Australian Competition and Consumer Commission

Promoting Competition and Fair Trading

Speech to the Queensland Press Forum
24 October 2003

The ACCC & the media: our role and function

Graeme Samuel, Chairman

INTRODUCTION

Today I would like to talk about the role of the Commission and the rationale that underpins our work.

Over the past couple of weeks the Commission has made decisions about Telstra and Foxtel refining the terms of access to Pay TV services, initiated investigations into cartel conduct in the shipping industry; we have been successful in the Federal Court declaring that television and in-branch advertising by the Commonwealth Bank for one of its home loan campaigns misled consumers. The Commission has made submissions to the Senate Committee on Small Business and the Productivity Commission on the national gas access regime, and we have taken action against Mr Henry Kaye and National Investment Institute Pty Ltd over alleged misleading and deceptive conduct over the promotion of a "millionaires" property investment strategy. Mr Kaye has undertaken not to continue radio and print advertisements and internet advertising until at least such time as the matter is settled.

We are also monitoring other practises in the real estate industry "dummy" bidding, two-tiered marketing and possible unconscionable conduct. Since the announcement of our interest our Infocentre has received many complaints alleging dubious practices in the real estate industry.

The public focus on the Commission's activities, by the media, the business community and with everyday consumers is constant and intense.

There is no transaction entered into between business and business or between business and consumers that is not in some way impacted upon

by the *Trade Practices Act 1974* (the Act) and as a consequence potentially subject to scrutiny by the Commission.

The public interest was perhaps starkly brought home to me when a Sydney hotel doorman said to me, "Mr Samuel, we look to you to take care of us – to protect our interests".

The responsibilities associated with the role of the Commission and the expectation of Australia's 20 million consumers as to the manner in which the Commission will fulfil those responsibilities weighs heavily upon the Commission and in particular its public face, the Chairman.

These 20 million consumers benefit from decisions we make in a number of different sectors of the economy. Areas where the Commission's decisions have impacted include: telecommunications charges; the prices of books and CDs; whether Qantas and Air New Zealand can share markets; allowing primary producers to negotiate collectively; the safety of consumer goods from cots to vintage gas masks. We influence the price of stamps and keep the insurance industry on its toes. Even our decisions regarding utilities, for example in the gas and electricity sectors influence how much consumers will pay for these essential services.

We influence the way business conducts itself through voluntary codes of conduct and through the enforcement of the law about consumer protection and anti competitive behaviour.

Now, it probably will come as a relief when I say that I'm not going to tackle all those topics in any detail today. However, I do want to emphasise the important role of the Commission and the clear public benefits that arise from the enforcement of competition and consumer law.

The Commission is a highly visible regulator and law enforcer – a protector of consumer interests and rights.

The Commission's responsibilities are defined under the Act and the Commission will discharge these responsibilities in a manner that is appropriately robust and loud.

There is an overwhelming focus on the Chairman, and although many sections of the media have a propensity to personalise institutions by reference to the Chairman or Chief Executive, I will continue to assert to anyone who is prepared to listen that while the Chairman is the face of the Commission all decisions are made by all of the Commissioners acting collectively and in almost all instances by consensus. The ultimate direction taken by the Commission on any issue will depend on the intellectual rigour of the views expressed by staff and debated by all Commissioners, not dictated by any single Commissioner, including the Chairman.

PUBLICITY AND THE MEDIA

One of the important tasks the Commission has is to inform the public of the activities of the Commission itself.

There is a clear public benefit generated by the broadcasting of Commission activities and initiatives.

This was the clear intent of Parliament which, in section 28 of the Act, directs that the Commission make available to persons in trade or commerce and other interested persons information about the operation of the Act and matters concerning the rights and interests of consumers.

In providing such information, the Commission accounts for its actions to the Australian public. As is proper, the community has a right to be informed of, and to assess and judge, the work and decisions of the Commission.

The Commission will continue to use the media, to use the public forum, to keep consumers informed of their rights and businesses informed of their responsibilities, under the Act.

Having said that, I also want to reassure those dealing with the Commission that we will respect the appropriate requirements of confidentiality in those dealings – we must not allow the media's not-unexpected insatiable thirst for information as to our dealings, to undermine the vital community respect for the integrity of our processes.

I believe the media can be used to bring about behavioural change on the part of business, in ensuring that they understand what their responsibilities are as well as to reinforce their obligation to behave in a proper, lawful manner in pursuing vigorous competition. Changes in the behaviour of real estate agents were prompted by the Commission's recent warnings about dummy bidding.

Of course, publicity attending an adverse judgment of say, pricing fixing or unconscionable conduct, can lower a firm's standing and reduce sales. This is of concern to the companies involved, and, sometimes, a matter of complaint.

I acknowledge this.

A good reputation is highly prized by businesses. Those planning unlawful anti-competitive conduct or unlawful behaviour that would breach the fair trading provisions of the Act put at risk a valuable asset.

That said, there is an important balance to be struck.

The Commission is not cavalier in its treatment of individuals or

corporations about whom we allege wrongdoing – not in public, and not in private.

