The Treasury / National Office for the Information Economy

"Seals of Assurance" Meeting

From Privacy to Portals: Implications for Seals of Assurance

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E-COMMERCE AND SEALS OF ASSURANCE – POTENTIAL ANTI-COMPETITIVE CONDUCT AND ACCC ENFORCEMENT ACTION

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Introduction

It is a pleasure to be here today to discuss the application of the *Trade Practices Act 1974* to electronic commerce, with a focus on seals of assurance. At the end of my presentation I would be happy to accept questions from you on the issues covered and any other relevant matters you may wish to raise.

By way of background, the Australian Competition and Consumer Commission (the Commission) is an independent statutory authority that administers Australia's competition legislation – the *Trade Practices Act 1974* and the *Prices Surveillance Act 1982*. The Commission also has responsibilities under related legislation.[1] My discussion today will focus on the *Trade Practices Act 1974* ("the Act").

Competition Provisions of the *Trade Practices Act 1974*

The *Trade Practices Act 1974* contains, among other things, provisions dealing with anti-competitive practices. Generally, Part IV of the Act prohibits:

- anti-competitive agreements and exclusionary provisions, including:
  - agreements which have the purpose or effect of substantially lessening competition in the market;
  - "primary boycotts", i.e. agreements between competitors which exclude or limit dealings with a particular party or class;
  - agreements which fix prices;
  - "secondary boycotts" which substantially lessen competition, i.e. actions by two or more people which hinder or prevent another from supplying or acquiring goods or services, or engaging in interstate trade or commerce;

- misuse of market power;

- exclusive dealing (including third line forcing);

- resale price maintenance; and

- mergers which substantially lessen competition.

In some situations, the prohibition is subject to a competition test, e.g. that the conduct has the purpose or effect of substantially lessening competition in the relevant market.

Significantly, the Commission shares its right to take legal action under the Act with the private sector.

Anti-competitive provisions of seals of assurance

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[1] *Airports Act 1996, Australian Postal Corporation Act 1989, Broadcasting Services Act 1922, Gas Pipelines Access (Cth) Act 1998, Moomba –Sydney Pipeline System Sale Act 1994, Telecommunications Act 1997, Trademarks Act 1995*

In developing a seal of assurance, an industry may potentially be in breach of Part IV of the Act if it agrees to a scheme with provisions which have the purpose or effect or likely effect of lessening competition.

There are two types of potential provisions in a seal of assurance scheme that are of concern to the Commission. Firstly, there are those that are inherently anti-competitive. Secondly, there are those which are imprecise or wider in scope than is required. The latter enhance the possibility of specious complaints being brought for anti-competitive purposes.

Seal of assurance schemes which contain provisions that:

- regulate prices or fees;
- regulate some business practices, e.g. advertising;
- prohibit members dealing with industry participants who are not members;
- contain harsh sanctions (e.g. expulsion or suspension), especially if membership of an association or compliance with the seal is necessary to compete in the market;
- provide differential entitlements, obligations or voting rights, allowing potential for the use of combined powers to force anti-competitive outcomes;
- provide for limitations on membership;
- impose high membership fees, representing barriers to entry into the industry; and
- provide for arbitrary or discretionary membership fee setting, representing potential to force anti-competitive outcomes;

may be considered to be anti-competitive.

A seal which contained a provision seeking to exclude service providers who were not members of a particular association, may also raise issues.

Liability for anti-competitive conduct

A party that breaches Part IV of the Act is liable to legal proceedings under the Act by the Commission or another party who suffers damage because of the conduct.
The penalties available in the Federal Court for any breach of Part IV are very severe - up to $10 million per breach for companies and $500,000 for individuals. Injunctions and damages can also be awarded by the Court.

Immunity from liability

The Act does, however, recognise that some objectives of society can not always be met by the operation of a competitive market and, occasionally, certain potentially anti-competitive provisions may be considered necessary for the success of the operation of the seal of assurance scheme.

Therefore, most conduct can be exempted from legal proceedings by the authorisation and notification provisions of the Act.

Authorisation

Authorisation provides protection from action for breach of Part IV of the Act (with the exception of misuse of market power).

Subsection 90(7) provides that the Commission shall grant authorisation only if it is satisfied in all the circumstances that:

- the provisions of the subject arrangement have resulted, or are likely to result, in a benefit to the public; and
- that benefit would outweigh the detriment to the public constituted by any lessening of competition that has resulted, or is likely to result, from the arrangements.

