**Protection for Whistleblowers**

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**Introduction**
I am delighted to have this opportunity to speak to you today. It’s a very great pleasure to be here in Darwin, and I hope I can offer you some insights into how we do what we do at the ACCC, how we can work with you, and also touch upon some major issues currently before us.

A vibrant modern economy is important to all of us. The Northern Territory Expo plays a major role in developing business, trade and investment within the Northern Territory and Australia generally, and with the Asian trading regions to our North. I’m aware that over 30,000 people visited the expo last year making it a very significant occasion – so I’m quite pleased that I’m able to attend for the first time.

Before starting in on the substance of my talk, I must first mention money! As you will have seen in the media, the ACCC has received a substantial increase in the recent Federal Budget. I take this as a clear signal that support for strong consumer protection and vigilant competition law enforcement is undiminished. I would also note that the Opposition have indicated support for budget increases for the ACCC. The additional funding is both for agency activities - $53.1M over four years with a significant bulk of that directed toward litigation – and $23.9 M in capital funding primarily to cover the recent deficits, to restore the Litigation Contingency Fund, and for the establishment of the Australian Energy Regulator.

**Role and Responsibilities of the ACCC**

Moving on to the role of the ACCC and how we work with businesses and consumers, I decided to look back, for this presentation, at the last year of media from the Commission that had to do with the Northern Territory. There have been a range of media releases on issues as diverse as our co-ordination of the global Internet Sweep, the payment of $385,000 to alcohol prevention programs in Nhulunbuy as an outcome of the Court proceedings against Woolworths, the Arnhem Club and Rhonwood Pty Ltd for price fixing of alcohol products, a $25,000 penalty ordered against a company official for resale price maintenance, and a Court enforceable Undertaking from Perkins shipping regarding access to the wharf in Nhulunbuy. The range of work is very broad and that is not surprising given that the objective of the Trade Practices Act is also very broad and the ACCC is an economy-wide regulator.

Most people may not realise that the ACCC is somewhat unique as a regulatory body, in part because we have responsibility for regulating aspects of the former government monopolies in electricity, gas and telecommunications, but significantly because we operate on both sides of the market – in consumer protection law as well as competition law. Many countries separate these functions, but in Australia we see
the roles as integrated, and those of you familiar with my views will be aware that I see the competition and consumer protection laws as two sides of the same coin.

Promoting fair and vigorous competition is just as much about protecting consumers as it is about ensuring business gets a fair go, and vice versa.

To take a simple deceptive conduct example, Con, one of the local greengrocers puts up a sign saying "top quality vine ripened tomatoes - $1.50/kg. Frank, his competitor across the road, knows that the wholesale price of the top grade vine-ripened tomatoes at the markets that morning was $2.50/kg. He checks out Con’s tomatoes and realises they’re low grade rejects, not vine ripened, and Con is making a motza.

This illustrates the intimate connections between consumer protection law and competition law. If one business is able to get away with false or misleading representations then it could gain an unfair advantage over its competitors - Frank loses, because the deception prevented him from competing fairly for the sale. And 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 – and as a result, they cannot drive competition appropriately. Both competition and consumers are harmed as a result of this type of dishonest behaviour.

**Enforcement**

Let me now turn to the most visible activity of the ACCC, its enforcement role. It is the aim of the Commission that all businesses comply with the Trade Practices Act.

Contrary to what some people believe, litigation is not something we proceed to instigate without a great deal of careful consideration; it is not something we do lightly.

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 sending out a brochure or letter or making a quick telephone call.

Just 634, or 1.2% of complaints, were escalated to investigation. Of these, 262 went to serious investigation and only 39 of the complaints received last financial year proceeded to litigation. These figures are not atypical of past years as well.

Despite launching those 39 court actions, I think all of us would agree that it is far preferable for business to comply with the Trade Practices Act in the first place, instead of us trying to undo the damage later.

This is why we put so much effort into education, advice and persuasion. And it’s one of the reasons why we make no apology for using the media to highlight our successes, publicise our campaigns, keep consumers informed of their rights, and businesses informed of their responsibilities under the Act.

