

NIETL Network Breakfast
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Advertising and Marketing and the Trade Practices Act

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Mr Chairman, Ladies and Gentlemen,

Today I have been invited to speak about how the Trade Practices Act impacts on marketing and advertising issues in the Australian business community, with some emphasis on small business concerns.

This topic is particularly relevant, as we are now into Week Four of the Victorian Government's *Small Business May*, which is a month long festival of events to inform and inspire Victoria's 200,000 plus small businesses. The theme for this week just happens to be "marketing and advertising". The Australian Competition and Consumer Commission is pleased to be a strategic partner with Small Business Victoria in presenting a range of activities throughout Victoria this month.

By way of introduction, the Australian Competition and Consumer Commission (ACCC) is a statutory authority responsible for ensuring compliance with the Trade Practices Act, for administering the Prices Surveillance Act and complimentary legislation.

The ACCC is the only nationally operating agency dealing generally with competition enforcement matters.

In fair trading and consumer protection its role complements that of State and Territory consumer affairs agencies, which administer the mirror legislation of their jurisdictions.

TRADE PRACTICES ACT 1974

The objectives of the *Trade Practices Act* are to prevent anti-competitive conduct, thereby encouraging competition and efficiency in business, and resulting in a greater choice for consumers (and business when they are purchaser) in price, quality and service; and to safeguard the position of consumers in their dealings with producers and sellers and business in its dealings with other business.

If all businesspeople acted in an honest and ethical fashion then the objectives of the Trade Practices Act may well be met. But as many businesses cut corners to gain a competitive advantage in vigorous markets, and the occasional unscrupulous business acts in a dishonourable manner to the detriment of others, then there is a need for a piece of legislation that ensures fair play – hence the Trade Practices Act was enacted in 1974.

The Commission has had a clear focus on small business issues for over a decade, in its enforcement of the Trade Practices Act. A substantial proportion of the complaints we receive relate to small businesses, either as the perpetrator or victim of unfair trade practices. As a consequence the Commission's role in ensuring that the operating environment for small business is fair and competitive remains important for business, consumers and the economy in general.

The Commission now has a dedicated small business unit with representation in each State and Territory. The Unit is very active in educating small businesses about rights and obligations under the Act and liaising with small businesses about trade practices issues that impact on their day to day activities.

I'd now like to turn to the subject matter for today, namely marketing and advertising. For those among us who have studied marketing, you would be familiar with the four **P**'s of

marketing that are regarded as the key elements to a successful marketing strategy, namely Price, Product, Place and Promotion. This is commonly known as the “marketing mix”. I’ll now explain how the Trade Practices Act supports ethical marketing behaviour under each of those elements.

PRICE

Firstly, price.

The Trade Practices Act prohibits a number of business behaviours which are referred to as restrictive trade practices. Some are illegal under all circumstances, while others are only illegal if they substantially lessen competition in the relevant market.

The Act prohibits agreements between competitors to fix, maintain or control prices. This is commonly known as “price fixing”. This conduct is illegal regardless of the effect on competition, because the Federal Parliament has regarded this behaviour as so inherently anti-competitive. Such an agreement does not have to be in writing. It could be just a “nod and a wink” understanding that could take place anywhere - in the pub, at an association meeting or a social occasion. The important point is not how the agreement was made or even how effective it is but that competitors are determining their prices collectively, and not individually as should be the case.

The ACCC takes price fixing matters very seriously indeed. In 1995 three concrete suppliers in Queensland, namely Pioneer, Boral and CSR and a number of staff from each company, were penalised in excess of \$20million by the Federal Court after the Court found that the three firms had engaged in illegal price fixing and market sharing conduct, following ACCC investigations.

In 1995 Inghams Enterprises and Steggle's consented to penalties of \$1/4 million each after admitted that they had made price fixing and market sharing agreements in the wholesale chicken meat market in SA.

Their agreements provided that each processor would retain existing retail customers and there would be no more discounting to 'poach other processors' retail customers. The customers included supermarkets, chicken shops and processors.

Price fixing agreements by large companies have a detrimental effect on small business competitiveness. But it should also be noted that the law equally applies to small businesses who like the big players, must also not engage in price fixing conduct.

I'd now like to discuss another illegal practice known as resale price maintenance. Like price fixing, this is illegal regardless of the effect on competition as it has a detrimental effect on small business' pricing strategies. You could imagine the impact on a small business' viability if it was suddenly told be a supplier that it is not allowed to discount one of its key products.

Suppliers, manufacturers and wholesalers are prohibited from specifying a minimum price below which goods or services may not be resold or advertised for resale. A supplier may recommend a resale price for goods or services, provided that the document setting out the suggested price makes it clear that it is a recommended price only and that the supplier takes no action to influence the reseller not to sell or resupply below that price.

