



Presentation to

***2nd Australian Rental Vehicle Industry
Convention & Trade Show 2005***

***“Competition & Consumer Issues in
Australia’s Car Rental Industry”***

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12th April 2005
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1. INTRODUCTION

I welcome the opportunity to speak to representatives of the car rental industry which plays such an important role in the Australian economy.

Latest available data shows about 55,000 rental vehicles were registered across Australia. Industry sources estimate there are currently about 600 businesses in this sector undertaking five to six million vehicle rental transactions per year. Car rental is a vital cog in the travel and tourism sectors and impacts on wider areas of commerce.

The majority of operators are small businesses. However, the five largest companies and their 150 franchisees account for about 30,000 vehicles and 75 per cent of business turnover in the sector. Just over half of the turnover by the five major franchise networks has been conducted at outlets both owned and operated by the franchisors themselves. Our largest franchisors also operate in other countries.

Key stakeholders in Australia's car rental industry are:

- motor trades;
- insurance;
- banking;
- tourism;
- consumer organisations;
- community legal services; and
- motoring clubs.

The ACCC enforces the Trade Practices Act (TPA) to ensure that there is a dynamic competitive marketplace with fair trading and truthful and ethical dealings with consumers.

However, in virtually every speech he makes, ACCC Chairman Graeme Samuel indicates the Commission would much prefer that all businesses comply with the Trade Practices Act in the first place, rather than us having to take action against them. That's why we put so much effort into education and promotion of effective codes of practice. It is the reason the Commission does not hide its light under a bushel when we successfully take court action.

You will be aware there have been concerns about some aspects of car rental activities particularly in respect of insurance arrangements that have lead to significant consumer complaints and attracted attention from the ACCC and State and Territory fair trading authorities.

So, in today's discussion I would like to take the opportunity to:

- Describe the role of the ACCC in administering the TPA
- Outline the issues that have been involved in the Commonwealth / State review of car rental consumer protection matters
- Look at the role of voluntary and mandatory codes under the TPA and refer to the ACCC's experience over the last 6 years of administering

the mandatory franchising code of conduct to which Australia's leading car rental systems have been subject

2. COMPETITION & FAIR TRADING RULES OF THE GAME

The ACCC is the federal government body responsible for administering the Trade Practices Act. The Act contains a number of provisions ranging from consumer protection to preventing anti-competitive conduct. By doing so, the Act encourages competition and efficiency in business and greater choice for consumers in price, quality and services.

Generally, the ACCC pursues allegations where there is a public interest in doing so. The ACCC is also willing to work with industry to assist in understanding its rights and obligations under the Act.

However, in order to effectively carry out its role, the ACCC must remain independent and objective. We do not play a role in changing or amending laws, or lobbying government on behalf of interested groups.

The ACCC's independence in its administration of the Act is achieved through the appointment of independent Commissioners like myself, to oversee the working of the ACCC. This allows the ACCC to promote and enforce the Act in an unbiased manner. We may take action against any corporation or business, and that includes government acting as a business, which we believe has broken the law and has acted in anti-competitive or unfair manner against the interests of consumers or other businesses.

As the watchdog we are ready to "bite hard" when there are serious breaches of the law.

In such cases court action is sometimes required. Our policy is to achieve very quick results that avoid or minimise harm to consumers and businesses. In some cases we will look at bringing about restitution, but generally court action aims to restore competition and fair trading to the marketplace.

However, our central objective is compliance with the law and hence avoidance of the need to take court action in the first place – prevention is the best cure. The ACCC puts considerable effort into assisting business to improve compliance with the TPA. We do this through our publications, the media, our internet site, and of course through forums such as this. Opportunities like today enable us to talk to business people face to face to help make you aware of your rights and obligations under the Act.

All corporations and most unincorporated businesses are subject to the TPA. All businesses in an industry like car rental should have compliance with the TPA as a ventral element of business management practices.

When it comes to protecting consumers, Trade Practices Act provisions apply to:

- misleading or deceptive conduct (s52);
- false or misleading representations (s53).
- bait advertising (s56);
- unconscionable conduct. (s51AA & s51AB); and
- implied warranty that services will be supplied with due care and skill. Also, when it is made known that services are wanted for a particular purpose, those services and any associated goods must be fit for that purpose. (Part V, Division 2).

The other side of the ACCC's operation relates to restrictive trade practices like price fixing and market sharing you. It's going back a few years now but I'm sure many here will recall the considerable fines handed out to members of your industry over the cartel that fixed prices for one way car rentals between Alice Springs and Ayres Rock. The fines and costs in that case totalled \$1.5 million and sent a very clear message to the rest of the industry. You will no doubt be aware of the ACCC's campaign against cartels in recent months and the fact that criminal sanctions are now being introduced to deal with serious cartels.