Such publicity helps to ensure that the actions we take are more transparent, making us accountable for our actions, not just to parliament and ministers, but to the public.
In general, we issue a press release for every substantive decision made, no matter how esoteric the subject matter. Many of you will also have noticed that the Commission is now giving reasons in relation to merger refusals.

But highlighting the ACCC’s work through the media can also play a crucial role in achieving behavioural change – discouraging behaviour which may harm both consumers and business.

A good example of this is the real estate market where it had become evident that booming property prices had encouraged a range of misleading and deceptive practices, including dummy bidding driving up prices at auctions and dubious property investment seminars and schemes.

Last year, the ACCC announced that allegations of misleading and deceptive behaviour in the property industry would be a priority. That created a lot of media interest. The publicity, coupled with enforcement activity, has produced a marked change in behaviour by sections of the property industry. As well, many states and territories have outlawed the practice of dummy bidding and consumers have also become much more aware and wary of dubious real estate practices.

Apart from the media, the ACCC also distributes around 800,000 copies of its publications each year, many of them targeted directly at specific industries. And the internet site, a source of information on virtually every aspect of the ACCC’s activities, is also actively used by consumers and business.

But all this education and advice is of little value if there is no compliance culture within business; this can be because the business has no intention of complying with the Act in the first place – executives are taking the risk because the financial numbers appear to make it worthwhile or they feel that they’re unlikely to be caught - or because of a fundamental failure in the compliance systems of the business.

The nature of compliance systems and whether the firm has a compliance culture is one of the factors we take into account when deciding whether to launch legal action. A pattern of non-compliance, for example, indicates that a company either is deliberately ignoring its obligations under the Trade Practices Act, or has systems failures that are not being remedied.

One of the questions I’m frequently asked is “What actually gets pursued? Which matters warrant significant intervention or a court-based outcome?”

The kinds of things that influence the Commission – and by Commission in this instance, I mean the current seven members sitting as the Commission – in its decision making when potentially unlawful conduct is detected and investigated includes:

- whether the conduct involves a blatant disregard of the law
- whether the person, business or industry has a history of previous contraventions of competition or consumer laws
- the detriment caused or being caused by the conduct and avenues available to redress that detriment
- whether the conduct is of major public interest or concern
• whether the conduct is “industry wide” (as in the example of real estate practices mentioned above) or is likely to become widespread if the ACCC doesn’t intervene
• the potential for action to have worthwhile educative and deterrent effect.

Apart from these kinds of factors, that influence a decision on how we might choose to proceed, the ACCC also has sectoral or behavioural priorities. Current examples of these are:

• real estate which has already been mentioned
• the media role in the publishing of misleading and deceptive claims which I’ll talk a bit more about in a moment;
• e-commerce – scams and email fraud for example, as well as disclaimers in relation to consumer rights under the Act, and I’ll come back to this issue.
• price advertising – for example failures to disclose full prices, or “was-now” advertising when the product was never at the “was price”.
• vulnerable and disadvantaged consumers – a campaign priority agreed with our Consumer Consultative Committee. Our advice was that there was a need to focus more strategically on the behaviour of some firms towards, for example, indigenous consumers, consumers from non-English speaking backgrounds, people with disabilities – whether intellectual or physical, elderly people, those with serious illness in a family who can fall prey to promises of amazing cures, and so on – essentially, a consumer who can be taken advantage of more easily. There is a strong history in the Darwin office of taking on issues affecting vulnerable and disadvantaged consumers and, given the makeup of the NT population, this is likely to continue.
• cartel conduct – including price fixing, bid rigging and market sharing, about which I’ll talk more in a moment and the relationship to our leniency policy.

When enforcement is required, our policy is to try and achieve results which avoid or minimise consumer harm in the longer term, and which bring about restitution to consumers where possible.

