

  <p data-bbox="614 358 710 436">Australian Competiti Consumer Commissi</p>	<p data-bbox="734 212 1356 347">ACCC Breakfast Seminar <i>Competition and Consumer issues in the top end</i></p> <p data-bbox="981 369 1356 414">Rod Sims, Chairman</p> <p data-bbox="893 425 1356 470">8 November 2011, Darwin</p>
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INTRODUCTION

Thank you for your time this morning.

I cannot claim to be a Territorian.

In fact, I grew up at the other end of the country in coastal Victoria.

But I have travelled extensively through the NT – mostly as a tourist - so I am familiar with this part of the country.

I can say that, over many years, I have enjoyed outstanding service from businesses here, whether they were hotels, restaurants, or tour operators.

I also recognise the large and growing contribution that the Territory is making to the Australian economy across many sectors, including to the tourism and mining sectors. There is also potential for greater contribution when and if the INPEX project proceeds. It will be one of the biggest LNG projects in Australia.

I have been chairman of the Australian Competition and Consumer Commission (ACCC) for about three months. My first day on the job was at the beginning of August.

Darwin has been my first stop, outside Sydney, Melbourne, and a brief visit to the Gold Coast, for an event like this.

My visit here today reflects my decision to meet people who are running businesses across Australia.

But it also reflects the role of the ACCC, as an enforcement agency with offices across every State and Territory capital, and in Townsville.

Specifically, in Darwin, the ACCC has been here since 1995, the very year the ACCC started.

Before that one of the forerunners of the ACCC, the Trade Practices Commission, was here.

The ACCC works closely with Consumer Affairs NT, and with the other Commonwealth agencies here.

Getting down to business, there are three things I would like to cover this morning.

One is the Australian Consumer Law, which came into full effect at the beginning of the year.

In my view, the introduction of the ACL is one of Australia's major recent economic reforms, and that fact is not recognised as widely as it should be.

The second point I will cover is the ACCC's role with Indigenous people, who are often more vulnerable as consumers, because of their relatively lower levels of literacy, understanding of business, or for other reasons.

We have some specific initiatives underway, to provide better protection to Indigenous people with their statutory rights as consumers.

The third subject is carbon-pricing.

As you would be aware carbon-pricing is planned to begin midway through next year and I want to share with you some information about the ACCC's role with this.

I would like to outline what it means for businesses that intend to raise prices.

1. AUSTRALIAN CONSUMER LAW – OVERALL

There are essentially two parts to the Competition and Consumer Act, which is the main statute that the ACCC administers.

The first part covers competition and our obligation to ensure Australia has a competitive economy overall, and to ensure competition sector-by-sector.

The second part of the Act is the ACCC's obligations in providing consumer protection.

In that area, there have been significant changes in the law in the last few years.

This has occurred, in part, because there was understandable pressure to reduce around 20 Commonwealth, State and Territory Acts to one.

Overall, the Productivity Commission has estimated the potential savings from harmonising consumer law at between \$1.5 billion and \$4.5 billion.

The good news for consumers is that this push for uniform laws also saw a push for a "highest common denominator" approach.

That is, from a consumer viewpoint, the best of the State and Territory laws were generally chosen. An example is unfair contract terms, which was based in part on the law in Victoria.

In addition, we looked overseas for international best practice and drew on that. For example, in consumer guarantees the Australian law now embraces the experience in New Zealand.

In product safety mandatory reporting, the new Australian law draws on similar law in Canada and the United States.

Consider the changes that have come in the new law:

- consumer guarantees are now statutory rights;
- there is a clear national statutory test for unfair contract terms;
- in product safety we now have a new mandatory reporting framework and a national set of standards for some goods and provisions that allow product bans

- provisions for unsolicited selling (namely door-to-door and telemarketing) have been harmonised; and
- there are new sanctions, in the form of infringement notices and court awarded pecuniary penalties, for breaches of consumer protection laws.

That is quite a list. It represents profound change.

The Commonwealth, States and Territories can be proud of their work on behalf of consumers.