The ACCC works closely with other Commonwealth agencies and in particular there is close cooperation between the ACCC and its counterpart agencies in the States and Territories.

Other Commonwealth Regulation

Other legislation which can apply to the car rental industry includes the *Corporations Act 2001*, the *ASIC Act 2001* and the *Insurance Contracts Act 1984*.

The *Corporations Act 2001*, inter alia, regulates specific areas of industry such as those marketing "financial products" through licensing requirements and a duty to provide standard disclosures. However it appears most car rental arrangements are not caught by the "financial products" provisions of the *Corporations Act 2001*.

The *ASIC Act 2001* also applies to industries which deal with "financial products" but mostly in relation to broad fair trading restrictions such as prohibiting false or misleading representations.

The *Insurance Contracts Act 1984* provides a number of consumer protection mechanisms, such as imposing obligations of utmost good faith on the parties, and methods of determining liability in certain situations. While an "insurance contract" is not defined under the Act, ASIC takes the view that car rental contracts containing waiver of liability clauses should be regarded as such. An aggrieved party may initiate a private action in court where a car rental company has breached the Act.

State Legislation

All States and Territories have *Fair Trading Acts* which apply to both corporations and unincorporated businesses. This legislation largely mirrors the above consumer protection areas of the Commonwealth legislation with the exception that fair trading

legislation in some jurisdictions does not require services to be provided with due care and skill. Victoria has recently amended its *Fair Trading Act 1999* to include unfair contract term provisions

3. CONSUMER ISSUES IN CAR RENTAL

As many of you will be aware the Ministerial Council on Consumer Affairs (MCCA) established a national working party with representatives from government fair trading agencies to examine consumer concerns in the car rental industry and regulatory options.

Many of the concerns raised are associated with representations and handling of action associated with alleged vehicle damage. The concerns which relate to large and small car rental operators alike include:

- *Transparency of Dealings* – Small print, complex and confusing contracts obscuring important terms;
- *Vehicle Insurance* – Renters being unaware of serious gaps in coverage and the exclusions being buried in the small print rental agreement;
- *Disputes about Vehicle Damage* – Lack of open and accountable procedures to verify when damage has occurred during rental and to prevent overcharging for repairs;
- *Credit Card Deductions* – Consumers being unaware that contracts authorise operators at their discretion to debit a renter's credit card for an unlimited amount such as for alleged vehicle damage;
- *Harsh or Unfair Contracts* - Contracts containing unfair or unreasonably harsh provisions; and
- *Advertising* – Complaints about misleading advertising regarding issues such as price, quality and availability of vehicles.

Unique Insurance Arrangements

Car rental insurance arrangements are very different to those provided for privately owned vehicles as the risks are much higher. Renters do not receive an insurance policy and offers to reduce liability for accident damage are embedded in the one rental contract.

To reduce the impact on fleet premiums or business costs, most operators who comprehensively insure their fleets do not pass on this level of cover to renters. They may exclude a range of rental incidents from coverage such as single vehicle accidents, driving on unsealed roads and reversing damage. Operators at the lower end of the market usually only carry third party property fleet cover. They also apply a range of exclusions.

In these circumstances, depending on the extent of damage, a renter will be liable up to the full value of the vehicle or at the very least an excess charge of up to about \$3,000.00. Arrangements and charges vary across the industry, including between major operators. In many cases, these factors are not apparent without a detailed study of the fine print.

Consumer Law Protections

It is unrealistic to think most consumers have the capacity to 'comb' through small print contracts at the rental desk. Accordingly any pitfalls are not evident until an accident occurs. Consumers are oblivious that contracts empower operators, at their sole discretion, to deduct amounts of up to thousands of dollars from the renter's credit card for alleged damage.

They are often unaware of such deductions until they have left the region in which the rental occurs. But in the absence of accountable verification procedures, it is difficult and costly for a consumer to dispute allegations of damage or overstated repair costs weeks or months after the rental.

At a policy level it has been suggested existing consumer protection law can not effectively address these concerns. Where there is a dispute it can be extremely difficult to clearly establish the facts.

Unconscionable conduct

'Unconscionable conduct' generally relates to unfair or unreasonable negotiations or outcomes in a contract. The term is not defined in either Commonwealth or State fair trading legislation. Its meaning is determined by the courts on the facts and circumstances of individual cases.

Court determinations take account of factors such as relative bargaining strengths, any undue pressure or influence and whether documents could be understood. They also take account of whether the conduct was reasonably necessary to protect the legitimate interests of the supplier.

Despite consumer concerns about some aspects of rental agreements, unconscionable conduct provisions do little to address them. Fair trading authorities have no formal power to act in relation to future potential breaches of the provisions. As each case is determined on its particular facts and all the circumstances, any orders made regarding particular litigants do not impose any obligations on other traders or on the future dealings of a trader in question.

