Developments in Consumer Protection & Competition

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Delighted to be here.

As a competition and consumer protection regulator, my background is a bit unusual in that my graduate work was done in public policy and I am neither an economist nor a lawyer – as are just about all the staff of the Commission.

Given that my appointment is to the Commissioner position under section 7(4) of the Act which requires that "At least one of the members of the Commission must be a person who has knowledge of, or experience in, consumer protection." I generally spend most of my time with the lawyers of course.

A key change in our societies over the past 40 years, a trend which has accelerated particularly in the last 20 years, has been the extent to which our culture has viewed the market as being a centrally important feature of their societies.

There's a new emphasis on getting the settings right to enable the market to work (which often involves getting government out of the equation at least in theory), of having the market deliver products and in particular services that in the past were very much in the domain of public provision, and of enabling trade by reducing nation-state protectionist barriers of all kinds. All of these changes are in the interests of a more productive efficient economy – and as some of the statistics produced for the Productivity Commission Review of National Competition Policy attest, these strategies have been a very important in outcomes for our standards of living.

The acceleration of this manner of organising our societies was much enhanced by a combination of events; the liberalisation of trade accompanied by the deregulation of financial markets (which occurred in the developed economies globally), coupled with two key technological developments - the new instantaneous communications technologies and the phenomenal growth of available computing power. This left capital truly free to seek the highest global return, and that truly changed the world and made markets that much more important.

An underpinning principle of a market economy is competition.

In 1974, the Trade Practices Act was a new law for Australia (though it had its antecedents of course), but this was the "real McCoy" – the core competition and consumer protection provisions. The second reading speech contains the first clear expression by a government that competition is a major strategy for promoting economic efficiency and reducing prices. I'm not sure how clearly the full

implications of this law - for business, the economy or the Australian people – were appreciated, but the commitment to competition by Australian governments has deepened and extended dramatically over the years, in particular with the acceptance of most of the Hilmer reforms and the agreements on a National Competition Policy.

One important feature of the Australian law was the combination of competition and consumer protection provisions in a single statute – the supply and demand sides of the market. Though some have argued that there is no inherent connection, in fact the ability of consumers to choose in an informed way in the market depends in a very basic way on not being misled. Misleading conduct is not only bad for consumer choice, it's a form of anti-competitive behaviour as well, essentially a form of unfair competition.

The object of the Trade Practices Act is now clearly stated, which is "… to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection."

The first clear articulation of that notion was not made by a Minister however; the first statement of the kind was made in *Queensland Wire* in 1989 – by Chief Justice Mason and Justice Wilson; "the object … is to protect the interests of consumers, the operation of the section being predicated on the assumption that competition is a means to that end."

I stress this point about the ends and means because the Act was designed to permit the authorising of <u>any</u> anti-competitive conduct (with the exception of the misuse of market power) where the public benefits outweighed the competition detriments. This is an early feature of our Act, which is being emulated widely elsewhere; and if there's time today, I will come back to the Adjudication function of the Commission, since it's a committee which I chair and I never fail to be fascinated by the issues involved in the analysis of whether to grant immunity for anti-competitive conduct in the public interest.

From an initial 172 sections, the Act now comprises 670 – I'm entirely reliant on a judicial manual count for this number - and as Justice French has also said in the title of a recent article in the Competition & Consumer Law Journal, this law covers "a multitude of sins". One of the cardinal sins in a competitive market economy is the deliberate undermining of competition.

There has been much press recently on the Government's intended changes to the Act to deal with the cardinal sin of cartel conduct.

As you are aware, the Treasurer announced that the Government intends to amend the Trade Practices Act, as recommended by the Review of the Competition Provisions of the TPA carried out by Sir Daryl Dawson, to introduce criminal penalties for serious cartel behaviour.

The Treasurer's announcement is that: "The proposed criminal cartel offence will prohibit a person from making or giving effect to a contract, arrangement or understanding between competitors that contains a provision to fix prices, restrict output, divide markets or rig bids, where the contract, arrangement or understanding

is made or given effect to with the intention of dishonestly obtaining a gain from customers who fall victim to the cartel."

That quote is very important since it basically picks up subsection 45(2) of the Act which prohibits contracts, arrangements or understandings which have the purpose, effect or likely effect of substantially lessening competition. However, the above statement adds the interesting phrase "with the intention of dishonestly obtaining a gain from customers who fall victim to the cartel."

In our civil cases, the conduct is the conduct and dishonest intent has not been a feature of examination of a cartel arrangement. Many argued, successfully in this instance, that dishonest intent should feature especially in relation to individuals facing possible incarceration. Dishonest intent will be proved, and again to quote from the background information released by the Treasurer, "if a jury is satisfied that the cartel arrangement was dishonest according to the standards of ordinary people, and the defendant knew it was dishonest according to those standards." So this is to be the key distinguishing feature – there will be no requirement for dishonesty in order to breach the civil cartel provisions.