I often hear criticism of reform attempts that are initiated by the Council of Australian Governments (COAG).

But here is a reform that has succeeded well beyond expectations, and it should be acknowledged as such.

As business people you might take a different view.

You could say it is a further form of regulation, which by definition, is a cost on you. But I argue that would be a mistake.

For business it brought an end to the “different state, different legislation” syndrome, which was a source of immense frustration.

Now it’s a case of sell television sets in Darwin or in Dubbo, and it’s the same rules in both places

And no business wants its competitors to gain an advantage through unscrupulous practices or because the rules are different somewhere else.

The Australian Consumer Law substantially reduces the chances of that.

There are three major areas of the Australian Consumer Law upon which I will elaborate today for you – I think these are among the key ones for business operators.

They are consumer guarantees, provisions on unfair contract terms, and extensive product safety provisions.

I’ll also say a few words about unconscionable conduct. These were existing provisions in Australian law, but I think they are an important component of consumer protection and fair trading in the Act.

Further, I am interested in exploring their potential application to a broader range of circumstances than may have been the case up until now.

Consumer guarantees

Starting with consumer guarantees.

The big change is this: previously statutory warranties were inferred in consumer contracts, which meant, effectively, if consumers could not resolve their concerns with the retailer, they were required to enforce their rights as breaches of contract.

Now consumer guarantees are statutory rights, enforceable by consumers and by the regulators – which are the ACCC and the state and territory offices of fair trading.

If you sell goods, you are required to assist a consumer that has a problem with goods or services they have bought from you.

A range of remedies are available – including repairing, replacing or refunding the money.

If it is what is called a ‘major failure’, the consumer can choose which remedy they want.

Say I order a hire car from you. I specifically ordered a four-wheel drive, because I’m going remote, and I note that for the rental car company in my order.

But when I arrive at the airport the vehicle is a two-wheel drive saloon and it is restricted to bitumen. That is a considerable difference from what I ordered.

So I can choose to accept the saloon, or the hire firm locates a four-wheel drive for me.

Or I could choose a full refund.

Note that it continues to be against the law for a seller to do anything that leads consumers to believe their rights are limited or that they do not apply—for example, by claiming that no refunds will be given under any circumstances.

Unfair contract terms in standard form consumer contracts

Turning now to unfair contract terms.

The Australian Consumer Law provides for a court to declare terms unfair, and therefore void, if they meet a three-point test set down in the law.

A term is unfair if:

- it causes a significant imbalance in the rights and obligations of the parties to the contract
- the term is not reasonably necessary to protect the interests of the advantaged party; and
- the term would cause detriment – financial or otherwise – to a party to the contract if the term were to be applied or relied upon.

The provisions on unfair contract terms in the Australian Consumer Law, mark a shift, because such provisions didn’t exist previously in national legislation.

I should note that the provisions apply only to standard form consumer contracts - examples of those being mobile phone contracts or rental car contracts – but not business-to-business ones.

The aim is to prevent the systemic use of contract terms that cause widespread consumer detriment or harm.

An example might be expensive lock-in terms or high termination costs that are common in a particular type of contract – say right across an industry or sector - and which are offered to consumers, effectively, on a take-it-or leave it basis.

The ACCC has reviewed contracts and conduct in sectors including domestic airlines, telecommunications, and vehicle rental, which have been sources of high levels of complaints in the past. And we've succeeded in getting alterations to consumer contracts provided by some businesses, without the need to go to court.

That is a good outcome, because it is always better to settle quickly and voluntarily if possible. But recently we have begun court proceedings against one business – Advanced Medical Institute – that includes termination clauses in its contracts that we believe are unfair.

I should add that this matter is still in its early stages before the Federal Court and is undecided.

Product safety

Now to product safety.

This is one of the most extensive areas of change because the new law is comprehensive.

It ranges from mandating product safety standards, right through to powers the Federal Minister has to ban products outright where a product poses a risk of injury.

