



Australian  
Competition &  
Consumer  
Commission

## Australian Competition and Consumer Commission

### Promoting Competition and Fair Trading

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**Protecting and promoting consumer interests: Where have we been and where are we going? Business, Consumer and Regulator Perspectives**

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#### ***Introduction***

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

The role of the Australian Competition and Consumer Commission in protecting consumers is well understood and accepted.

What is not often understood is that our other role - promoting fair and vigorous competition - is also just as much about protecting consumers.

#### ***Role of the ACCC***

The ACCC has two primary functions:

- 1 To promote vigorous, lawful competition which involves taking action to prevent or halt anti-competitive conduct with the fundamental objective of providing a fair, competitive environment in which all businesses – big, medium and small – have the opportunity to survive and thrive, and to conduct their business in a manner consistent with the interests of the Australian public, the Australian consumer.
- 2 To protect consumers against misleading and deceptive conduct and all that is entailed by those two expressions as the foundation stone of Part V of the Trade Practices Act.

If for example, one business is able to get away with false or misleading conduct and representations then it could gain an unfair advantage over its competitors.

But if consumers are given deceptive or misleading information about goods and services they are not able to make an informed choice when choosing between competing products.

So the ACCC's role is not about competition for competition's sake – but rather that competition is crucial to the economic well-being of this nation, and the quality of life for all Australians.

It is not, however, the job of the ACCC to preserve competitors or protect any sectors of the economy from competition.

The ACCC's mandate is to enhance the interests of Australian consumers by promoting fair, vigorous and lawful competition, *whether it be between big, medium and/or small businesses.*

The ACCC's focus is on protecting the interest of consumers and the community at large, and we cannot be diverted from this.

Protecting certain businesses or any particular sector of the Australian community from fair, vigorous and lawful competition for whatever reason will come at a cost to the Australian consumer.

Anti-competitive conduct in whatever form removes the competitive disciplines on business and the resultant incentives to provide consumers with:

- Lower prices
- Higher quality of goods and services
- Choice and convenience
- Information to enable consumers to make that choice

### ***Tools in ACCC's weaponry***

#### ***Media***

There is a clear public benefit generated in publicising the activities of the Commission and all Commissioners, including myself, will never be shy about using the media and public forums such as this to keep consumers informed of their rights, and businesses informed of their responsibilities, under the Act.

Such publicity ensures the actions we take are transparent, making us accountable for our actions, not just to parliament and ministers, but to the public.

But it also plays a crucial role in achieving behaviour change – discouraging behaviour which may harm both consumers and business.

A good example of this was in relation to the real estate market where it had become evident that booming property prices had encouraged a range of misleading and deceptive practices, including promotion of dubious property investment seminars and schemes, two-tier marketing arrangements and misleading and deceptive behaviour and misrepresentations in connection with property sales.

So last year we announced that allegations of misleading and deceptive behaviour in the property industry would be a priority for us, with a

national task force having been established to focus on stamping out these practices.

The extensive media interest in this announcement, and some well-honed court cases, produced a marked change in behaviour by sections of the property industry. Consumers became more aware and wary of dubious practices.

But we must never seek publicity just for its own sake. When businesses come into conflict with the Commission good reputations must only ever be harmed by their own bad business behaviour.

That is why the Commission must be circumspect where rights and reputations might be improperly affected.

Confidentiality is also absolutely fundamental to the Commission.

We simply cannot operate if people have any fears that information they bring to us which is clearly confidential in nature, will be disclosed, either privately or through the media.

We must balance the right of the public to know what we are doing, with the rights of those who deal with us.

One final rule about the media is that we cannot be driven to do things because we're worried about how it will be portrayed by the media.

We can never have the situation where the actions of the Australian Competition and Consumer Commission are driven by media perceptions of what we should be doing, rather than what we believe is the best outcome.

### ***Compliance pyramid (or sliding scale)***

When it comes to enforcing the Trade Practices Act, the Commission operates a sliding scale, or what we sometimes refer to as the compliance pyramid.

Our belief is that it is eminently more sensible to have business comply with the Act, instead of having them act in a way that does damage to both consumers and the business, and then have to try to undo the damage later.

To this end, the base of the pyramid is education, advice and persuasion – the sort of thing I referred to with regard to publicity and behaviour change.

In addition to using the media, the ACCC distributes around 800,000 copies of publications each year, many of them targeted directly at specific businesses.

