuniary penalties for breaches of the consumer protection provisions of the *Trade Practices Act* (with the exception of section 52)—these had previously only been available for breaches of competition provisions
- › disqualification orders, where the court can restrict individuals from managing

corporations if it finds they have been involved in repeated instances of *Trade Practices Act* misconduct

- › substantiation notices, which the ACCC can issue to businesses to substantiate claims made about their products or services and to assist in determining whether a contravention of the consumer law has occurred
- › infringement notices, which allow the ACCC to deal with breaches of the law through the payment of an amount that precludes further ACCC action
- › public warning powers, which may be particularly useful in the areas of product safety and scam activity.

Further, the new law provides the ACCC with the ability to seek orders from the court to seek redress for consumers who are not parties to particular legal action. This will assist vulnerable and disadvantaged consumers, who are unlikely to be aware of court processes.

All of these new powers are key features of the first tranche of legislation—known as ACL1—which also included a provision to deal with unfair contract terms in standard form contracts.

These are contracts offered to consumers on a ‘take it or leave it’ basis, where the parties don’t negotiate the terms—for example, contracts offered by mobile phone companies or gymnasiums. For more information on these, see page 14.

ACL2—the second tranche—has three main components: the establishment of a new national product safety system, new national laws on conditions and warranties, and a series of ‘best practice’ reforms.

The existence of different state and territory laws for product safety was particularly problematic where one state had regulated a particular good but this was regulated differently or not at all in another state. To combat this, the ACL establishes a national product safety system.

The regulatory system will be significantly simplified, as only the Commonwealth will have the power to implement product safety standards and bans, although states and territories will be able to implement short interim bans. Additionally, the ACCC will

have the power to make regulations for standards and bans on services related to consumer goods.

As part of these changes, the ACCC has completed a process to harmonise product safety standards and bans, reducing them from 177 to 58.

Product safety changes include a new mandatory reporting requirement which, from 1 January 2011, will require suppliers to advise the ACCC of incidents associated with consumer products that result in death, serious injury or illness.

The ACCC has already taken steps to simplify access to information about product safety and product recalls by setting up the www.productsafety.gov.au and www.recalls.gov.au websites.

The lack of a national law has also created inconsistencies for consumers in relation to conditions and warranties.

Under ACL2, statutory consumer guarantees will give consumers clearer and more effective laws regarding their rights when buying goods and services. They will also make the obligations on business clearer.

The best practice reforms will see nationally consistent laws in place relating to various sales practices, such as lay-by and unsolicited selling.

This package of reforms will make the rights of consumers clear and consistent and protect consumers equally wherever they live in Australia. At the same time, Australian businesses will benefit from simple, national laws that make compliance easier.

... statutory consumer guarantees will give consumers clearer and more effective laws regarding their rights when buying goods and services.

Better informat



... 49% of franchisees relied heavily on their gut feeling when deciding to go into franchising ...

Franchising in Australia is a \$130 billion industry and it's still growing strongly. Over 45 000 people a month use Google to find franchising information, searching for 'buying a franchise' or 'buy a franchise'.

On 1 July an amended Franchising Code of Conduct came into effect, helping to strengthen and protect this sector of the economy.

Recent years have seen substantial growth in new franchisees' business across a wide range of opportunities, like fast food and coffee shops, travel agencies, and domestic services like cleaning and gardening, to name only a few.

According to Franchise Australia, between 2006 and 2008 there was growth of approximately 9500 new franchise units, not including people who bought existing franchise businesses.

The amendments to the code provide greater transparency by providing greater disclosure to prospective franchisees and by ensuring there is better information flow to the more than 70 000 businesses currently in a franchise. The amendments also strengthen mediation processes and provide an avenue to help resolve franchise disputes at low cost.

Despite franchisors having an obligation under the franchising code to provide accurate disclosure documents to potential franchisees, 41 per cent of franchisees surveyed said they faced surprises after buying their franchise.

The new amendments require franchisors to provide additional information to prospective franchisees to assist with their due diligence.