As you might expect from the ratio of numbers of complaints to actual court cases, a company that finds itself facing ACCC court action can expect tough, unrelenting proceedings designed to bring about the right result for Australian consumers.

But, often, we find that simply signalling that we are prepared to launch proceedings is enough to bring about a quick result without the need to actually go to court. If a matter can be corrected quickly, reflecting the fact that there is a compliance culture within an organisation, court action may prove to be unnecessary.

So, companies faced with substantiated Commission allegations have two choices. One is to recognise that there is a problem, sit down and try to sort the problem out; the other is to deny the complaint and fight the Commission down the line. While this may not be our image, companies that approach the ACCC to say “we’ve got a problem and we’d like to fix the problem” will find us very receptive I assure you.

Let me now focus on three of our key priorities – media involvement in misleading and deceptive conduct, our recent work on online or e-commerce trading sites, and cartel behaviour.
Print and electronic media outlets
As I’ve noted, a current area of concern for the Commission is misleading or deceptive advertising in the media.

It’s accepted by the courts, and I’m sure everyone here, that the Trade Practices Act and various state laws require businesses to be truthful when advertising their goods and services.

The ACCC believes that duty of care should extend to those who make, publish or broadcast those ads.

In short, it is our very strong view that advertising agencies and media outlets have a responsibility to ensure that they too do not engage in misleading or deceptive conduct in advertising and promotions prepared and/or 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, and
• 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 the program’s website.

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

In the past, publishers and broadcasters argued that the “publisher’s defence” would enable them to avoid prosecution under Section 52 of the Act relating to misleading and deceptive conduct. More explicitly, the defence includes that they “did not know and had no reason to suspect” that publication would amount to a contravention of the Trade Practices Act and that the ad was “received” in the normal course of business.

Given the increasingly blurred lines between information and advertising, it is the ACCC’s view that publishers and broadcasters will find it increasingly harder to use the publisher’s defence, especially in case such as, for example,

(a) the advertising claims appear on their face to be extravagant, particularly if they relate to weight loss, exercise and miracle cures.
(b) the representations appear to be clearly contrary to generally known facts.
(c) the publisher may be aware of concerns about 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 not be factual.

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 be successful.

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 will take all reasonable efforts to maintain a high level of compliance with the Trade Practices Act.

The media campaign is one which touches both businesses and consumers directly since it relates to misleading and deceptive conduct.

E-Commerce and Online Trading

Let me know turn to e-commerce issues. The Internet has become prime territory for scammers around the globe and I am aware just how important the internet is in more remote regions for enabling businesses and consumers to access the global market place. I mentioned the global Internet Sweep, which the ACCC co-ordinates: in February, 24 enforcement agencies from around the world got online for three days, all at the same time, to sweep the internet for shonky traders. Globally, a record 1847 suspicious sites were flagged by the Sweep. There are truly outrageous claims out there and no lack of preying on people – claims for example for cures for serious illnesses, extravagant assertions of income-earning potential in work from home scheme, get-rich quick plans and so on. In Australia, as a result of the Sweep, more than 30 traders either took down or amended their sites. The message to consumers at the moment has to be: “be careful when shopping online”.

Today, I am pleased to launch another major campaign of the ACCC’s. Shopping Online is a survey of the top 1000 consumer websites in Australia. Of these, about a third are transactional websites – they are doing business online. In looking in detail at these sites, we found that over 50% of the sites that contained online terms and conditions tried to disclaim responsibility for the accuracy of their information, about half have disclaimers of warranties and two-thirds have limitation of liability clauses. Some of these clauses are not unlawful – though they fall short of best practice – but some clauses, for example the disclaimer of statutory warranties, are unlawful.

So, let me give a clear warning to online traders – there are four key points here:

1. Certain rights are implied into ALL consumer contracts and these statutory conditions and warranties cannot be excluded. Implying that these rights are excluded may mislead consumers and risks breaching s.53(g) and s.52 of the Trade Practices Act.

2. Companies have a duty to ensure that any material posted on their website is correct.
3. Warranties of merchantability and fitness for purpose cannot be excluded.