Our Internet site provides an easy source of information on virtually every aspect of the ACCC's activities.

But all the education and advice in the world is of little value if there is no compliance culture in place within a business – whether it's because the business lacks the willingness to comply with the Act in the first place, often as a result of an attitude flowing from senior management, or because of a fundamental failure in its systems.

And so, if we detect a systemic or process weakness in an organisation's compliance strategies, sometimes reflected in a personnel attitude problem, we will have no hesitation in drawing the attention of senior management or Directors to those issues, in an endeavour to bring about a broad compliance culture within an organisation.

When enforcement is required - the sharp end of the pyramid - our policy, at all times, is to achieve very quick results which avoids or minimises consumer harm in the longer term, and brings about restitution to consumers when possible.

Often, simply signalling that we are prepared to launch proceedings brings about a quick result without the need to actually go to court.

A good example of this occurred last year after the Commission received complaints concerning demands by Reader's Digest for payment for unsolicited books, tapes and magazines sent to consumers.

After lengthy investigation of the complaints by the ACCC and discussions with Reader's Digest, Reader's Digest agreed it had contravened the Trade Practices Act.

It agreed to have an independent audit of its direct marketing practices, retrain staff, write to customers, place corrective advertisements and in two cases, pay refunds.

All of this was achieved without, in the end, the need to go to court and served as a warning to all direct marketing companies that the ACCC views demanding payment for unsolicited goods very seriously.

We issue court proceedings when we believe they will be effective in bringing about a quick result. If a company finds it is at the sharp end of one of the Commission's enforcement activities, it can expect quick, tough, unrelenting court proceedings designed to bring about the right result for Australian consumers.

But if a matter can be corrected quickly, reflecting the fact that there is a compliance culture within an organisation, court action may not be necessary.

Just to give you an idea of how our enforcement activity works, in the last financial year the Commission received 53,532 complaints and inquiries relating to the Trade Practices Act.

Of those we actually resolved 26,377, or just under 50%, during the initial contact, usually involving a quick telephone call or letter.

Just 634, or 1.2% were escalated to investigation, of which 262 went to serious investigation and only 39, or .07% of the total complaints received last financial year proceeded to litigation.

So the principles underlying the ACCC's approach to enforcement action are that it

- Is Fast Track
- Stops consumer harm
- Stops bad business behaviour
- Brings about change in industry behaviour and
- Where possible, results in restitution for consumers.

On all these grounds, negotiation is often preferable to litigation because it produces speedier outcomes, is much cheaper for both the business and the taxpayer, and is often better at providing restitution for consumers.

Last year we had a big court victory over the Abtronics belt sold by direct marketer Danoz Direct, which it was claimed could do the work of 600 push ups by simply strapping it to your waist while you did the ironing or watched TV.

Our success in the Federal Courts in halting the ads made a great press release, but there had been 94,000 of these Abtronics sold at a cost to consumers of \$15 million before we won. Obtaining restitution for consumers is virtually impossible with the law as it currently stands.

By contrast, Danoz agreed to offer refunds and place corrective apologies after allegations it was making misleading claims concerning its Pest Control and Pest Offense devices which it was claimed could repel insect and rodent pests through ultrasonic or electromagnetic pulsations.

The 240,000 consumers who bought these electronic pest repellents through the Danoz group of companies are able to obtain refunds as a consequence of the negotiated settlement of this matter with the Commission.

So, companies faced with substantiated Commission allegations have two choices. One is to deny the complaint and tell the Commission it is willing to go to the highest courts of the land to defend its position.

The other way is to actually recognise that there is a problem, sit down with the Commission and try to sort problems out quickly. If a company comes to the Commission and says "we've got a problem and we'd like you to help us fix the problem quickly", I can assure you, you will find us very receptive

But a company that takes a view that says "well, we'll teach the ACCC a lesson not to take on a company of our size" will quickly learn that ACCC has the resources and the determination to take it on.

### **2004 priorities**

Our priority in the year ahead is at all times to enforce on a **fast track basis, vigilant consumer protection.**

In terms of **misleading and deceptive conduct** and unconscionable conduct, the Commission will be particularly concerned to address conduct that targets and seeks to exploit disadvantaged and vulnerable consumers.

### **Print and electronic media outlets**

One area of concern is our very strong view that advertising agencies and media outlets have a responsibility to ensure that they do not engage in misleading or deceptive conduct in advertising and promotions prepared and published by them.