Common Law

Renters are unlikely to risk the high cost of private actions or test the uncertain protection of common law. This is particularly so once they are apprised of the extent of obligations in the contract and the difficulties in proving the facts of their case. These obstacles are magnified for those people residing interstate or overseas.

Regulation in Other Countries

In New Zealand the *Transport Services Licensing Act 1989* provides for licensing of car rental operators and a range of prescribed terms for agreements. In particular, this includes indemnifying the renter against liability for accident damage with the renter being responsible for any insurance excess specified by the operator.

In California the car rental industry is regulated via a number of statutory codes. They include requiring a range of disclosures in rental contracts including information about damage liabilities and prohibiting the operator from recovering liabilities for damage via the renter's credit card without the renter's express permission.

In the UK, *Unfair Terms in Consumer Contracts Regulations* can be used to release consumers from unfair terms. A contractual term which has not been individually negotiated will be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer. Car rental contracts in the UK were considered difficult to understand and to contain unfair terms. Industry representatives subsequently agreed to drop the unfair terms and draw up a new model contract for their members.

3. CONSULTATION AND REVIEW OF CAR RENTAL ISSUES

In 2003 the Ministerial Council on Consumer Affairs released a public discussion paper entitled *Possible Regulation of the Car Rental Industry in Australia*.

Submissions on the discussion paper and discussions with a number of stakeholders were complemented by a survey of vehicle renters undertaken by a research consultant, Colmar Brunton.

Submissions on behalf of the five largest franchisors contend that the low number of complaints to fair trading authorities does not support a need for regulatory intervention.

However, a consumer survey of renters indicated that a vastly greater number of consumers experience problems than is reflected by complaints received by fair trading authorities. Survey findings confirm that consumers have great difficulty in reading and understanding vehicle rental contracts and they are not aware of important terms or their implications. Most respondents indicated they preferred mandatory requirements as the best means of making improvements in the industry.

The greatest number of submissions preferred legislative intervention with less than one quarter supporting the introduction of a voluntary code and less than one fifth supporting the retention of the status quo.

Car Rental Insurance Ltd, the largest vehicle fleet insurer servicing rental operators supported the introduction of a mandatory code of conduct.

Possible Responses

While it is not appropriate to comment on proposals yet to be considered by Ministers it is apparent the key areas that need to be addressed cover:

- Plain language and minimum disclosure requirements for car rental contracts including about liabilities such as for vehicle damage;
- Accountable procedures for verifying responsibility for vehicle damage and charges;
- Access to renter credit cards being subject to a number of conditions;
- Requirements relating to advertising and price quotations; and
- Disclosure requirements relating to the operator's break down service.

While 80 percent of operators in the industry (mainly small businesses), do not belong to an industry body perhaps that could be changed if a peak association got serious about establishing and enforcing an effective code of conduct.

However the industry as reflected in the largest franchisor companies does not appear to have the will or capacity to adopt regulatory measures on a voluntary basis. The large franchisors have indicated they strongly favour the retention of the status quo and have rejected the possibility of voluntary improvements in business practice which go beyond their individual franchise networks. Further, their franchisees must comply with proprietary standards and procedures.

The National Rental Vehicle Association accounting for 20 per cent of operators has a preference for licensing legislation rather than a voluntary code.

Whatever approach is taken should aim for improved consumer and competition practices on a national consistent and transparent basis

It is relevant that a separate Ministerial working party is investigating the development of a nationally consistent legislative scheme to address unfair contract terms.

The ACCC as an independent enforcement agency does not have a direct role in setting a regulatory framework for the car rental industry, if that is to be the course taken. If a mandatory code were to be established under the TPA, the ACCC would be responsible for its administration in the same way the Commission administers the mandatory Franchising Code of Conduct. On the other hand the ACCC also has a proactive role in supporting industries in the development of effective voluntary codes. I discuss the role of codes in a later section of this paper.

4. CODES OF CONDUCT

Recognising the role that effective voluntary industry codes of conduct can play in achieving compliance with the Act, the ACCC recently launched its Guidelines for developing effective voluntary industry codes of conduct. The Guidelines are designed to help industry improve voluntary compliance with the *Trade Practices Act 1974*.

The ACCC has considerable experience in the use of codes of conduct to regulate market behaviour. The Guidelines are based on this experience coupled with consultations held with industry and consumer organisations.

The Guidelines set out a framework for developing and maintaining an effective voluntary industry code of conduct. This framework is composed of a number of essential criteria that are fundamental to an effective voluntary industry code.

For example: *Sanctions for non compliance is an essential criterion for an effective voluntary industry code.*

Enforcement of commercially significant sanctions is necessary to achieve credibility with and compliance by participants, and also engender confidence in the industry code.