The other aspect of the proposed changes is that the criminal penalties will be for serious cartel conduct that causes large scale or significant economic harm, rather than for minor breaches. In making an independent determination as to whether to prosecute a particular matter, the DPP will consider factors such as the impact of the cartel and the scale of detriment caused to consumers and the public. The thresholds to be included in the Memorandum of Understanding between the ACCC and the DPP are to indicate that the value of affected commerce should exceed $1 million within a 12-month period.

The proposed amendments will be in the hands of the States and Territories for consultation over the next three months, but I am anticipating that in the lead up to these amendments adding criminal penalties being introduced and passed by the Parliament, that the ACCC may get some considerable activity under its leniency policy.

The history of our leniency policy goes back to 1998 when the ACCC published a guideline dealing with cooperation which offered partial or complete immunity from ACCC action in return for co-operation from offenders. That co-operation policy remains in force.

It is now complemented however with the formal Leniency Policy initiated in 2003 which is for *cartel conduct only.*

The decision to go down this route was an explicit acknowledgment that the secretive nature of cartels means that they are often only exposed by whistleblowers – by those persuaded to break the code of silence.

Under the leniency policy, the ACCC offers:

- immunity from ACCC initiated proceedings, where the leniency applicant is the first to disclose the existence of a cartel of which the ACCC was previously unaware; or

- immunity from pecuniary penalty, where the leniency applicant is the first to make an application for leniency in relation to a cartel of which the ACCC was aware, but in relation to which the ACCC had insufficient evidence to commence court proceedings.

But the policy only applies when those seeking leniency:

- give full and frank disclosure, co-operating fully, expeditiously and continuously with the ACCC,
- cease involvement in the cartel;
- were not the instigators of the cartel, nor have coerced others into participating in it; and, importantly,
- were first through the door.

If a corporation qualifies for leniency, all directors, officers and employees of the corporation who admit their involvement will also receive leniency. There are also specific provisions and conditions dealing with individual leniency applicants.

So, the policy makes cartel 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. Their evidence then exposes others involved who will be investigated and, if the evidence permits, brought before the courts.

But leniency only applies if they were the first to expose the cartel, or the first to come forward once the ACCC begins its investigations.

While those companies that are not through the door early and are penalised may regard this as "unfair", any plea for parity of treatment is unlikely to carry much weight with the courts.

In the December 2003 *Tyco* case*, Justice Wilcox noted:

"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."

**Australian Competition and Consumer Commission v FFE Building Services Limited* [2003] FCA 1542, at para 29-30

I know there is great debate in the legal community as to whether this type of behaviour – cartel conduct – should be the subject of possible incarceration. It is little different, however, from classes of corporate crime that already attract criminal sentences, but it is not always perceived in this way.

I thought Justice Finkelstein's point in the *Transformers** matter was important in this regard:

"Generally the corporate agent is a top executive, who has an unblemished reputation, and in all other respects is a pillar of the community. These people often do not see antitrust violations as law breaking…

"…there is a great danger of allowing too great an emphasis to be placed on the "respectability" of the offender and insufficient attention being given to the character of the offence. It is easy to forget that these individuals have a clear option whether or not to engage in unlawful activity, and have made the choice to do so."

The new penalties for a cartel offence will be:

A maximum term of imprisonment of five years for an individual convicted of a criminal cartel offence, and a maximum fine for an individual of $220,000 or 2,000 penalty units.

For corporations, the fine will be the greater of:

- $10 million
- Three times the value of the benefit from the cartel, or where the value cannot be readily ascertained,
- 10 per cent of the annual turnover of the body corporate and all of its related bodies corporate (if any).

In addition, the court will have the option of disqualifying an individual implicated in a contravention from managing a corporation.

Let me now turn to developments in consumer protection. The prolific Emeritus Professor Warren Pengilley has often reiterated his view that Part V of the Act, or more specifically s 52 – the misleading conduct provision - is the most successful part of our trade practices law; it is certainly the most litigated part of the Act.

The wording of 52, and its mirror formulation in the states and territories, is deceptively simple: "A corporation shall not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive." This effectively establishes a norm of conduct, and s 52 has been very widely applied, in situations that I think were probably not really envisaged by those who drafted the clause.

(I gather from speaking with the head of the consumer protection in this State that the agency is now able to bring cases directly to your court, so I imagine you will be seeing a few more crucial consumer protection matters including the equivalent of s 52 cases.)