The law now:

- Has consistent mandatory safety standards, for some products, covering performance, design, and labelling. The standards also apply to some product-related services
- Introduces mandatory reporting to the Minister – by suppliers – of consumer goods that they supply, or use in services related to them, where the goods have been associated with a death, serious injury, or illness. Practically, the mandatory reporting has led to 43 additional recalls of products since the law came into effect

Three examples from the last few months illustrate the benefits of the product safety reforms.

- The ACCC negotiated a recall for two hair products that had unsafe levels of formaldehyde.
- A bicycle distributor recalled eight models because the bikes didn't have chain guards, which are a mandatory safety device. That followed a program where the ACCC tested bicycles from 84 retailers
- And the Court imposed a \$400,000 penalty on a retailer for supplying children's dressing gowns which failed to comply with the mandatory standard for fire labelling of children's nightwear

Here in the Northern Territory, the Territory government has conferred administration and enforcement of the product safety provisions of the law on the Australian Government.

So that means the ACCC is responsible for implementing the law on product safety here and the ACCC is more active in the NT regarding product safety.

We have increased our staff in the Darwin office to meet these extra responsibilities.

Some of you may be aware of an example here in the Territory, just before Christmas last year, where a toy-seller working at local markets was selling toys that did not meet mandatory standards for toys for children aged up to three years.

The trader agreed to stop selling the toys because they didn't meet the standards.

Eventually, the ACCC issued a public warning – for everyone to read - because the seller continued to offer the toys.

It is a good example of how active we are in product safety.

Unconscionable conduct provisions

I would also like to mention the provisions regarding unconscionable conduct. These were existing provisions that have been moved into the Australian Consumer Law. They apply to business-to-consumer transactions and business-to-business ones.

For something to be unconscionable it has to be more than unfair; it has to be irreconcilable with what is right or reasonable and show no regard for conscience.

It's a challenging area of the law, because the tests that a court must apply in an unconscionable conduct case are rigorous, and the evidence in these cases is often a series of claims and counter-claims by the people involved.

Despite these complexities, I am interested in exploring the potential application of the unconscionable conduct provisions in the Act in both business-to-consumer and business-to-business settings.

The ACCC has achieved outcomes in over 30 unconscionable cases to date.

At the moment we have a case underway – based here in Darwin – in which we specifically allege a firm called EDirect, trading as VIPTel Mobile, engaged in unconscionable conduct in the way in which the firm has sold mobile phone contracts. We allege that EDirect used relentless high-pressure techniques.

The case remains before the court, and it has not been decided yet, but it illustrates our interest in taking such cases.

2. COMMITMENT TO INDIGENOUS PEOPLE

I said earlier that I wanted to outline our commitment to Indigenous people as consumers.

The ACCC pays particular attention to vulnerable or potentially vulnerable consumers.

In the case of indigenous people, this vulnerability often presents in relatively low levels of English, relatively lower levels of financial literacy, restricted access to services, and/or geographic isolation.

There have been some notable cases taken by the ACCC where indigenous consumers have been the subject of unlawful conduct.

One of those was in the Northern Territory, where a man named Ramon Lal Keshow, was promising educational materials in remote Aboriginal communities.

Keshow signed up indigenous women who had little or no English literacy or understanding of financial matters such as the consequences of signing up for continuing direct debits to indefinite deductions from their bank accounts.

Little or no educational materials were delivered by Mr Keshow but the payments went on regardless. For instance between 1998 and 2004 Keshow took more than \$10,000 (ten thousand dollars) from one woman through automatic deductions.

The Federal Court found he had acted unconscionably against eight women, and the community more generally, and took the unprecedented step of banning him from entering Aboriginal communities in the Territory to transact business. That case was in 2005.

In another case, where the Federal Court has just handed down declarations, a solicitor based in Melbourne was found to have engaged in misleading and deceptive conduct.

She had sent out about 20,000 (twenty thousand) debt collection notices a month in the 12 months before we took action against her.

The debt collection notices made claims on behalf of video stores, including that the video store was entitled to recover solicitor's costs that it was, in fact, not entitled to recover.