In deciding whether it should grant authorisation, the Commission must examine the anti-competitive aspects of the arrangements and the public detriments arising from the arrangements, and weigh the two to determine which is the greater. Should the public benefits or expected public benefits outweigh the anti-competitive aspects, the Commission may grant authorisation or grant authorisation subject to conditions.

The Commission has the power to put any necessary conditions onto an authorisation and to provide authorisation on an unlimited basis or for a set time period. The Commission can revoke the authorisation if it feels that there has been a material change of circumstances affecting the conduct being authorised or if the information on which the Commission's authorisation decision was made, was misleading.[2]

Decisions made by the Commission in relation to authorisations can be appealed to the Australian Competition Tribunal (the Tribunal).

Notification

Exclusive dealing conduct (other than third line forcing) is given automatic immunity from Part IV when notification is given to the Commission. The immunity remains unless revoked by the Commission on the grounds that the conduct results in a substantial lessening of competition which outweighs any public benefit flowing from it.

Notification of third line forcing attracts immunity after a prescribed period.[3] It cannot be revoked unless the Commission finds that the public benefit from the conduct does not outweigh the public detriment.

Public benefit

The public benefit of the conduct is assessed within the context of the market. The Act requires the Commission to have regard to all the circumstances that relate to the public benefit. Public benefit is not defined by the Act, but left to the discretion of the Commission, and on appeal the Tribunal. Some outcomes that have been recognised as public benefits in the past include:

- fostering business efficiency;
- industry rationalisation;
- expansion or employment;
- promotion of industry cost savings;

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[2] For further information about authorisations and notifications, please see the Commission publication *Guide to authorisations and notifications*.

[3] For third line forcing notifications lodged after 30 June 1996, the prescribed period is 14 days.

- promotion of competition in industry;
- promotion of equitable dealings in the market;
- development of import replacements;
- growth in export markets;
- arrangements which facilitate the smooth transition to deregulation.

Applications for authorisation of seal of assurance provisions could be based on arguments that the potentially anti-competitive provision produces public benefits in that, for example:

- the provision restricts the operation of unethical traders;
- the provision covers such issues as complaint handling, transparency and accountability;
- the seal addresses market problems, for example:
  - information deficiencies, such as:
    - insufficient information on products or prices
    - large disparities in information between buyers and sellers
    - false or misleading product or price information; or
  - high costs, including:
    - costs incurred in negotiating and executing a contract;
    - costs associated with monitoring performance of the contract;
    - costs of enforcing the contract or obtaining a remedy if post sales disputes occur;
    - costs of having to fix defective products;
    - costs incurred by consumers to find out about prices, quality and durability of products before purchase; and
    - cost associated with finding out the number and capacity of suppliers and how the relevant market operates.

In some cases where there is the potential to force anti-competitive outcomes, a provision may be authorised, if certain safeguards are implemented to ensure anti-competitive consequences do not eventuate. For example, a provision prohibiting members from dealing with non-members may in some circumstances be considered to provide the public benefit of ubiquitous coverage of the seal. This provision might be authorised with the proviso that substantial safeguards be implemented so that the provision is not able to be used for an anti-competitive purpose. Similarly, suspension or expulsion provisions may be authorised if they allow for an independent appeal mechanism.

It is important to remember that the granting of authorisation means that a statutory test has been satisfied, not that the Commission endorses the seal of assurance it has been asked to consider.

Public detriment

"Public detriment" also has a wide definition. In Victorian Newsagency[4] the issue of public detriment was characterised as:

[4] *Victorian Newsagency (1994)* ATPR 41-357 at 42,682

> ...any impairment to the community generally, any harm or damage to the aims pursued by the society including as one of its principal elements the achievement of the goal of economic efficiency, in the sense we have adopted.

The Commission makes its assessments of public detriment in similar terms, placing primary emphasis on detriments which affect economic efficiency.

Examples of detriments that may arise from seal of assurance scheme provisions include:

- a reduction in the number of effective competitors;
- restrictions on access, for example to information/ registries;
- creation or increase of barriers to entry;
- constraints on competition by market participants affecting their ability to innovate effectively and conduct their affairs efficiently and independently; and
- negative impacts on those issues listed as public benefits.

Factors that will reduce the public detriment and enhance the benefit of a seal of assurance scheme will include whether the requirements, procedures and administration of the scheme adequately secure and advance the particular public interest which the scheme was required to address (particularly regarding consumers), and whether the scheme is competitively neutral in its scope, requirements, legal structure and administration.