Franchisors are now required to provide prospective franchisees with a disclosure document at least 14 days before entering into a new agreement. Information must include:

- › a notice that, like any business, the franchise or franchisor could fail
- › details of any payments to any third parties, known or reasonably foreseeable
- › if the franchisor's dispute resolution costs, including any legal costs, will be attributed to the franchisee
- › whether a confidentiality agreement will be required and what it will cover
- › any past incidences of unilateral variation of a franchise agreement or the circumstances in which an agreement may be unilaterally varied in the future
- › arrangements that will apply at the end of the franchising agreement, including whether there will be an option to renew the agreement or enter into a new one, and whether the franchisee will have the right to sell the business if they don't wish to renew.

Gut feeling is not enough

Franchising research in 2009 found that, alarmingly, 49 per cent of franchisees relied heavily on their gut feeling when deciding to go into franchising, despite disclosure requirements.

ion on franchising

So the ACCC recognised that more needed to be done to encourage prospective franchisees to do their home work before entering into a franchise agreement. To assist with this, the ACCC, in conjunction with Griffith University, is offering a short, free, pre-entry franchisee education program.

The program is designed to provide prospective franchisees with information about franchising, the risks, their rights under the code and other practical things they need to consider.

It's intended to be a one-stop shop for prospective franchisees. Topics covered include:

- › disclosure
- › franchise agreements
- › royalties
- › obtaining finance
- › site selection
- › leasing
- › marketing funds
- › the operations manual
- › dispute resolution
- › questions to ask franchisors and existing and former franchisees
- › useful business skills
- › assessing your suitability to become a franchisee.

It is an online education program delivered by Griffith University and, to date, over 700 prospective franchisees have signed up.

The pre-entry education program and the changes to the code will benefit both franchisors and prospective

franchisees. Franchisees who are well informed about the business and how to run it are more likely to be successful.

Information for current franchise holders

Changes to the code also apply to existing franchise holders whose agreements are transferred, renewed or extended after 1 July 2010.

Franchise agreements run for a set term, usually five or 10 years, and there is no guarantee that the franchisee will operate the business beyond that term. In addition to disclosing what will happen at the end of the agreement, a franchisor must notify a franchisee, at least six months before the contract comes to an end, of its decision to renew or not to

renew the contract or to enter into a new one.

If the agreement is not renewed, the franchisee will lose the right to use the franchisor's brand and

operating system. Most franchise agreements will also prevent the franchisee from setting up a similar business under a different name.

The franchisor must provide an updated disclosure document to franchisees between 1 July and 31 October each year. The code sets out what must be included in updates and what materially relevant facts, such as majority ownership changes, must be notified to franchisees within 14 days.

... Franchisees who are well informed about the business and how to run it are more likely to be successful.

Mediation for franchise disputes

The aim of the new pre-entry education program and the amendments to the disclosure provisions is to prevent conflict and litigation by helping prospective franchisees make more informed decisions before entering franchise agreements.

However, if a dispute arises, the updated code provides a mechanism for parties to resolve the dispute through mediation. The code now requires that both parties must try to solve disputes in a reconciliatory manner, including by making their intentions clear at the outset and not damaging the reputation of the franchise system. The code sets out the expectations of parties in this process and says that each party is equally liable for the costs of mediation, unless they agree otherwise.

Further information

The ACCC has a number of free publications designed to assist prospective franchisees, including a Franchisee Manual and a Franchisee Start-up Checklist. You should also read the new fact sheet that outlines the recent Franchising Code of Conduct amendments. These publications are available online at www.accc.gov.au/franchising or by calling our small business hotline on 1300 302 021.

For more information on the pre-entry franchise education program or to sign up, visit www.franchise.edu.au/pre-entry-franchise-education.



Globalisation lea



Cooperation between the ACCC and its United Kingdom counterpart was crucial to Australia's part in an international response to the global 'marine hose' cartel.

Increasing globalisation in business means cartel activity has gone global too. Taking action against international cartels is a high priority for the Australian Competition and Consumer Commission—and the work is challenging.

Cartels are difficult to detect and investigate in general. The key figures are often senior managers who know the conduct is illegal and use measures to avoid detection. Combating international cartels can be even more difficult. In particular, witnesses and documentary evidence are often located overseas and there can be legal and practical hurdles to presenting them in a local court.