Perhaps because of the robustness of this section of the Act, and the success with which the ACCC has pursued actions – quite apart from private litigation of this section – there has not been as much sense that the consumer protection provisions of the Act were in need to the type of constant review which has occurred on the competition side.

There are major developments afoot at the moment, however, including a Commonwealth-State review of product safety laws, issues arising from our international obligations in cross-border fraud, consideration of new emerging issues in complex markets, and the globalisation of consumer scams. I want to touch on the global scams and complex markets primarily.

You may not have been aware, but February is global scam prevention month!

The International Consumer Protection Enforcement Network, to which I'm the Australian delegate, has declared February as our month to really profile and hunt down scams. We have always done the global sweep of the Internet in February – this is where some 50 – 60 agencies get on the web and surf it looking for scams and trying to capture the perpetrators before they disappear on us. This year's theme is "scams by spam". The list on the overhead is the set of scams that we currently have on our website - mainly to warn consumers.

One of the latest scams that you may have heard about is "phishing" – where an email is sent to a consumer with a live link purporting to be from their financial institution and urging them to click through to the website. The website is, of course, a false one, and consumers are asked to provide information which enables the scamster to obtain access to their bank accounts. This type of activity is getting very sophisticated – let me read you an email I got a couple of months ago, and you may have received a similar one as well – you'll see why consumers are getting caught.

I've pulled off the website of the Office of Fair Trading in the UK – this is also a competition and consumer protector regulator. I thought the commonality of this was fascinating – and it points to the fact that scams have gone global. In fact, a comment provided to me by people in the communications regulator, who are the regulators for spam itself and are working jointly with the high-tech crime unit, is that these spammers are not "three men and a dog" in a back room; it appears that this is organised criminal activity.

We are not co-operating only within Australia to try and deal with the new life given to scamsters by email, we also have to co-operate between jurisdictions to try and shut them down and bring the perpetrators to court. That is one of the reasons that the consumer protection enforcement network was created and the cross-border co-operation requirements are raising some issues for our Act – including the ability to share information, and our ability to seek refunds for overseas consumers. In fact, as you are undoubtedly aware, our ability to seek restitution for Australian consumers is an issue at the moment due to the limitation of the Act which restricts remedies to those consumers that have given prior written consent to a claim on their behalf. This redress issue is not only one of protection of consumers, but from an economic perspective, the current situation effectively means that offenders can retain the proceeds of their actions despite courts orders for injunctions, declarations and so on. We are suggesting statutory recognition of disgorgement as a complementary remedy that a court may order to deprive those contravening the Act of unfairly obtained benefits.

The area that I have taken a particular interest in since joining the Commission has been the issue of the interface of competition and consumer protection law – and

specifically in those markets that are newly deregulated. With our society's reliance on the market to deliver benefits for consumers in a range of newly-competitive areas – such as telecommunications, financial services and energy - a number of questions also arise about consumer protection. While substantial benefits have been delivered from these deregulations, a lot of risk is also shifting to the consumer in terms of their decision making. For example, choosing a superannuation plan can be extremely complicated, and even comparing mobile phone services and bank accounts can be quite difficult. These complications can also be exacerbated by bundling arrangements even when these also bring benefits. Where consumers cannot choose effectively, they also cannot effectively drive competition.

Complex contractual arrangements are especially evident in these relatively newly deregulated markets – and the characteristics of such contracts can include lock-in terms and fine print clauses that disable the consumer's ability to examine true costs or value for money. In general, also, these are contracts of adhesion – they are take it or leave it contracts except in the price and other core terms which can be negotiable. While one would want to be cautious about interfering with contracts, the European Union including the UK, some parts of the US and now Victoria in Australia are putting into place unfair contracts laws. Whether other Australian States and Territories follow suit remains to be seen. I view these laws – in the same way that I see the misleading conduct provisions of the Act – as protections for consumers in the market, but also protections for other competitors who are disabled by a term, for example, that would prevent a consumer switching from one provider to their better deal without paying a prohibitive penalty. This is probably the newest and most interesting area of consumer protection to emerge and, it is interesting to see some of the competition economists turning their minds to the demand-side issues.

Finally, a minute on Authorisation and Notification in the Act.

As I mentioned, the Act is explicit in providing for the ability of the ACCC to authorise anti-competitive conduct (including conduct that would be a per se breach) in the public interest. So, for example, the arrangements between Qantas and British Airways on the Kangaroo Route, arrangements which include price-fixing for example, were authorised last week by the Commission since the public benefits outweigh the competitive detriments.

The major change about to happen is collective negotiation, intended for use by small businesses in their negotiations with larger business. Such behaviour will no longer need to be authorised and can simply be notified to the Commission. Immunity commences after 14 days and stands unless the Commission makes a formal decision to revoke.