Some illegal resale price maintenance activity took place in recent years at the nearby Preston Market.

In 1997 the Federal Court imposed a penalty of \$1.25 million on George Weston Foods Limited, trading as Tip Top Bakeries, for price fixing and resale price maintenance of bread. George Weston admitted to the contraventions and also admitted that it unsuccessfully attempted to have an independent Albury retailer cease discounting in May 1995. It also admitted that it had reached an agreement with Safeway to increase the retail price of bread sold at the Tip Top store at the Preston Market.

The ACCC is currently involved in proceedings against Safeway Supermarkets in the Federal Court in Melbourne. This case is linked to the George Weston case. We are alleging that

Safeway misused its market power to encourage George Weston to engage in its resale price maintenance behaviour, by withdrawing stock or refusing to stock bread at certain supermarkets. Safeway deny the allegations.

In 1996 Penalties of \$515,000 were imposed on Hugo Boss Australia Pty Ltd for engaging in resale price maintenance in the wholesale of men's suits. A penalty of \$75,000 was also imposed on the Managing Director.

The bottom line here is that small retailers shouldn't put up with suppliers who set minimum resale prices below which they must not sell their products.

Finally on the topic of price, the Act prohibits the misuse of market power. This refers to a situation where a business takes advantage of a substantial degree of power which it has in a market, for the purpose of eliminating or substantially damaging a competitor, preventing the entry of a person into any market, or deterring or preventing a person from engaging in competitive conduct in any market.

This section of the Act may be used to prohibit predatory pricing. You may ask, what is predatory pricing? Well, the layman's understanding of this term would be where a firm with market power, uses that market power to reduce prices in the short term in order to deter competition, with the purpose of restoring prices to the original levels once competition has been eliminated or reduced.

Last year the ACCC commenced proceedings in the Federal Court in Melbourne against Boral Ltd and Boral Besser Masonry Ltd in which it alleges predatory pricing and a misuse of market power.

The ACCC alleges that the companies used their market power to reduce prices at which they offered to supply concrete masonry products in Melbourne for the purpose of:-

- eliminating or substantially damaging its competitor C&M Bricks Pty Ltd
- preventing the entry of C&M Bricks and others into the Melbourne market or

- deterring C&M Bricks and other manufacturers from engaging in competitive conduct in the Melbourne market or other concrete masonry product markets in Australia.

The ACCC alleges that the predatory pricing was extensive and covered key concrete masonry products over a lengthy period.

The ACCC is seeking a penalty and injunction amongst other things. The Boral companies deny the allegations.

In concluding on the topic of prices, I think you would agree that the restrictive trade practices provisions of the Trade Practices Act have a significant impact on pricing behaviour in Australian business, in that the Act encourages competitive and ethical pricing decisions.

PRODUCTS

I'd now like to address how the Trade Practices Act impacts on product issues.

The consumer protection provisions in Part V of the Act provide an important safety net for both consumers and competitors in markets where vigorous competition might tempt some businesses to making misleading claims.

The Act contains a range of provisions aimed at protecting consumers and businesses that qualify as consumers by:

- a general prohibition on misleading or deceptive conduct known as Section 52,
- specific prohibitions for false or misleading representations, about a range of things such as a product's value, quality, place of origin or impact on the environment and
- provision for statutory warranties that afford consumers refunds in certain circumstances.

The Commission is active in taking actions under this part of the Act where there is a broad public interest involved.

One problem area that often comes up is claims about a product's country of origin.

In 1998 the ACCC accepted court-enforceable undertakings from Golden Circle after examining the labelling of orange juice, apple juice and orange fruit drinks.

The ACCC found that certain Golden Circle products contained significant levels of imported concentrate while using terms such as 'Australian Made' and 'Australian Grown' on its corporate logo on these products from 1995 to 1997.

In the undertakings, Golden Circle agreed to:

- review and amend, where necessary, its products' labelling;
- publish a corrective and explanatory notice to consumers Australia-wide; and
- implement a trade practices corporate compliance program.

The ACCC was concerned to protect Australian producers of citrus and other fruit, along with Australian consumers.

Only this month the Commission took an action of direct interest to small businesses, that involved both price and product dimensions.

The Commission obtained court-enforceable undertakings from a major direct marketer of stationery and office supplies, Viking Office Products Pty Limited, as the Commission had serious concerns that consumers were being misled about the true level of discounts on offer in catalogues, which include the *Price Buster Catalogue*, *Buyers Guide* and various specialist catalogues.

An ACCC analysis of three products promoted in the Viking catalogues as having a 'Regular Price' revealed that:

- the products were offered for sale to a significant number of customers at prices less than the 'regular price';
- sales of these products at the 'regular price' accounted for a very small percentage of the total sales of these products; and

- the bulk of sales of these products had been made at prices substantially less than the ‘regular price’.