In the face of such challenges, many of the world's competition regulators are sharing more information and aligning their approaches to businesses seeking leniency for

their involvement in cartels. Detecting and penalising cross-border cartels in as many jurisdictions as possible results in stronger protection for consumers.

Many cartels operate in areas of commerce consumers often don't think about—but we are affected all the same.

Detecting and penalising cross-border cartels in as many jurisdictions as possible results in stronger protection for consumers

Puffin, Wandoo and Bayu-Undan aren't exactly household names but the businesses that work in these places—Australian offshore oil and gas fields—are a little more familiar: the likes of international energy companies Mobil, Conoco Phillips and Woodside. Keeping the oil and gas moving from fields like these to the world's hungry energy

markets takes a lot of expensive equipment, including marine hose—piping used to transfer fuels at offshore moorings.

ds to cooperation

Between 1999 and 2007, suppliers from Japan, Italy, France and the United Kingdom participated in a cartel to control marine hose prices and share the international marine hose market between them.

The cartel came to a screeching halt in 2007, when a number of executives were arrested as they left a meeting in Texas. The United States Department of Justice had known about the meeting in advance and secretly recorded it. The arrests were coordinated with raids in Europe by authorities there, including on the house in Britain of the director of a 'consulting' company engaged to manage the cartel.

At about the same time, a cartel member company approached the ACCC seeking immunity for its involvement in the cartel. The company provided information on the cartel as part of cooperation obligations placed on it by the ACCC. Such approaches and disclosures are now relatively common worldwide, as many jurisdictions, including Australia, have instituted whistleblower programs based on the successful US model.

The global cartel had adverse impacts on Australia but it had been organised offshore. The ACCC had some evidence of cartel activities relating to some bids for Australian work but it needed more information and wished to investigate whether other bids had been rigged. For information, the ACCC approached the UK Office of Fair Trading (OFT), itself working closely on the matter with the US Department of Justice and the European authorities.

Formal information sharing between authorities internationally is becoming more common. Requests are considered on a case-by-case basis, as competition authorities around the globe generally have to balance requests for disclosure from their fellow regulators with the need to protect the integrity of their investigations, whistleblower programs,

and any rights of and commitments given to parties under investigation.

Under UK law, the OFT can disclose information to a regulator like the ACCC to progress investigations or bring proceedings, subject to strict conditions on use and further disclosure. The OFT must consider whether the matter is serious and whether the receiving country's laws provide appropriate protection against self-incrimination in criminal proceedings and appropriate protection for personal data.

... the cartel had caused a significant increase in prices ...

In the marine hose investigation, the ACCC was able to satisfy the OFT's requirements and the UK regulator released vital information—the first time it had released such information to an overseas regulator under the information-sharing laws. The ACCC made a subsequent successful information request to the OFT and was also in contact with US authorities.

In April this year, as a result of the ACCC's investigations and its court action, the Federal Court of Australia ordered four businesses—Bridgestone, Dunlop Oil & Marine, Parker ITR and Trelleborg—to pay over \$8.2 million for engaging in cartel conduct in Australia that restricted marine hose supplies and controlled the price of marine hose sold to Australian customers or projects. In the words of the ACCC's Chairman, Graeme Samuel, international cooperation was key to this successful court outcome.

Justice Finkelstein found that the cartel had caused a significant increase in prices above what would be seen under fair and open competition and this increase had impacted on oil and gas industry customers' costs. Mr Samuel

later observed that the cost of the cartel ultimately fell on oil and gas end users: arrangements made between foreign companies thousands of kilometres from Australia can substantially harm competition in Australia—and all consumers can end up paying.

In recent years, the ACCC has taken legal proceedings against 15 airlines in relation to alleged international price agreements on air cargo surcharges. The Federal Court has ordered in excess of \$40 million in penalties to date, with nine proceedings still before the court.