Having said that, we will make comment to the media and issue press releases; Commissioners and staff will give speeches like this; we will issue discussion papers; we will publish technical papers and make available details of our technical modelling and we will continue to operate an internet site to provide the Australian community with detailed and comprehensive information about the operation of the Act.

However clearly we think we speak, we must always be aware that media messages cannot be controlled which may lead to possible misunderstanding.

I am acutely aware that perceptions must not become the overwhelming driver of the Commission's activity. The proper driver should be to achieve outcomes required under the Act.

The Commission will continue to be circumspect where rights and reputations might be improperly adversely affected. Announcements of the institution of legal proceedings will be factual and balanced.

The Commission will not discuss cases whilst it is carrying out the investigation or going through court process. This will be facilitated if those the subject of our proceedings also refrain from commenting to the media other than in a factual way.

The Commission has, of course, long-standing expertise in both the theory and administrative practice of competition law, which we will continue to articulate in public.

From my experience, I believe the best approach to take is not to debate public policy in a public forum. The Commission will continue to work with Governments and with Parliament through appropriate Parliamentary Committees to establish and modify where appropriate the legislative framework in which we operate.

That framework has to be set by Parliament, and it is our role as a regulator to provide independent, rigorous advice to Government and to the Parliament as to the settings of that legislative framework – its effectiveness and its failings.

We must leave it to Parliament to determine whether those settings are adequate or whether and how they should be modified. And in that context, it is up to Parliament to determine whether it has regard to the advice that we have provided.

POLITICAL PRESSURES

Like our fellow commonwealth regulatory agencies, the Australian Securities and Investment Commission (ASIC) and the Australian Prudential Regulation Authority (APRA), the Commission is an independent statutory body.

It is objective, rigorous and transparent.

We are accountable to the Australian community, not to any single government or interest group whether they represent small or big business, consumers, the environment, or whatever.

The Commission cannot succumb to political pressure to deal with issues or to deal with a particular issue in a particular manner.

COMPLIANCE

Striking the right balance between enforcement and compliance is a crucial task.

The Commission would much prefer to see the Act complied with. Compliance is much preferred to chasing unlawful conduct with remedies and court action.

Necessarily, in responding to unlawful behaviour by seeking remedies we are forced to adopt a second-best approach. Despite the Commission's best endeavours, and those of the courts, there will be individuals, and perhaps society at large, who are made worse off by the unlawful conduct of others – even if the conduct was stopped and penalties have been obtained.

That said, where the Commission believes that the Act has been breached in a serious way, we will not hesitate to take enforcement action. This, of course, encourages compliance in that, if individuals and companies believe that the Commission will take action if a breach of the Act has occurred, they are more likely to behave in a manner consistent with law.

Compliance is not so much a tick-a-box approach as it is a culture, often starting with the CEO/Board of Directors. Some CEOs view compliance and a strong collaborative working relationship with the Commission as an essential part of normal business practice.

I am encouraging the Commission's staff to recognise strong and effective compliance cultures in businesses.

There are other CEOs who have developed a confrontational style focussing

on media tirades against the Commission. Whilst those public tirades may superficially establish the CEO as the "defender" or "hero" of the organisation, they tend to breed a culture of confrontation and non-compliance.

I would like to point out they do not influence one way or another the Commission's approach to enforcing the Act.

I am spending some time talking to some of the more recalcitrant CEOs to try and explain and emphasise that the organisational culture in a business must be attuned to compliance.

ENFORCEMENT

The Commission is not so naïve as to believe that compliance is regarded by business as an altruistic nicety to be pursued in the public interest. For the reality is that regulation exists to deal with misconduct and its strength flows directly from the effectiveness of its enforcement regime. Where the Commission believes that the Act has been breached in a serious way, we will not hesitate to take enforcement action.

Enforcement is the 'sharp point' of the Commission's compliance approach.

There are two very effective tools of enforcement which I would like to discuss in more detail.

Leniency Policy

The Commission's leniency policy encourages corporations and their executives to reveal the most serious contraventions of competition law such as price-fixing, bid-rigging and market sharing.

It was prepared with reference to leniency policies that have been successfully used to break cartels in other jurisdictions such as the UK, the US, Canada and the European Commission. Even though the policy was only introduced in June this year we already have companies and their executives that have contacted the Commission, in the context of the policy, providing valuable information concerning cartel activity.

The Australian 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, transparent and certain offer of leniency.

The catch is that the policy only applies to the first cooperative company or executive to come forward. The others will be exposed, investigated and if the evidence permits, brought before the Courts.

The leniency policy is particularly directed at large corporations and their directors, officers and employees that have engaged in serious clandestine hard core cartel conduct affecting significant Australian markets.

However, smaller businesses or individuals that may have been involved in less serious cartel type conduct are also encouraged to take advantage of the leniency policy.

Hard core cartels constitute the very worst violations of competition law. They hurt consumers and businesses by artificially inflating the price of goods and services. They damage the capacity of businesses to compete effectively in international markets, by reducing the competitiveness of Australian industries.