4. Liability cannot be unconditionally limited.

The publishing of the results of this survey are an indication that the ACCC is examining online businesses and where we find a breach of the Act, it does not matter whether the business operates from the high street, electronically, or in a mall. The law doesn’t change depending on the way in which a business offers its products or services. So any of you that operate a business that also includes an online component selling to consumers, go back after today and have a very close look at your website, because we are looking at it right now.

Let me now turn to cartels and protection for whistleblower.

**Cartels and Leniency**
For some time, as you are probably aware, the ACCC has been taking a keen interest in cartels.

At the present time we have about 35 suspected cartels under investigation, ranging from sophisticated international operations, to very small scale local agreements to fix prices.

We are being enormously assisted in this by the Leniency Policy introduced last year. Under the Leniency Policy, the offer is this: report cartel conduct such as price fixing, bid rigging and market sharing to the Commission in return for a clear, transparent and certain offer of leniency. The policy, however, applies only to the first company or executive to come forward and cooperate with the Commission. Nor will such leniency apply, as it should not, to people who were instigators – those who coerced others to participate in a cartel or were clearly the cartel leader.

To complement the ACCC Leniency Policy for cartel conduct, the ACCC continues to have the ACCC Co-operation Policy for enforcement Matters. As a general principle, persons who wish to co-operate with the Commission will be given priority in the order that they come forward. The first co-operative person will receive the most lenient treatment, the second applicant the second-most lenient treatment, and so on.

A NT example of the use of this policy was a case against car rental companies and individuals in Alice Springs alleging that they had an understanding not to discount rentals to Uluru and return. One of the Companies allegedly involved was not joined to the proceedings due to their co-operation and one of the individuals received no pecuniary penalty as a result of co-operation with the ACCC. The remaining respondents paid total penalties of $1.5 M including a record individual penalty of $150,000.

Basically, the leniency policy encourages corporations and their executives to turn whistleblower before someone else does or before the ACCC discovers the anti-competitive conduct through other means.
We are still quite new in working with this Leniency Policy though other jurisdictions overseas have had the availability of such a policy for such time. Let me relate to you one of our first major experiences with our Leniency Policy.

In December 2003, a penalty judgment was handed down by the Federal Court in a case instituted by the Commission. $3.5 million in penalties were imposed by the Court against a New South Wales fire protection company for industry price fixing, market sharing and misleading or deceptive conduct in making various ‘cover price’ arrangements with competitors on fire protection tenders. These arrangements contravened section 45 of the TPA.

The investigation of this case began as a result of one of the companies involved in the arrangement discovering through its trade practices compliance and training program that the conduct had occurred. The company approached the Commission with the information. By doing this, the company was able to apply to take advantage of the leniency policy which encourages disclosure of collusive cartel conduct, as I’ve mentioned, on a ‘first in best dressed’ basis.

Justice Wilcox, in his Reasons for Judgement in the fire protection case had this to say about the Commission’s policy of leniency (though I would note that the leniency, in that matter, began under the co-operation policy).

“Through its solicitors, Tyco alerted ACCC to the fact of the contravening conduct. Tyco, and its relevant executives, agreed to provide evidence to ACCC in return for a leniency agreement under which ACCC agreed not to seek the imposition of a penalty upon any of them.

No doubt it was appropriate for ACCC to offer leniency; without such an offer, ACCC may not have been able to prove the collusive conduct. It is another matter whether ACCC should have gone so far as totally to abjure any penalty application. However, that is not for me to determine. It is sufficient to say that, because of the existence of the leniency agreement, there can be no valid argument for parity in outcome as between Tyco and FFE. If this approach leads to a perception amongst colluders that it may be wise to engage in a race to ACCC’s confessional, that may not be a bad thing.”

(par 29. 30)

This brings us to what penalties should apply for those convicted of such behaviour.