This year the ACCC obtained penalties in the case of two other international cartels. The Federal Court ordered a Singapore company and a related Australian company to pay penalties totalling \$4 million for cartel arrangements made overseas that had an impact on paper supplies in Australia (allegations against others are still before the court). It also ordered, by consent, a US-based company to pay a \$1 million penalty for cartel behaviour in the international military training industry.

The Australian Parliament last year passed laws making it a criminal offence to engage in cartel activity, bringing our approach further into line with the US, UK and Canadian approaches to cartels. The events of the marine hose cartel took place before the commencement of Australia's criminal prohibitions, but in the northern hemisphere nine individuals were given prison sentences for their roles in the cartel. A number of international cartel cases remain before the courts.

The ACCC will continue to seek information from other regulators to pursue international cartels that impact adversely on Australian consumers and business.

Unfair contract terms explained



If you own a mobile phone or have a gym membership, chances are that you have signed a 'standard form contract'.

These contracts are used in many sectors to streamline transactions and create efficiencies for businesses and consumers.

They are generally offered to consumers on a 'take it or leave it' basis, with little, if any, room for negotiation. As such, there is often a power imbalance between the business offering the good or service and the consumer purchasing it.

On some occasions, the terms of standard form contracts can be so unfair to consumers that, if relied upon, they would cause the consumers to suffer a detriment. An example of this could be a term that allows a business to increase the price of a good or service but does not allow the consumer to end the contract if it does so.

To create a more level playing field between the consumers and businesses that enter into agreements through standard form contracts, a new law—effective from 1 July 2010—was introduced as part of the first tranche of the Australian Consumer Law (ACL). The ACL amends the *Trade Practices Act 1974* (which from 1 January 2011 will be re-named the Australian Competition and Consumer Act) to introduce a single, national consumer law.

The unfair contract terms provisions provide a three-pronged test of unfairness. A term is unfair if:

1. it would cause a significant imbalance in the rights of the parties to the contract
2. it is not reasonably necessary to protect the legitimate interests of the party it advantages
3. it would cause detriment if applied or relied upon.

When deciding whether a term is unfair, the court must also consider the transparency of the term within the contract, and the contract as a whole. The law applies to contracts that are entered into on or after 1 July 2010 and to the terms of existing contracts that are renewed or changed on or after 1 July 2010.

To promote compliance with the new law, the ACCC will review standard form consumer contracts in sectors where consumer detriment or complaints are prevalent and work with businesses to help them understand their obligations under the new provisions. However, the ACCC cannot endorse or approve contract terms.

If potentially unfair terms are not removed or amended through the cooperative review process, the ACCC may take further action to have the courts decide whether a term is unfair.





... there is often a power imbalance between the business offering the good or service and the consumer purchasing it.

In the case of standard form contracts for financial products and services—such as mortgages or contracts for credit cards—the Australian Securities and Investments Commission (ASIC) rather than the ACCC can take legal action. If a contract involves both general issues and those relating to financial products and services, either regulator can delegate functions to the other to enforce.

The laws apply to contracts in all forms, whether written or oral, and in all media, whether online, over the phone or face to face. When assessing whether a contract you have entered into contains a term that is potentially unfair, it is useful to consider:

- › Are you penalised if the contract is terminated through no fault of your own, but the business is not?
- › Can the business change important terms of the contract without asking you?

- › Can only the business decide whether the contract has been breached?
- › Would the term cause you detriment (financial or non-financial) if the business tried to enforce it?
- › Would you lose money or suffer inconvenience, delay or distress if the term was enforced?

The new laws are applied nationally and action can be taken by the ACCC, ASIC and state and territory consumer protection agencies. Individuals can also take direct legal action through the courts to recover money or to seek compensation for damage suffered because of a term declared to be unfair.

While these new provisions have been introduced to increase consumer protection, you should also exercise some responsibility and be aware of your rights and obligations under any contract before agreeing to it.

The ACCC recommends that you ask questions and seek independent advice if there is anything you are unsure about or do not understand. If the contract does not meet your needs, don't be afraid to negotiate or shop around. If a business gives you an explanation of particular terms or words in a contract, ask for the explanation to be put in writing and attach it to the contract.