Where comparison is being made with previous or other prices charged by the company the claim of a discount will be misleading unless significant sales have recently or are currently being made at the higher price.

The Commission took this action because direct marketing to small business by catalogue, phone or over the Internet is increasing. It is crucial that those businesses can rely on the claims made in catalogues, particularly on the important element of price.

When discounts are advertised the basis for calculating the discount should be clear and prices used for comparison must be a genuine and relevant price.

The potential for compensation to affected small businesses and consumers under the Act is considerable. For example the Commission took an action against Telstra a few years ago over alleged breaches of Section 52 that prohibits misleading and deceptive conduct. The allegations concerned a wiring plan which Telstra promoted. The settlement resulted in refunds of \$45 million to 1,500,000 customers.

Competitors, suppliers and consumers are also very active in taking private legal action under the Act, particularly where there are false and misleading claims about products.

Only recently the Kettle Chips Company, which was a small business producing snack foods, was successful in obtaining \$11 million¹ damages from the former snack foods division of Coca Cola Amatil for closely copying their products. Kettle Chips successfully argued that this conduct constituted a breach of Section 52 which prohibits misleading and deceptive behaviour.

Finally on the topic of products, the Commission has also recently become responsible for enforcing product safety standards. We have been very active in this area, with recent actions concerning motor cycle helmets and children’s bicycles.

¹ This amount was recently upheld by the Full Federal Court.

Place

I'd now like to turn our attention to the issue of place. Effective distribution and placement of products and services to consumers is another key element of any marketing strategy, and here are some examples of when the Commission was able to enforce the Act to foster competition in the transport and distribution sector.

I mentioned before the Commission's role in investigating price fixing conduct. The best known case the ACCC has been involved in, concerned the overnight freight express cartel in which major companies agreed on market sharing and price fixing arrangements, which for many years raised prices and lowered service quality to users. The main users were thousands of small businesses in Australia sending their parcels and other packages urgently from one destination such as Melbourne to other parts of Australia such as Sydney.

Further, in 1996 the Commission took court action against Mayne Nickless and TNT respectively for misleading consumers about their air freight businesses. The companies admitted to making representations to customers that their goods would be transported by air, when in fact the goods were transported by road.

The ACCC has an important role in examining mergers that may have anti-competitive effects.

The Act prohibits acquisitions that would have the effect, or be likely to have the effect, of substantially lessening competition in a substantial market.

An example of the Commission's work on a proposed merger that would have effected the distribution of goods, was when we examined an agreement between Rank Commercial Ltd and Coles Myer Ltd, that would have resulted in the transfer of assets from Foodland Associated Ltd to Coles Myer. The Commission was concerned about the likely anti-competitive effect on the grocery market in Western Australia, and successfully sought injunctions to stop the bid deal from proceeding.

Promotion

The final aspect of the marketing mix is promotion. I've already touched on many aspects of how the Trade Practices Act fosters honest and ethical promotion, but here are a few more examples with particular emphasis on advertising.

Comparative advertising, when one business promotes its product's superiority over others, can result in real and deserved commercial advantage. But the potential benefits can be negated by the risks. The main risk is that competitors are naturally motivated to consider retaliation by taking action under the Trade Practices Act, where the comparisons can be proved to be wrong. Comparative advertising is particularly prevalent in competitive and emerging markets such as telecommunications. Before you decide to engage in comparative advertising, take some time to weigh up the risks and benefits.

Bait advertising occurs when a business advertises products at a price where it could not be reasonably anticipated that the products would be readily available at that price for a reasonable period. For example, a car dealer offers certain vehicles at a special price, but customers are then told that the vehicles have been sold or are out on a test drive. It makes good sense then that if you advertise a sale product, you make sure that you have reasonable stocks to meet the likely demand. If the demand exceeds your expectations (and don't we all wish for that!); then offering a raincheck may be a good alternative.

Two price advertising is another dubious practice, if it misleads consumers about the substance of the savings. Consumers are naturally attracted by advertising that suggests they will receive discounts, but retailers must make sure that the discounts are real.

A business can compare its current prices with its own previous or normal prices, so long as the latter are genuine and actually applied to a sufficient and reasonable number of goods concerned.

I mentioned the Viking Office Products matter before. The ACCC also recently settled litigation with Kmart Australia Ltd, in which we alleged that some Kmart Stores had falsely represented the possible savings on a particular espresso machine.

Kmart gave a court undertaking that it will not, for three years, represent that purchasers would save a specified amount by a price reduction where the saving is not calculated by referring to the price which applied for a reasonable period before the cut.

While on the topic of advertising, I should mention that the Commission has produced a very useful booklet on the topic of “Advertising and Selling” which is available today for a small cost of \$10. We also have a range of free publications that you may like to take with you.

Finally on promotion, it’s worth bearing in mind that promotion doesn’t end once the consumer enters a store, and accordingly retailers should take particular care with oral statements, notices and other representations.