Under s.76 of the Act, a business may be faced with pecuniary penalties of $10 million and $500,000 for executives. These may seem high, but the Federal Government introduced a bill yesterday that will increase these penalties. When it passes, companies could face penalties of $10 million, 3 times the value of the benefit of the anti-competitive conduct, or where the value cannot be determined, 10 per cent of the annual turnover of the body corporate and all its related bodies – whichever is greater. That is because a company can potentially gain tens of millions of dollars by participating in such a cartel.

The ACCC has also publicly put the view that executives planning cartels will take an entirely different view of the cost/benefit analysis if they find themselves facing not
just monetary penalties, which might ultimately be covered by their shareholders or customers, but several years behind bars.

We are not alone in this thinking, and the Dawson Committee recommended the introduction of criminal sanctions for serious, or hard-core, cartel behaviour, after looking at the overseas experience. 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 differently?

Aside from important considerations of equity in the law, simply put, a possible stint in jail, clarifies the mind marvellously well. Jim Griffin, the Deputy Assistant Attorney General of the US Department of Justice Anti-trust Division, last year told Commission staff that in his 25 years prosecuting cartels he had listened to many accused say they were happy to agree to much higher fines to avoid imprisonment; but he had never once heard anyone offer to spend extra days in jail in exchange for a lower fine recommendation.

Some of the cartels that we are looking at operate across borders. That of course makes it difficult to enforce Australian court orders for breaches of trade practices law if those responsible for the cartels are overseas residents. We are enhancing our relationship with overseas regulators in a range of enforcement areas including cartel conduct.

Close
In closing, I would like to touch on the last couple of items in the list of issues which I know are of interest to you.

On the issue of section 46 – the misuse of market power - small business has been calling for greater protection against the predatory policies of big businesses and this has been a vibrant debate over the past year or so, including a Senate Economics Reference Committee inquiry into whether the Act adequately protects small businesses from anti-competitive or unfair conduct.

Section 46 is an essential pillar of the Trade Practices Act. It is about protecting the process of normal competition and dealing with situations where a business with substantial market power uses that power to harm a competitor – often a smaller business - and thereby harms competition and ultimately consumers. There is a need to distinguish between vigorous competitive conduct and anti-competitive behaviour that breaches the law. The Commission certainly agrees that vigorous competitive conduct benefits consumers while anti-competitive behaviour harms competition and in the short to long-term will bring harm to the public. The difficult question at the heart of s 46 is when does vigorous competition end and anti-competitive behaviour begin.

Following the Rural Press and Boral High Court decisions and recent decisions of the Full Federal Court, the Commission formed the view that there was an urgent need for clarification of s 46 to give guidance to the courts and certainty to the business community.
Principally, we recommended that section 46 should be amended to clarify that the threshold of ‘a substantial degree of market power’ is lower than the former threshold of substantial control, that ‘substantial market power’ does not mean that a business is absolutely free from constraint and that evidence of a company’s behaviour is relevant to determining substantial market power. Additionally, the Commission argued that the concept of ‘taking advantage’ in regard to market power needed clarification as the Court decisions have created uncertainty and that the law should make it clear that section 46 applies to any use of substantial market power with a proscribed purpose, irrespective of whether the conduct takes place in the same market where the power exists. We also made suggestions for improving aspects of the protections for small business in relation to unconscionable behaviour by big business.

Yesterday, the announcement from the Federal Government indicates that clarification of a number of these issues will take place and that it would accept the recommendations to enhance the operation of s51AC of the Trade Practices Act, the unconscionability provisions. The collective negotiation process for small business will also be changed and made easier to access.

In a situation where there are quite major changes contemplated to the key economic act of a nation, the Trade Practices Act, it’s fair to say that many businesses are keen for the uncertainty to be reduced, for decisions to be made and for the changes in the laws to be put through so that we can all get familiar with them and modify our practices in relation to them. But it’s also fair to say that for the vast majority of businesses, complying with the law and their obligations under it, will mean little change at all.

I hope I’ve given you some insight into the ACCC and its operations. It’s been a pleasure joining you today and I look forward to continuing to work with you into the future.

Thank you.