Fundamental features of effective seals of assurance

Based on the Commission's experience with Codes of Conduct, I would suggest that seal of assurance schemes would have to include a number of essential criteria to be effective. These criteria include:

- **Addressing consumer concerns**

  To be effective in addressing consumer concerns a scheme needs to have rules which address common complaints and concerns about industry practices and which set performance standards for participants. Such rules should address specific stated problems and not be written as broad general principles. The scheme should set out in its objectives clearly stated reasons why the scheme was established and what intended outcomes it sets out to achieve.

- **Consultation**

  If schemes are going to be accepted by governments and the public at large, then credibility with these stakeholders is absolutely vital, because only with such credibility will there be public acceptance of the scheme or an industry-based scheme and commitment to it by the appropriate regulators. To have any credibility at all there needs to be consultation with the appropriate consumer/ community/ user groups and appropriate regulatory/ government agencies. It goes without saying that the industry members themselves need to be consulted.

- **Scheme administration**

  Unless there is some body responsible for ensuring the implementation and the ongoing administration of the scheme then its success in delivering fair trading outcomes is severely limited. A scheme administration body needs to be established

and its existence and operations written into the scheme document itself so that it becomes part of the overall scheme.

- **Transparency**

Industry based schemes aimed at delivering fair trading outcomes need to contain appropriate consumer/user representation on the administration committee, and where appropriate, in complaints handling. In some instances, representation by the appropriate regulatory authority on the scheme administration body can serve as a means of the regulatory body putting forward a public interest view. Such representation provides transparency to the scheme by providing a "public window" on its operations which ensures that the industry group will be acting in the broader public interest.

- **Coverage**

The effectiveness of any scheme will only be as good as the amount of coverage the scheme has of the relevant industry for which it is aimed. Where schemes are being used as an alternative to government legislation some form of mandating legislation may be required to ensure industry wide coverage where this can not be achieved by voluntary means.

- **Complaints handling**

The scheme should include provisions to allow for complaints to be lodged and then to be handled by signatories. Performance criteria for effective complaints handling should form part of the scheme. Standards Australia has developed a benchmark type standard for effective complaints handling (AS4269).

- **In house compliance**

The scheme's administration body needs to ensure that each participant has some form of in house compliance system to ensure compliance with the scheme. It can also assist compliance at this level with advice and training. Standards Australia has developed a standard for compliance programs (AS3806).

- **Sanctions for non-compliance**

Commercially significant sanctions will be necessary to achieve credibility with, and thus compliance by participants and also engender consumer confidence in the scheme.

- **Independent review of complaints handling decisions**

The scheme should also provide for a review mechanism where a member of the public or an industry member is dissatisfied with the outcome or the way the complaint was dealt with or the sanctions imposed at first instance.

- **Consumer awareness**

Unless consumers are aware of the scheme and its contents the scheme will be ineffective in achieving its fair trading aims. The scheme provisions themselves should incorporate mechanisms designed to ensure that consumers and other relevant groups are made aware of the terms of the scheme and its complaints handling provisions.

As schemes give consumers some measure of assurance that a trader strives to operate by established standards of conduct, there could be benefit in publishing a list of traders that have adopted a scheme and are deemed to abide by it.

- **Industry awareness**

In many cases a scheme such as a code of conduct fails to operate effectively, not because its principles and procedures are inadequate, but because employees or industry members are either unaware of the scheme or fail to follow it in day to day dealings. A provision in the scheme requiring employees and agents to be instructed in its principles and procedures is therefore essential. This is a task which needs to be overseen by the scheme administration body.

- **Data collection**

Data collection is important, not only from a reporting point of view, but as a valuable source of market information about the origins and causes of complaints, and therefore to enable identification of systemic and recurring problems which need addressing by industry members.

- **Monitoring**

Regular monitoring of schemes for compliance is essential, not only to ensure the desired outcomes, but to ensure that ethical members complying with the scheme are not disadvantaged.

- **Accountability**

Annual reports on the operation of the scheme should be produced by the scheme administration committee, allowing for periodic assessment of the scheme's effectiveness.

- **Review**

A scheme should provide for regular reviews to ensure that the standards incorporated are meeting current community expectations and that the scheme is working effectively.

- **Competitive implications**

Schemes should avoid being written in such a way that they have a negative impact on competition. Where it is considered necessary for the success of the operation of the scheme to include anti-competitive provisions, there needs to be a transparent public benefit justification process.

- **Performance Indicators**

Performance indicators should be developed and implemented as a means of measuring the effectiveness of the scheme's operation. Examples include:

  - a high level of awareness of the scheme amongst participants and consumers;
  - easy accessibility of the scheme to consumers;
  - decreased level of complaints received on issues the scheme is designed to address;

- otherwise meeting the stated objectives of the scheme;
- high visibility and easy accessibility of complaints handling mechanisms, including quick response times; and
- effective in-house scheme compliance mechanisms are in place by participants.

