



ACCC intervention in private proceedings

July 2002



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ISBN 1 920702 02 4

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ACCC intervention in private proceedings

These guidelines set out the factors the Australian Competition and Consumer Commission (ACCC) will consider when assessing whether to intervene in private court proceedings instituted under the *Trade Practices Act 1974* of the Commonwealth (the Act).

Amendments to the Act made by the *Trade Practices Amendment Act (No. 1) 2001* have given the ACCC an expanded statutory basis for applying to a court to intervene in private proceedings.

The ACCC's role

The ACCC is the Commonwealth agency responsible for achieving compliance with the Act and the competition codes of the states and territories. It has the power to commence proceedings for alleged contraventions of the Act or codes.

Private parties can also bring actions irrespective of ACCC action.

Remedies available to the ACCC differ from those that private litigants are able to obtain. For example, any party can seek damages or injunctions, but only the ACCC can seek:

- penalties for breaches of Part IV
- injunctions in respect of price exploitation and mergers that substantially lessen competition
- community service orders, probation orders, orders requiring the disclosure of specified information, and corrective advertising orders.

The ACCC also has the power to bring representative actions.

In appropriate cases the ACCC may also seek leave of the court to intervene in private proceedings.

ACCC intervention in private proceedings— background

In the past, Australian courts have recognised that the public interest may be served by permitting the ACCC to be heard in private proceedings, for example if the case involves an issue of general public importance—as in *O’Keeffe Nominees Pty Limited v BP Australia Limited and Trade Practices Commission [Intervener]* (1995) ATPR 41-393. Another reason is if the outcome would help to clarify the law.

Before the *Trade Practices Amendment Act (No. 1) 2001* was enacted in July 2001 the ACCC had a limited statutory power to intervene in private proceedings brought under the Act. Section 163A(3) empowered it to intervene in private proceedings brought for a declaration under Part IV of the Act only.

For example, the ACCC relied on s. 163A(3) to apply to intervene in:

- *Bass & Anor v Permanent Trustee Co. Limited & Ors* (1999) 198 CLR 334, in relation to Crown immunity and the application of ss. 51AB and 52
- *Melway Publishing Pty Limited v Robert Hicks Pty Ltd (trading as Auto Fashions Australia)* (2001) 178 ALR 253 in relation to the interpretation of s. 46
- *NT Power Generation Pty Ltd v Power and Water Authority and Gasgo Pty Ltd* (2001) ATPR 41-814, a case involving derivative Crown immunity and the application of s. 46 to the Crown
- *Bray v F. Hoffman–La Roche & Ors* [2002] FCA 243 (13 March 2002), which are private proceedings against various international vitamin manufacturers that the applicant alleges were engaged in price fixing and market sharing. This case raises important issues involving the application of the Act to foreign entities.

Intervention in private proceedings not instituted under the Trade Practices Act

Aside from trade practices matters, if the ACCC wished to intervene in any other private proceedings it had to rely upon an appropriate discretionary power being vested in the relevant court or tribunal by its rules. These have been matters where the ACCC has formed the view that the interpretation of the legislation has implications for the application of the Trade Practices Act and intervention by the ACCC was in the public interest.

In deciding whether to apply to intervene in proceedings that were instituted under legislation other than the Act, the ACCC will consider such matters on a case-by-case basis, but the guiding principle will continue to be whether the public interest would be served by the ACCC intervening in the proceedings.

Trade Practices Amendment Act (No. 1) 2001

Item 33 of Schedule 1 to the *Trade Practices Amendment Act (No. 1) 2001* came into operation on 26 July 2001. It enacted a new s. 87CA, which states that the ACCC may, with the Federal Court's leave and subject to any conditions imposed by the court, intervene in any proceeding instituted under the Act (subsection (1)). If the ACCC intervenes it becomes a party to the proceeding and has all the rights, duties and liabilities of such a party (subsection (2)).

In amending the Act, Parliament clearly intended to permit the ACCC to intervene in a broader range of cases than previously contemplated under s. 163A and expects that the ACCC will use its increased power accordingly. The ACCC now has an express statutory right to apply to intervene in a wide range of private actions under the Act without having to rely on the court's inherent jurisdiction.

The amendment forms part of a broader spectrum of changes to the Act aimed at enhancing the ACCC's ability to protect consumers and small business.

The explanatory memorandum for the amending Act stated that the ACCC would develop guidelines to outline when it may intervene in private proceedings. This publication sets out those guidelines. The ACCC will review them in light of its experience in using s. 87CA.

Guideline considerations—intervention under the Trade Practices Act

The ACCC will consider intervention in private proceedings under the Act in one or more of the three following circumstances. In applying to intervene the ACCC generally will seek to provide the court with a broader perspective than that of private litigants.

■ Issues of significant public interest

The ACCC would usually only intervene in cases involving significant public interest—for example, if there is a major detrimental effect on fair trading and competitive market forces and the ACCC wishes to make submissions to preserve the competitive process and prevent future contraventions of the Act.