To this end we have launched a major campaign to bring to account those involved in the preparation and publication of advertising content including:

- Advertising pre-produced by agencies
- Advertising prepared by the advertiser and submitted to the media outlet for publication
- Advertorials where the media outlet or a particular employee/presenter endorses or appears to endorse a product
- Infomercials, which in the context of television broadcasts, is in the nature of programming
- The promotion of products in the guise of current affairs reportage or lifestyle programs, in particular where the program purports to be credible investigative journalism and the product is actually being promoted, including by linkage to program's website.

In the ACCC's view everyone involved in the preparation and broadcasting or publication of misleading and deceptive advertising is in potential breach of the Trade Practices Act.

Broadcasters and publishers will breach Section 52 of the Act relating to misleading and deceptive conduct if they publish advertisements that contain misleading or deceptive statements, unless they are able to avail themselves of the "publisher's defence". This defence will not operate unless the publisher "did not know and had no reason to suspect" that publication would amount to a contravention of the Trade Practices Act.

There are circumstances when it will be difficult for a publisher to argue that it did not know and had no reason to suspect that advertising material was false and misleading, for instance where:

- (a) the advertising claims appear on their face to be extravagant, particularly if they relate to weight loss, exercise, or curatives or to representations as to future matters.

- (b) the representations appear to be clearly contrary to generally known facts. It may also be reasonably apparent on the face of the advertisement that a claim is false, misleading and deceptive
- (c) the publisher may have been put on notice of grounds to query an advertisement's accuracy, for instance if it is aware of Commission concerns or pending Court proceedings in respect of the goods or services the subject of the advertisement
- (d) the publisher may have previous experience or received complaints which indicate an advertisement may give rise to compliance problems.

The Commission takes the view that as a media outlet's involvement in the production and scripting of advertising content increases and as advertising moves from being discrete from programming and becomes a promotion or endorsement that is integrated into programming, the media outlet's responsibility for the content of the advertising increases and it becomes less likely that the "publisher's defence" will apply.

The community depends on the advertising industry, including media outlets, to provide it with vital information to inform purchasing decisions – it has every right to expect that the industry take all reasonable efforts to maintain a high level of compliance with the TPA. In the Commission's view, this requires the maintenance of proper systems and procedures designed to prevent the publication of false, misleading or deceptive advertisements.

The Commission will have regard to the possible liability of relevant media outlets when investigating advertising that may contravene the TPA.

Media outlets would be well advised to have in place proper systems and procedures designed to prevent publication of false, misleading or deceptive advertisements.

To reinforce this I am writing to newspaper publishers and broadcasting licensees to advise them of their obligations and to alert them to ACCC's close scrutiny of these issues.

### ***Cartels***

As you may be aware, the ACCC has now commenced substantial investigation into a number of cartels.

We have identified more than 30 suspected cartels ranging from very small scale, local price fixing agreements, to large international cartels. They involve price fixing, market sharing and collusive tendering including for government contracts.

Cartels are a cancer on the economy, a silent extortion which can in many instances do far more damage to our economy, to business, and to consumers, than many of the worst consumer scams.

I am reasonably confident that the Commission will soon be able to start court action, potentially in co-operation with international regulatory

agencies, to try and bring these secretive cartels to a halt, due in part to whistleblowers encouraged by our leniency policy.

The policy makes corporate lawbreakers and their executives an offer to cease the unlawful conduct and report it to the Commission. In return they receive a clear and certain offer of leniency.

The catch is that it is only the first in the door who benefits. But as Justice Wilcox noted in a recent case:

*"If this approach leads to a perception amongst colluders that it may be wise to engage in a race to the ACCC's confessional, that may not be a bad thing".*

Under the current penalty regime those convicted of running cartels face stiff fines, but no jail term, even though the reward for participating in such a cartel could potentially be worth tens of millions of dollars.

Serious tax cheats are imprisoned, sometimes even pensioners who defraud social security are sent to jail. Why should executives who deliberately enter secretive cartel arrangements to defraud their customers or taxpayers be treated any differently?

Jim Griffin, the Deputy Assistant Attorney General of the US Department of Justice Anti-trust Division, last year told Commission staff of a senior executive, who was committed to compliance with anti-trust laws, and who explained that:

*"So long as you are only talking about money, the company can at the end of the day take care of me – when you talk about taking away my liberty, there is nothing that the company can do for me."*

These remarks go straight to the heart of why criminal penalties must be introduced for hard core cartel behaviour in Australia.