Given the global nature of electronic commerce, I hope that these essential criteria for effective seal of assurance schemes can be prescribed at the international level, for governments to use as a recipe for developing successful seals of assurance schemes. I think there is a role for organisations such as the OECD and ISO in the development of this international statement of schemes criteria.

Government regulation and industry based schemes

While some form of government regulation of industry will always be required, the Commission recognised that industry based regulation schemes have an important role to play in gaining fair trading outcomes for consumers.

Indeed, industry based schemes can offer some advantages over government regulation. These advantages include:

- Developed voluntarily on the initiative of an industry, they can provide a flexible, cost effective approach to problem areas. Market failure problems can be addressed on an industry-wide basis, and so enhance the competitive process. Also, by addressing recurring or structural problems, schemes can establish a form of industry quality control. They offer the flexibility and sensitivity to market circumstance necessary for product innovation, diversification and development.

- They can address industry specific problems and practices and consumer needs and can respond more readily to the dynamics of the market place.

- Members of an industry can feel some ownership over the regulation of that industry.

- Schemes developed by industry in consultation with consumer affairs agencies and consumer/user groups can set agreed quality standards of work which can serve as a bench mark in settling disputes between industry members and consumers. They can provide public access to quick and informal complaints handling and redress mechanisms.

- They can provide a positive guide for ethical traders on agreed best practice benchmarks - going further than outlining minimum legal behaviour. They provide a sector of an industry wishing to gain a competitive advantage with the means to contend that it meets higher standards of fair trading than others in the industry (e.g. the use of "quality trader" logos which can give consumers, particularly those buying through the Internet, some degree of confidence).

- Adherence to a scheme written as a condition of a contract allows for a private

right or action for remedies when there is a breach of the scheme.

ENFORCEMENT ACTION

I would now like to take the opportunity to briefly outline the approach that the Commission follows in its role in enforcing the Act.

The Commission is always keen to ensure that it chooses the right enforcement tool to achieve the Commission's goals and objectives. In making this decision, the Commission will take into account a series of factors, including the following:

- blatant disregard of the law;
- significant public detriment;
- educative or deterrent effect;
- new market issues; and
- the need to test the reach of the Act.

In choosing the appropriate method for enforcing a particular section of the Act, the Commission will also need to take into account the aims of any enforcement action. The sorts of aims that the Commission would normally be concerned about include the following:

- Stop the unlawful conduct;
- Obtain compensation/restitution for the victim;
- Undo the effects of the contravention;
- Deterring/preventing unlawful conduct occurring/being repeated in future; and
- Punishing the wrongdoer.

CONCLUSION

The emerging global marketplace requires a lateral approach to ensure that the enormous potential benefits it has for consumers and businesses alike are not lost. Part of this lateral approach involves recognising that industry based regulation schemes can complement the role of government regulation in electronic commerce.

That said, it is important to also recognise that while industry based regulation schemes such as seals of assurance offer a number of advantages over government regulation, they must also contain a number of essential criteria to be effective, and should be designed so that they do not negatively impact on competition. In the event that a scheme may lessen competition in the relevant market, the Commission has power to authorise the scheme if the public benefits arising from the scheme outweigh any public detriment.

In conclusion, the Commission is generally in favour of self-regulation provided that the regulation scheme is properly and carefully designed and implemented. Seals of assurance provide an opportunity for self-regulation to be meaningfully introduced in the area of electronic commerce and we welcome this development.

APPENDIX

Mr Malcolm Crompton, Federal Privacy Commissioner, will discuss the TRUSTe privacy seal matter in his presentation. The case study below provides an outline of the matter.

Case study - TRUSTe

There has recently been criticism in the US of a privacy seal program.

TRUSTe, the industry-backed privacy seal program was recently criticised over an affair involving the information-collection practices of RealNetworks, a company carrying the TRUSTe seal. RealNetworks admitted that one of its programs permitted the company to surreptitiously monitor and gather data in regard to consumers' music listening habits. TRUSTe maintained that RealNetworks did not breach the strict terms of its contract. Embarrassed, TRUSTe has nevertheless announced that it will expand its program to include software (not just websites). RealNetworks, meanwhile, has been slapped with a $500 million class action filed Monday, Nov. 8, by an enterprising California lawyer for breaches of that state's fair business practices laws.

TRUSTe-affiliated companies are required to operate their websites on a few basic personal information gathering principles: posting of privacy policies, notice and disclosure of practices; consumer choice; ensuring data security; offering opportunities to change incorrect information. TRUSTe is an industry-funded organisation.