In O’Keeffe Nominees Pty Limited v BP Australia Limited and Trade Practices Commission [Intervener]—a case involving allegations of misuse of market power in the form of price discrimination and exclusive dealing—the ACCC was given leave to intervene in private proceedings on the basis that the issues in question were not only of general public importance, but also of particular importance to the ACCC in its former identity as the Trade Practices Commission.

■ Construction of the Trade Practices Act—in untested areas or to clarify its operation

A key objective of the ACCC’s enforcement functions is to seek clarification of the law. The ACCC’s role in this has been recognised consistently by the courts, for example in cases involving the 1998 unconscionable conduct provisions (*ACCC v Leelee Pty Ltd* (2000) 22 ATPR 41-47, *ACCC v Simply No Knead Pty Ltd* (2000) 22 ATPR 41-790 and *ACCC v Goldy Motors Pty Ltd* (2001) ATPR 41-80). The ACCC believes it can provide a perspective that may help a court to see matters in a wider public interest context than could private parties, who may be unable or unwilling to do so.

If a party contends that a provision of the Act is ambiguous and the matter to be determined rests on the interpretation of that provision, or if there are important and novel questions of interpretation, the ACCC may wish to make submissions to clarify the Act through precedent.

For example, the ACCC successfully intervened in the High Court appeal by *Melway Publishing Pty Limited v Robert Hicks Pty Ltd (t/a Auto Fashions Australia)*. This case involved the interpretation of the phrase ‘taking advantage’ in s. 46. The ACCC sought to put forth an interpretation of that provision that had not previously been considered by either party to those proceedings. It is important to note that in this case the ACCC sought to draw the court’s attention to a new issue of statutory interpretation. Generally speaking, the ACCC will not intervene in private litigation if its role is confined to reiterating the views of a party to the proceedings.

■ **International conduct**

Globalisation, new technology and liberalisation can be seen as opportunities for new forms and areas of market power, for instance anti-competitive conduct and consumer exploitation on an international scale.

The ACCC has strong links to overseas competition, consumer protection and regulatory communities. These links are critical for the ACCC to effectively address issues such as e-commerce, other cross-border consumer protection matters and global cartels.

In appropriate private cases the ACCC may wish to make submissions to the court about the deleterious international nature of the conduct being complained of, even if the economic impact in Australia is limited, or the actual conduct in Australia is only a small element of the international conduct.

ACCC intervention in matters other than those that meet these three criteria will be considered case by case, but the guiding principle will be whether the public interest would be served in some way by the ACCC intervening in the proceedings. Depending on the circumstances of the case the ACCC may find it more appropriate to participate as a friend of the court (*amicus curiae*), rather than to apply for intervention and be a party to proceedings. Intervention in this way would be for a limited purpose, such as the making of submissions to the court only, where the ACCC was not proposing to adduce new evidence or seek orders from the court.

Principles upon which intervention will occur

The ACCC will not subsidise trade practices litigation brought by private parties. Further, it will not bear the cost of any party to civil proceedings. It sees its role in this area as being different to that of the various legal aid bodies in Australia. Rather, the ACCC will ordinarily exercise its right of intervention in the public interest, with the leave of the court and subject to any conditions imposed by the court, on the following terms.

- The ACCC will bear its own costs in relation to intervention. It may agree to share certain costs with other parties (e.g. experts' fees, consultants' reports).
- The ACCC will appear through its own counsel only.
- When the ACCC supports submissions by another party it will, to the extent possible under the Act and other relevant legislation, exchange information with that party. However, it will be on a confidential basis and subject to the other party agreeing that it will be at the ACCC's discretion whether that information is put before the court. See the ACCC's procedural guide, *Collection and use of information*, for more information.

Requests for intervention

The ACCC invites requests from persons who believe the public interest would be served by the ACCC's intervention in their private proceedings. The request must be in writing from a party to the proceedings or its solicitors and must contain the following information:

- a copy of all pleadings filed in the proceedings so far
- legal advice (by the solicitors or other agencies) on the likelihood of the case being successful and identifying, where practicable, the matters on which submissions by the ACCC could assist
- a summary of the matters that would justify ACCC intervention, addressing the guideline considerations outlined above, with specific reference to how the public interest would be served by the intervention.

Requests should be sent to the senior ACCC officer in the state or territory where the proceedings have been commenced. A list of contacts is on p. 8.

The intervention, whether sought by the ACCC or requested by the parties, will be allowed at the court's discretion. The court can tailor the intervention so that it is appropriate to the proceedings and fair to the existing parties.

Cases to which these guidelines apply

The ACCC can only use this new power to apply to intervene in proceedings instituted on or after the date of commencement of s. 87CA: 26 July 2001.

With respect to private proceedings instituted before that date, the ACCC will take the above-listed considerations into account when deciding whether to apply to intervene.

Contacts

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