To download or order a copy of the publication *A guide to the unfair contract terms law*, visit www.accc.gov.au/uct.

The unfair contract terms provisions provide a three-pronged test of unfairness.



Not so SPORTING

Sporting Associations, businesses that supply sporting goods or services and professional sports teams have no special exemption from Australia's competition laws, and they need to ensure that any restrictions placed on members, players and officials don't fall foul of the rules in the *Trade Practices Act 1974* (the Act).

These rules, prohibiting anti-competitive conduct, are based on the worldwide experience that competition tends to produce choice, efficiency and, ultimately, prosperity. Employment arrangements and activities which do not occur in trade or commerce can fall outside the Act's coverage, but the starting point is that most conduct is in the running to be subject to the rules.

One such rule is the prohibition on exclusive dealing, which is the practice of one business trading with another on conditions that restrict the second business's ability to choose with whom, what or where it deals.



Forced to choose between sanctioned and non-sanctioned leagues, players and officials would have less opportunity to play and otherwise participate in the sport.

Depending on the form of exclusive dealing, it is at times prohibited outright and at other times prohibited when it substantially lessens competition.

But so-called 'bundling' and 'tying' arrangements may also produce benefits. For this reason, the Act also provides a mechanism where parties can notify the ACCC of conduct or arrangements that might otherwise raise competition concerns. The ACCC then assesses whether the conduct should be allowed in the public interest.

Sport holds a special place in many Australians' hearts. Sport involves the pursuit of some admirable goals—participation, fair competition and attaining high standards. The ACCC recently had to weigh up these issues—participation, competition and standards—in assessing whether membership and participation restrictions proposed by the Australian Ice Hockey Federation should be allowed under the Act.

The federation, also known as Ice Hockey Australia, notified the ACCC in 2009 that it proposed to expel or suspend any member who had participated or was participating in non-Ice Hockey Australia sanctioned ice hockey leagues or games. This proposal was to apply to players, coaches and officials, including referees. The Ice Hockey Australia application was made in reaction to the unaffiliated competitions run in recent years, particularly in New South Wales in summer.

Ice Hockey Australia submitted to the ACCC that having the power to effectively discourage players from participating in competitions not approved by Ice Hockey Australia would result in:

- › economies of scale in providing 'ice hockey services'
- › adequate risk management practices and lower insurance premiums
- › the ability to discipline players effectively
- › satisfaction of International Ice Hockey Federation requirements.

Once Ice Hockey Australia had notified the ACCC of its proposal,

the exclusive dealing conduct was protected from court action. For this particular type of dealing, the ACCC can revoke this protection if it is satisfied the conduct is likely to substantially lessen competition and its benefits would not outweigh the detriments from the lessening of competition.

To make a determination on the proposed exclusive dealing of Ice Hockey Australia, the ACCC had to compare the pros and cons of the proposed rule with the likely alternative of no such restriction.

In December 2009, the ACCC released a 'draft' notice outlining possible concerns about the proposal and invited submissions from the public. Individuals and organisations, including government sports agencies, state ice hockey associations and ice rink operators, made submissions. The issues were discussed at a conference convened by ACCC Deputy Chairman Peter Kell.

In March this year, the ACCC decided to revoke the protection of the notification, concluding Ice Hockey Australia's conduct was likely to substantially lessen competition by:

- › imposing a barrier to the establishment and expansion of rival ice hockey leagues
- › reducing the competitive viability of existing rival leagues.

Forced to choose between sanctioned and non-sanctioned leagues, players and officials would have less opportunity to play and otherwise participate in the sport. The ACCC concluded that the proposal might also lessen competition in the market for hiring out rinks.

The ACCC concluded there might be some efficiency benefits in having one body administer health and safety guidelines but this did not outweigh the competition problems. The ACCC decided that the proposed rule was not necessary for Ice Hockey Australia to continue to govern ice hockey at the national level.

The Ice Hockey Australia matter is certainly not the first time competition law and sporting competitions have met head to head in Australia—one of the most notable incidents was Federal Court of Australia action in the

[continued >]



[Not so sporting continued]

mid-1990s over the creation of the Super League rugby competition—and it will most certainly not be the last.