For example, earlier this year the ACCC investigated allegations that major Australian hardware trader Bunnings Building Supplies Pty Ltd were misleading consumers in South Australia, Northern Territory and Western Australia.

During a recent 'Do it for Australia, Buy Australian Made' promotion in the week before Australia Day this year Bunnings ran a promotion of Australian made products. But in its stores, Bunnings put or fixed A4-size price cards captioned: *'Do It For Australia – Buy Aussie Made'* on products in the promotion, when many products were not Australian made.

Bunnings gave court undertakings for a range of remedies.

Closer to home in Melbourne, the Commission found that Westco Jeans had been misleading consumers about their rights to a refund under the Trade Practices Act. Westco had been placing 'No Cash Refunds' and 'No Returns on Sale Items' signs in their stores. If there's such a problem with the goods a consumer can choose to accept a refund, exchange or repair. Retailers shouldn't display signs that mislead consumers about their rights.

In this case the Federal Court decided that the best remedy would be to have Westco strengthen its internal education program.

This doesn't mean that there aren't costs involved for businesses who only have to improve or put in place a compliance program. The real costs involved are losses of valuable staff time involved litigation, loss of public face and the sheer inconvenience of it all.

I'd now like to talk about something slightly off the topic of "advertising and marketing". As this morning's breakfast is a feature of Small Business May I would like to take this opportunity to mention the Commission's role in promoting and enforcing two new provisions in the Act that support small businesses.

Firstly the new Section 51AC aims at providing protection for small businesses against oppressive business behaviour by prohibiting unconscionable conduct. It will prohibit the stronger party from exploiting its bargaining advantage to impose contractual terms, or engage in conduct, that would be unconscionable in the context of the particular commercial relationship between the parties.

The provisions provide guidance not only to the courts but also to business about factors that a larger business needs to take into account in its dealings with small business. Business will need to consider how to ensure it does not engage in unconscionable conduct - full disclosure of the terms of any transaction will be a good start.

The Commission recently filed its first action under the new section 51AC of the Act, alleging that a landlord of a food plaza in Adelaide engaged in unconscionable conduct towards one of its tenants. The Commission alleges that the landlord of the food plaza acted unconscionably towards a tenant by:

- increasing the rent contrary to the terms of the lease;
- failing to act to protect the tenant's rights under his lease; and

- forcing the tenant to charge not less than a particular amount for certain food dishes while allowing his competitors to charge less for their food dishes.

The Commission is seeking injunctions, declarations that the tenant has suffered loss or damage, findings of fact, and orders for the payment of damages. A successful outcome in this case will show how the new law protects small business and that landlords must treat their tenants fairly.

The new Section 51AE enables industry codes of conduct to become mandatory. The *Franchising Code of Conduct* is now in force and applies to the franchising sector throughout Australia. It balances power between franchisors and franchisees.

The franchising sector is a major area of small business growth in Australia, and particularly in the retailing and service industry sectors. According to recent independent surveys, annual growth in the number of franchisee-operated outlets has averaged 17% compound between 1994 and 1998, and total employment in franchising has grown from 279,000 jobs to 678,000 jobs over a similar period.

While the franchising sector is experiencing terrific development, a significant number of small business franchisees had experienced difficulties in obtaining quality information about franchises so that they could make informed decisions about whether to enter, extend or renew a franchise agreement – hence the Government saw a need for a compulsory code!

The Commission is keen to encourage active compliance by franchisors, and on that note my staff have two free publications available on franchising which available today.

CONCLUSION

I hope that my presentation today has given you some insight into how the Trade Practices Act can impact, in a positive fashion, on marketing and advertising issues.

Competition is a factor that encourages innovation, cost and production efficiency and enhanced consumer satisfaction by businesses striving to keep ahead of their competitors. However, stiff competition also creates incentives for unethical traders to 'cut corners' to beat their rivals, and this is where the ACCC must step in. Dishonest and unfair marketing and advertising techniques can also attract the attention of competitors, suppliers and consumers who can also take action under the Trade Practices Act. Recent trends have shown that a culture of healthy and legal competition between businesses has developed in Australia since the introduction of the *Act*.

In addition to its enforcement role, the ACCC sees itself playing an important part in developing and maintaining industry compliance and awareness of the *Trade Practices Act*. There is increasing awareness by business of the need to educate staff to promote compliance. The ACCC most certainly encourages this attitude of compliance and will continue in the future to assist in the process of deterrence of breaches of the Act. The ACCC is certainly a firm believer in the age old cliché that "prevention is always better than cure".

On that note Ladies and Gentlemen I wish you a productive financial year ahead in marketing your business in an honest and ethical fashion, and with a further understanding of how the Trade Practices Act may be used to protect your business from unscrupulous business behaviour.