A working party appointed by the Federal Treasurer is currently considering whether criminal sanctions for serious hard-core, cartel behaviour should be introduced and is expected to report to Government in the first half of this year.

### ***International cooperation***

We are all increasingly recognising the internationalisation of consumer scams as a result of the globalised market place and, in particular, the increasing presence of the internet as an important means of communication between business and consumers.

But it is very difficult to enforce Australian court orders for breaches of trade practices law against overseas residents, and to demand of people in other countries information about scams and breaches of the Act.

It is therefore crucial that consumer enforcement activities become similarly internationalised.



We do have a treaty with the United States which is both extensive and useful, and memorandums of understanding with a number of countries but these have only limited impact in terms of international co-operation.

It is therefore important that we continue to be closely involved in with organisations such as the International Competition Network and International Consumer Protection Enforcement Network to ensure those responsible for scams are not granted immunity simply by operating outside our jurisdiction.

***Too good to be true.***

In this context the ACCC recently led consumer protection agencies from 24 countries in scouring the internet to uncover shonky websites which are 'Too Good to be True', as part of the sixth International Internet Sweep.

We scrutinised websites such as those promoting work at home schemes which grossly exaggerate potential earnings, lottery scams, pyramid selling schemes, get rich quick schemes, prizes and free offers which were not actually 'free' and educational offers.

Globally a record 1847 suspicious sites were flagged by the sweep. Participating agencies are now acting on results in a number of ways, including educating traders about compliance, advising consumers about how to avoid being duped by such sites, sending warnings to traders, seeking settlements and taking enforcement action.

At this stage the ACCC has contacted around 40 traders whose websites were identified during the Sweep. The results are very positive; around 60% of the sites containing misleading representations have at this stage been resolved. This includes traders offering consumers full refunds, the removal of entire sites and the amendment or removal of misleading representations.

Two of the sites which the ACCC identified as being 'Too Good to be True' are being acted on. In both cases the traders voluntarily changed their sites, and agreed to offer the Commission enforceable undertakings.

The Commission anticipates that it will work closely with a number of state offices of fair trading in relation to these additional matters.

The most recent figures from the National Office of Information Economy show 10 per cent of Australians now purchase goods on-line, 23 per cent pay bills on-line, and more than a third use the internet for banking.

As consumers grow more confident in conducting transactions over the internet, it's clear much more needs to be done to ensure those consumers are better informed about their rights, and what they can do to protect themselves. This links in with one of the consumer rights promoted by National Consumers' Day – the right to be informed.

So, today, the ACCC is launching a booklet with some good advice on what consumers can do to help protect themselves from scams when using the internet.

The booklet includes advice such as:

- Avoid unsecured websites that insist on personal details or up front payments
- Install software that protects their computer from viruses and unwanted programs, such as internet dialling programs that cause hefty phone bills

- Check that the internet address matches the site and not accessing banking and ticketing sites from email links.

I should stress that in no way is the Commission trying to warn people off using the internet for transactions. The internet can be a safe, convenient and cheap way for consumers to purchase goods and services and a great facilitator of 'the right to chose'.

But it also opens up new avenues for fraud, and as customers become increasingly confident about on-line transactions, they must be better informed about their responsibilities and rights.

Equally, businesses must also be aware of their responsibilities under the Trade Practices Act.

### ***Conclusion***

As I said at the outset, consumer regulation is a never ending struggle.

Thankfully, neither the ACCC, nor the legislation that empowers it, is static.

We are currently in the midst of campaigns to improve on-line trading, ensure competition in broadband internet and ensure everyone involved in misleading or deceptive advertising is held responsible, to name just three.

We are also involved in responding to two separate reports on changes to the Trade Practices Act which will help keep small business competitive and protect them from unfair conduct.

This congress is the first joint effort between a consumer protection regulator (Consumer Affairs Victoria) and the consumer movement and I want to congratulate all those involved in this initiative, and for putting together such a wide ranging program.

The Australian Consumers' Association, Consumer Law Centre Victoria and the Consumers' Federation of Australia are all represented on the ACCC Consumer Consultative Committee, so the ACCC knows first hand the significant contribution that the consumer movement makes to the work of regulators.

It is welcome, however, to have the opportunity to step back from the flurry of the day to day and to discuss a vision for consumers with key stakeholders.

Thank you for that opportunity.