Speedracing

The ACCC has this year also revoked notifications relating to car-racing speedways, under which track operators had sought to stop drivers from accessing tracks unless they had obtained a licence from a nominated third party, the National Association of Speedway Racing (NASR).

Broadly, the Act prohibits a particular form of exclusive dealing called third-line forcing. A corporation is prohibited from supplying its goods or services on the condition that the buyer also buys other goods or services from a particular third party. A court can find that this conduct—unlike other exclusive dealing—has breached the Act without a party having to show it has lessened competition. The ACCC receives hundreds of notifications of such third-line forcing conduct each year and, after assessing them, generally takes no further action.

In the case of the speedways, the ACCC was concerned about the effect the conduct would have on other speedway associations that issue licences in competition with

NASR, reducing their attractiveness and ability to expand membership.

The ACCC accepted that there might be benefits in having a national set of safety and related racing standards but the licensing restrictions for track access did not achieve this. The ACCC similarly accepted that there

Sporting bodies must be aware that any conditions they impose that restrict someone's ability to choose with whom, in what or where they deal could in many circumstances raise concerns under the Act.

may be some benefit in having a single controlling body to represent the broad interests of the sport. Such a body could develop minimum safety and related racing standards to be met by licensing bodies and recognised by tracks.

For example, a voluntary industry code could be developed, establishing minimum objective standards on health, safety and competitor conduct. Such a code could allow alternative speedway licensing associations to demonstrate that they comply with the minimum

standards and could provide tracks with an effective risk-management process.

In May this year the ACCC revoked notifications from Brisbane International Speedway, Murray Bridge Speedway and Premier Speedway Club Warrnambool. In assessing these notifications, the ACCC had to again balance such issues as fair competition, participation and standards—and it decided that the restrictions fell short of the line.

At the same time, the ACCC issued a draft notice expressing the preliminary view that it should also revoke notifications from Perth Motorplex and Avalon Raceway. It has since been considering submissions in response.

Parties can appeal to the Australian Competition Tribunal, which is independent of the ACCC, against ACCC decisions to revoke a notification.

Sporting bodies must be aware that any conditions they impose that restrict someone's ability to choose with whom, in what or where they deal could in many circumstances raise concerns under the Act.

More information is available on the ACCC's website www.accc.gov.au/ForBusinesses, under the 'Dealing with other businesses' heading.

Mass-marketed advance fee fraud scams are a global problem and target everyone. One of the best ways to stop scammers from succeeding is to raise awareness of their tricks and traps—by reminding people that ‘if it seems too good to be true, it probably is’.

Scams: Not if, when ...

Each year it is likely that about one in 20 Australians will be defrauded through fake lotteries, pyramid-selling schemes, fake ‘phishing’ emails and other scams. The issue is not whether you or someone close to you will be targeted by a scam but when it will happen—and whether you will be prepared to deal with it.

The Australian Competition and Consumer Commission is working on a number of levels to combat scams. A key tactic is to raise awareness in the community of how scams work so that people can better protect themselves and their families, friends and colleagues.

We’ve surely all heard of the infamous inheritance letter scam and its variations, a type of mass-marketed advance fee

fraud, but scammers are becoming increasingly ingenious and sophisticated in their approaches.

Mass-marketed fraud operations are often linked to or structured as professional organised crime syndicates. The industry is sophisticated and includes telecommunications experts and specialists for hire, such as brokers selling ‘lead lists’ or ‘sucker lists’ of people identified as vulnerable.

Disrupting scam activity is difficult. Scammers are often based in a different country to their victims, often move quickly within and across borders and use countermeasures to disguise their locations and tracks. A key way to disrupt scams is to make people more aware of them, including by spreading the general

message that, if the offer seems too good to be true, it probably is, so don’t respond at all to unsolicited offers.

Mass-marketed advance fee fraud reports accounted for more than half of all scam reports made to the ACCC last year—a staggering 10 000 complaints about mass-marketed advance fee fraud were made to the ACCC in 2009.