There are significant benefits in developing and complying with voluntary industry codes. As outlined in the Guidelines these benefits include but are not limited to:

- greater transparency in the industry to which signatories to the code belong
- greater stakeholder or investor confidence in the industry/business
- ensuring compliance with the Act to significantly minimise breaches
- a competitive marketing advantage.

Other reasons for developing a voluntary industry code include:

- it is more flexible than government legislation and can be amended more efficiently to keep abreast of changes in industries' needs
- it is less intrusive than government regulation
- industry participants have a greater sense of ownership of the code leading to a stronger commitment to comply with the Act
- the code acts as a quality control within an industry

Complaint handling procedures under a code are generally more cost effective, time efficient and user friendly in resolving complaints than government bodies. The Commission is widely disseminating these Guidelines to assist industries in developing and maintaining effective voluntary codes of conduct.

While most states and territories in Australia have provisions in fair trading legislation enabling codes of conduct to be prepared and prescribed for fair dealing, the most effective approach is to develop national codes. For the car rental sector an effective national code would allow the industry to not only address in a consistent manner the issues of concern already mentioned but also to isolate dubious marketing representations and maintenance and safety practices which are the subject of complaint at the lower end of the market.

5. CAR RENTAL & FRANCHISING

The Franchising Code, as many of you here are well aware, is currently the only mandatory code under the Trade Practices Act 1974.

The Code has been effective in addressing a number of key concerns that existed before the Code's commencement, and in some cases, still exist in the franchising sector. The Code provides an opportunity for prospective franchisees to have sufficient information to enable them to make an informed decision about whether a franchise system is right for them. The Code also provides mechanisms to allow franchisees and franchisors to resolve disputes in a fair and reasonable manner.

The Code, by and large, has been extremely effective. The ACCC has seen a steady decline in the number of complaints and inquiries which we receive concerning franchising generally and few concerns raised in relation to car rental franchising. .

However, from my position as the ACCC Small Business Commissioner I see a need for continual improvement in certain areas. Our experience has demonstrated that franchising complaints generally fall into three broad types:

- scams and exploitation;
- structural pressures; and
- poor relationship management.

Fortunately there are no major complaints relating to the scams and exploitation category in the car rental industry. However given the widespread nature of franchising in your industry it is relevant to mention the "traps" that can occur from the other two categories of complaint.

Structural pressures

These types of complaint occur when the provision of goods or services by an otherwise genuine franchising system does not fit well with the conditions of supply and demand in the market in which that franchising system is competing. These structural problems can arise where a franchise system:

- expands more rapidly either in the number of outlets or the nature of the products or services supplied by the system;
- is unable to maintain the level of service promised to franchisees, for example training and support for franchisees;
- fails to deliver in terms of its advertising strategies or in the achievement of profit projections as the system expands into new markets or faces increased competition;
- does not respond to changing market conditions, for example changes to consumer demands or increased competition, with the result that its franchisees may be unable to compete effectively within the uniform business system; or
- responds to changing market conditions by rationalising the number and/or location of outlets or by requiring franchisees to invest in signage or other system changes that are costly at a time when turnover is low (the initial impact of the changing market).

The various ways in which franchisees can be negatively affected by such complaints can lead to perceptions that a franchisor has treated its franchisee unfairly and may generate complaints alleging misleading or deceptive conduct and unconscionable conduct.

Poor relationship management

The other type of franchising complaint generally arises as a result of poor communication or consultation between parties to a franchise agreement. This can be partly related to issues of structural problems.

It may occur when one party wishes to change the manner in which either the system or an individual franchise does business. Complaints alleging a lack of consultation often arise in relation to advertising campaigns or changes to product lines offered by a franchise system.

Alternatively, relationship management problems may result from the manner in which one party responds to concerns raised by the other party to a franchise agreement. This may include a reluctance to acknowledge the legitimacy of concerns held by the other party or one party perceiving a complaint to be a personal criticism and responding in kind.

Relationship management issues differ from structural issues in that while the substance of the original concern that gives rise to a relationship management issue may appear quite minor, the manner in which the dispute is raised or responded to can result in significant distress to one or both parties.

6. THE WAY FORWARD

Business commentator at the Australian newspaper Robert Gottliebsen has emphasised the critical importance of all sectors keeping up with or being ahead of technological innovation and contemporary business practices.

The issues being faced by the car rental industry in terms of reasonable consumer expectations and competing on a “level playing field” are relevant to that philosophy. Possible regulatory or other mechanisms to deal with the issues I have outlined are a matter for Ministers.

However, I would exhort the car rental industry to bit “take the teeth” and support a best practice model. In this regard the ACCC would welcome an ongoing dialogue with car rental industry representatives.

Thank you for the opportunity to speak to you today, I am happy to respond to any questions.