Importantly, the leniency policy will only apply to the existing regime under the Act that gives rise to civil penalties. If criminal penalties are introduced for certain offences, the leniency policy will need to be re-examined to determine its appropriateness, with or without modification, to criminal regimes.

Criminal Sanctions

The Treasurer recently announced the formation of a committee to consider whether criminal sanctions for serious, or hard-core, cartel behaviour should be introduced. This would include fines against any convicted corporation and imprisonment and fines, as appropriate, for implicated individuals.

The Commission views cartel behaviour as an extremely serious offence. It exists as a silent extortion.

Tax cheats who defraud the Commonwealth of revenue may be subject to criminal liability depending upon the seriousness of their offence. Similarly, pensioners who defraud the Commonwealth's system of social security may be and are sent to jail.

Why should executives who deliberately enter secretive cartel arrangements to defraud their customers, or consumers generally, be treated any differently.

Aside from important considerations of equity in the law, criminal liability, including jail, provides a deterrence not achievable under a civil regime.

I believe that there is nothing so effective at focusing the mind of an executive that the possibility that their conduct will land them in gaol.

At the Commission's 2002 Enforcement Conference Jim Griffin, the Deputy Assistant Attorney General of the US Department of Justice Anti-trust Division said

First, in 25 years experience of prosecuting individuals engaged in cartels he had listened to many accused say they would gladly pay a higher fine to avoid imprisonment but he had never once heard anyone offer to spend a few extra days in goal in exchange for a lower fine recommendation.

Secondly, he told of a senior executive, who was committed to compliance with anti-trust laws, 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."

COMPETITION AND CONSUMER PROTECTION PROVISIONS

As we are all aware, the purpose of competition policy and competition law is to promote and protect competition in the interests of consumers. Competition law is not about preserving competitors or protecting certain sectors of business from the rigours of competition.

What is not clearly understood is that businesses that are able and motivated to take advantage of the competitive environment through innovation, improved efficiencies, keen pricing, quality service standards and other forms of vigorous competition will thrive. But businesses that are unable or unwilling to respond to the challenges of competition will languish and may ultimately fail.

It may be the case that to promote and nurture competition in a market, it is necessary to intervene to protect competitors or a class of competitors in that market from substantial damage or indeed elimination as a result of a course of behaviour by another competitor. However, as noted, where this is done it should be in the interests of furthering competition.

The difficult task for governments and competition policy regulators is to strike the balance – to distinguish between vigorous but lawful conduct that is likely to lead to significant benefits for consumers, and unlawful anti-competitive behaviour which may disadvantage consumers.

SECTION 46 – MISUSE OF MARKET POWER

This brings me to one of the most hotly debated provisions of the Act - section 46 which deals with misuse of market power.

Broadly, the objective of section 46 is to protect the competitive process by preventing firms with substantial market power from engaging in illegitimate, unilateral, anti-competitive conduct. As such, small businesses are assured a measure of protection from the predatory actions of powerful competitors.

In our submission to the Senate Economics Committee, we noted that case law has provided increasing clarity to the operation of section 46. However, several recent judicial decisions, particularly the *Boral* appeal in the High Court, have raised issues as to the application and operation of section 46.

It appears that section 46, as drafted and as interpreted by the courts, does not appropriately implement the stated policy intentions of Parliament. There is not sufficient time to cite the fine detail of our arguments here, so I will just stand one example up for inspection – the issue of when a firm has a substantial degree of market power.

In 1986, the Parliament amended section 46 to lower the bar for the section from "substantial control" to "a substantial degree of market power". We believe that the High Court in its recent Boral decision has said that the current drafting of section 46 does not reflect this policy intention of the Parliament. The policy intention behind section 46 should be given effect by amending the provision to clarify the following principles:

- the threshold of 'a substantial degree of power in a market' is lower than the former threshold of substantial control
- the substantial market power threshold does not require a corporation to have an *absolute* freedom from constraint – it is sufficient if the corporation is not constrained to a *significant* extent by competitors or suppliers
- more than one corporation can have a substantial degree of power in a market, and
- evidence of a corporation's behaviour in the market is relevant to a determination of substantial market power.

As well as misuse of market power, the Commission has suggested that other desirable modifications to section 46 be considered. The main changes include:

- the clarification of the 'take advantage' element of the provision
- in cases of predatory pricing, an amendment that a finding of recoupment not be required to establish a contravention, and
- clarification of whether or not section 46 applies to any use of market power with a proscribed purpose, irrespective of where the conduct occurs.

You will find the reasoning that supports these brief conclusions in our submission to the Senate Committee.

CONCLUSION

How then do I see the Commission going about its business in the years ahead?

I want the Commission to be a highly effective, visible regulator. I want it to maintain acceptance throughout Australian governments, business and the Australian community of the vital importance of a vigorous, honest and competitive environment.

I want us to be an uncompromising enforcer of the law.

I want the Commission to expose, prosecute and break up hard-core cartel activity and bring about acceptance by business that such activity can and will be detected, prosecuted and result in severe and hopefully criminal penalties.

And on a personal note to have that doorman at that Sydney hotel say to me as I leave "Mr Samuel, you have looked after the interests of my family."