A recent Australian Bureau of Statistics study found that in one year more than 800 000 Australians aged 15 and over—about 1 in 20—were the victims of fraud and about half of these people lost money—a sobering \$977 million.

But this is just the tip of a nasty iceberg. Victims often don’t report their losses to scams because they are embarrassed, fearful, depressed, shameful, and worried that family and friends will think less of them.

Across the world, authorities have found that the effects of being a scam victim range from small monetary losses and feelings of embarrassment to more serious impacts such as depression and alienation, significant scam debts have even enticed victims to travel overseas, at which point they have been kidnapped and held for ransom.

[continued >]

Scammers target everyone and save their most heinous tricks for the most susceptible, often following up a successful scam with another that purports to be an offer of official assistance to retrieve money lost, or continuously appealing to the scam victim's most basic human emotions in order to gain more and more money.

A recent case study from the Threat Assessment report released in June by the International Mass-Marketing Fraud Working Group (the Working Group) showed the devastating effects

of mass-marketed advance fee fraud:

'A retirement-age man who lives in Australia lost more than \$6.1 million to an investment scheme. The man, who had been a successful businessman before the fraud, eventually admitted to authorities that he could no

longer walk to the bus stop in his neighbourhood because each time he did so he felt a temptation to step in front of an oncoming bus.'

The Working Group includes the United States Department of Justice and Federal Bureau of Investigation, the United Kingdom Office of Fair Trading, Europol, the Nigerian Economic Financial

Crime Commission and the Australian Competition and Consumer Commission. The Threat Assessment report says millions of consumers and businesses around the world are

being fleeced of tens of billions of dollars by mass-marketing frauds, perpetrated through mass communication channels such as the internet, mass mailings and the telephone.

The ACCC recently participated in a Working Group initiative,

Scammers are becoming increasingly ingenious and sophisticated in their approaches.

a global awareness day called 'Think Fraud!' The initiative aimed to increase awareness about mass-marketed advance fee fraud and its painful impacts.

To support Think Fraud! day, the ACCC commissioned a follow-up survey from its 2009 Scam Activity Report (see Update, April 2010) to look in more detail at consumers' experiences with scams. The April 2010 survey of callers to the ACCC's Infocentre confirmed the sophisticated nature of advance-fee fraud scams, which were often disguised in legitimate online dating or online shopping websites. The survey will help the ACCC education activities to increase awareness about the dangers of scams and how consumers can better protect themselves.

For more information about mass-marketed fraud, to obtain a copy of the international Working Group's Threat Assessment or to report a scam, visit www.scamwatch.gov.au or call 1300 795 995.

Mass-marketed advance fee fraud, exemplified by the infamous inheritance letter scams, is a global problem with serious local effects. Two recent matters dealt with by the ACCC illustrate the global nature of scams. Last year cooperation between Australian and US agencies led to an online medical book scam run by two people from New South Wales being shut down. Globally, the scammers had sold more than 60 000 books, which, according to the ACCC's expert evidence, advocated measures that would not have any therapeutic benefits for, or medical efficacy in, the treatment of the health conditions targeted. The scam was brought to the ACCC's attention by the Washington State Attorney-General's Department, which also took proceedings against the man and woman in the US.

In Australia, the ACCC also cooperated with the NSW Police, resulting in one of the scammers, Aaron David Smith of Cecil Hills, being sentenced in July to 15 months periodic detention for obtaining benefit by deception.

Earlier this year, the ACCC moved to disrupt an apparently overseas-based telemarketing scam, touting a carbon-credit investment opportunity, fleecing consumers out of a reported \$3.5 million.

The telemarketers made calls to Australian businesses and individuals asking their views on environmental issues and whether they would consider investing in environmental projects. Those who expressed interest were later contacted by a representative from WesternField Holdings Incorporated and offered the opportunity to invest in projects generating carbon credits. The scheme was backed up by professionally presented websites. The ACCC received reports that investors had not been able to obtain their 'investment certificates', sell their investments or obtain refunds.

The ACCC identified and contacted people who had already transferred money to the scheme, had media releases advertising the scheme removed from websites and worked with state police to alert banks to intercept payments to certain accounts.