The court ordered her to stop the practice, to publish corrective notices in newspapers, and to pay \$30,000 (thirty thousand dollars) towards the ACCC's costs.

The case originated with a complaint from the Central Australian Aboriginal Legal Aid Service, which had received information from its clients.

However, the ACCC is committed to doing more to protect indigenous consumers than taking cases alone. We do that routinely, on behalf of all Australian consumers.

We're working in co-operation with the State and Territory fair trading agencies, and other Commonwealth agencies, to provide both better information and education for indigenous people on their rights, and we're taking steps to ensure earlier detection of potentially unlawful behaviour towards indigenous people.

Here in the Northern Territory, we have appointed Yvonne Dunn, who visits remote communities, raising awareness of people's rights when it comes to door-to-door selling and things like mobile phone contracts, and developing partnerships with community agencies that can bring problems to our attention at an early stage.

We are also exploring the use of social media as a way to spread the message to Indigenous people.

In co-operation with Fair Trading New South Wales, we are working on a project in remote communities in the west of that state to ensure early detection of high-pressure sales tactics that are aimed at Indigenous people.

That project is likely to be a pilot for similar projects elsewhere.

Overall, I want to assure you - and others who read this speech - that protecting Indigenous consumers on their statutory rights is high on the ACCC's agenda.

3. CARBON PRICING – ACCC ROLE

I will turn now to my final point, which is the impact of carbon pricing when it begins midway through next year.

As businesspeople, you are going to have questions about this, particularly if you find someone is charging you more because they say they are factoring in carbon pricing, or if consumers are asking you about the impact on the prices you charge.

The key point is this: if a business raises its prices, and says that the increase is a result of carbon pricing – or even partly the result of carbon pricing - it must ensure that what it says about the price increase is true.

It is misleading conduct to say a price increase is due to carbon pricing, or even partly due to it, when that isn't the case.

A business can raise (or lower) its prices at any time, as it sees fit. But if a business says something about the reason why prices are going up (or down), it's unlawful to mislead consumers as to what that reason is.

The ACCC's role is to ensure that businesses are not making misleading claims if they attribute price increases to a carbon price.

The Treasurer has directed us to make this a priority.

Attempting to jump the gun, and claim price rises due to carbon pricing now, will not help.

And we are already on the look-out for such claims.

Some businesses will be faced with price rises from their suppliers, and the suppliers might tell you that the price increase they are imposing is fully or partly due to carbon pricing.

Say you plan to pass that increase on to your own customers and say it is because of the carbon price.

If you are not confident about the claim that is being made to you by the supplier, we would expect you to check, and seek further information from the supplier in order to satisfy yourself that the increase is due to carbon pricing.

If you think you are being misled by the supplier, you should report it to the ACCC.

Carbon pricing – practical example

Let me run through an example that I hope will give you a sense of what I mean when I say claims can be misleading:

Say I'm running a hair salon. I put up a price list that says from 1 July all services are subject to a 10 per cent price increase that is largely due to the carbon price.

A month earlier the salon received a statement from the electricity supplier saying there would be a new tariff from 1 July. The salon's energy use was such that the electricity price increase is equal to roughly 2 per cent of the retail price of a hair style.

The claim by the salon that styles are increasing by 10 per cent - and that is largely because of carbon pricing - is misleading.

It's not clear that the power company has raised prices because of carbon pricing, and even if it has, 10% is a lot more than 2 per cent.

You should also be aware that oral representations – what you or your staff say to customers – are covered by the law.

So, let's imagine a staff member in your café says to customers: "All the prices on our menu have increased because of the carbon price."

If you have no factual basis to back that claim it is, on the face of it, false and misleading to say that the prices have increased because of carbon pricing.

We'll have more online resources available on this for businesses shortly.

And you can contact our information centre at any time on 1300 302 502.

You can also contact our Darwin office and speak to Derek Farrell, who is in the audience this morning, for further assistance

Our aim is to reduce the potential for confusion, so businesses know what they can do, and consumers understand what they can expect.

I will take questions now.