However, people should not just be wary of offers apparently from overseas. In April, as a result of ACCC action, the Federal Court of Australia declared that an Australian-based scammer whose company had claimed it had a secret method to predict future Powerball lottery draws had engaged in misleading conduct. The court ordered that the scammer and the company pay almost \$50 000 in compensation, following on from earlier orders freezing related bank accounts.

Don't get scammed

If it looks too good to be true—it probably is.

ALWAYS get independent advice if an offer involves significant money, time or commitment.

Remember there are no 'get rich quick' schemes: the only people who make money are the scammers.

If you are going to reply at all to an offer that you believe is legitimate, do not agree straight away: tell the person that you are not interested or that you want to get some independent advice before making a decision.

You can contact your local office of fair trading, the Australian Securities and Investments Commission or the Australian Competition and Consumer Commission for information.

NEVER send money or give credit card or online account details to anyone you do not know and trust.

Check your bank account and credit card statements when you get them. If you see a transaction you cannot explain, report it to your credit union or bank.

Keep your credit and ATM cards safe. Do not share your personal identity number with anyone. Do not keep any written copy of your PIN with the card.

For more tips about scam awareness, see the 'How to Protect Yourself' link at www.scamwatch.gov.au.



ACCC reaches out during Law Week

The focus of the ACCC's activities was on mobile phone issues for consumers, such as refunds and warranties, the cost of downloads, and scammers using mobile phones to target people.



Above: Siobhan Ford and Albert Julum at the COSBOA Summit in Brisbane.

Below: NSW Outreach Manager Martino Santi at the Law Week Expo in Sydney.

The ACCC had a strong presence at National Law Week held in May this year, with its Regional Outreach Managers participating in a range of activities across the country.

For the first time in many years, Law Week was held simultaneously across the states and territories rather than at different times of the year. The focus of the ACCC's activities was on mobile phone issues for consumers, such as refunds and warranties, the cost of downloads, and scammers using mobile phones to target people.

The New South Wales office participated in the Law Week Expo in Martin Place in the centre of Sydney. Northern Territory, South Australia and Queensland staff took part in court open days and, in Victoria, students from secondary schools heard presentations from staff.

While activities were aimed at all consumers, Law Week had an educational component that aimed to make legal concepts easy for school-age children to understand.

In the case of mobile phones, this was a particular focus, as teenagers are a large part of the target market for mobile phone download products such as ringtones, games and music. These services are frequently offered through a subscription, and consumers may not actually understand the charges involved until they receive the bill or their credit disappears.

The continual evolution of scams also means that mobile phone users are being targeted, particularly those who use their phone for banking or making purchases. A scammer may pose as a bank representative or another

organisation claiming to need personal details—when in fact they want to use them for scam purposes.

Regional Outreach Managers work in each of the ACCC's state and territory offices and undertake a range of activities, including attending expos and trade shows, giving presentations and seminars to industry and community groups, distributing publications and visiting traders to ensure they are fully informed of any relevant trade practices issues.



ACCC publications— recent highlights

View these and many more online at accc.gov.au

Publication orders can be placed online or by calling the **ACCC Infocentre** on **1300 302 502**



Industry associations and the Trade Practices Act



Consumers and unfair contract terms



Motor vehicle recovery straps supplier guide



Franchising code of conduct compliance manual for franchisors and master franchisees



Don't take advantage of disadvantage



News for business: Unfair contract terms



News for business: ACCC powers to issue infringement substantiation and public warning notices

www.accc.gov.au

ISSUE 29 › OCTOBER 2010

SUBSCRIPTION

To subscribe to *ACCC update*, please email:
publishing.unit@acc.gov.au

or subscribe online:

www.accc.gov.au/ACCCUpdateSubscription

(Please note: This web address is case sensitive)

ACCC contacts

Infocentre 1300 302 502

Small Business Helpline 1300 302 021

Website www.accc.gov.au

Callers who are deaf or have a hearing or speech impairment can contact the ACCC through the National Relay Service:
relayservice.com.au

Voice-only (speak and listen) users phone:
1300 555 727 and ask for 1300 302 502