Practising trade
ACCC E-Commerce Conference

On-Line Competition

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Firstly I would like to welcome you all and thank you for attending today’s sessions. I would also like to particularly thank our panellists today, who have kindly agreed to contribute their knowledge in this exciting new area of competition law and policy.

E-commerce is one of the key challenging phenomenon arising in commercial activities. There is much said and much written about the potential for e-commerce to create a variety of new business opportunities. For existing business, there is the challenge of translating their internal activities as well as relationships with customers and suppliers from the offline to the online world. This will enable business to reap the benefits of greater efficiencies and broadening the reach of their operations. For new businesses, the challenge is to find the right market or niche for their online services.

NOIE’s recent publication, B2B E-Commerce, Capturing Value Online illustrates this by providing a number of examples of how e-commerce is extending market opportunities and delivering greater efficiencies. It reports the findings of a recent Allen Consulting Group study that companies using and developing Internet business tools generates about $28B or 4% of GDP and that 55% of businesses are actively participating in e-commerce. In another case, the PEG project, NOIE’s report indicates that by using this electronic platform for e-procurement and supply chain management, the pharmaceutical industry may reduce transaction costs from $50-$70 per transaction to $2 - $5 per transaction.

What this means is new competitive opportunities and new competitive threats. We have seen a number of examples arising in the e-commerce area, particularly within the United States. One example is the Microsoft litigation which focussed public awareness on the potential for new technology monopolists to arise. Another is the ongoing debate regarding online services such as Orbitz, the US airline portal which has attracted complaints from offline travel agency, fearing vertical integration from airlines into retail ticketing activities may stifle competition.

Over the last 18 months, the ACCC has increasingly been asked to comment on e-commerce and trade practices issues, particularly in relation to B2B electronic marketplaces.

On the one hand, businesses view the Trade Practices Act with some apprehension, and want to know what their liabilities are before embarking on an e-commerce strategy. However, without knowledge of what e-commerce models are being adopted, it is not always possible to predict the trade practices ramifications. So why is this so complex? New challenges are developing, for example in understanding the competitive structure of e-commerce applications and the IT industry which underpins the cost and innovation in e-commerce. Also, businesses developing an online presence are offering new opportunities for collaborative ventures with their
competitors (for instance in the B2B area), and with customers which could raise competition issues.

Some organisations question whether in fact the Trade Practices Act is appropriate in the electronic age. However, it is not yet clear where in fact the Act may be deficient. Many e-commerce activities are the same as the activities that businesses engaged in offline, so why should the laws be any different?

Equally, this is a challenging area because as yet, there are not many examples of cases or precedents in the area for business to draw on in developing compliance programs. In the most part, cases regarding competitive conduct issues have arisen predominantly in the United States and Europe, and may or may not be relevant precedents in the Australian context. Determinations such as the US Federal Trade Commission’s decision not to take action at this time in relation to the Covisint eHub in the auto industry, but not ruling out that the venture may raise competition issues, illustrates that in many cases regulators will not be in a position to make a final determination until e-commerce applications themselves are further developed.

In this regard, over the last 18 months, the Commission’s approach has been to monitor emerging trends and where possible, hold discussions with participants in B2B ventures which could raise some issues to ensure that they are aware of the potential trade practices consequences. Even so, we are still very much in the learning stages of identifying the nature and competitive effect of proposals. To further understanding of the potential issues and raise broader awareness in this area, the Commission engaged Gans & King to provide some preliminary analysis of B2B electronic marketplaces, and has issued a Discussion Paper seeking to place the competitive analysis within the context of the Trade Practices Act. I see this forum as the next step in the process of developing both the Commission and industry’s thinking on these matters.

So what do we hope to achieve from today’s proceedings? Firstly, to increase our understanding of what is happening in e-commerce, what kinds of new services or new ways to do business are developing and what does this mean in terms of access to markets, including global markets, efficiency and economic growth. Second, we hope to generate an interactive forward-looking thinking discussion on the legal, economic and practical application of the Trade Practices Act to e-commerce scenarios. Third, and perhaps most importantly, we see today’s event as an opportunity to learn and to take a further step forwards towards promoting confidence in e-commerce by raising awareness of competition issues, and how to deal with them.

Finally, we hope to use this opportunity to identify what if any further guidance may be necessary for business in e-commerce generally, or perhaps in specific areas such as competitor collaborations in B2B.

To facilitate this, we have divided the day into 4 sessions and 4 major topics, although some overlap is likely to occur. For each session we have brought together a panel of experts from industry and the fields of law and economics to offer their thoughts on a range of issues identified in the Gans & King Paper and the Discussion Paper.

Our goal is to ensure that these sessions are as interactive as possible in order to canvas as broad a range of views as is possible in what is unfortunately, a very limited
timeframe. To do this, we will be encouraging questions and comments from the floor, as well as panel members.

Before commencing, I would just like to take a few moments to note some of the key themes in this area, and challenge you to think about these during today’s proceedings.

- **Balancing the pro-competitive elements of e-commerce with potential anti-competitive behaviour.** This is not a new topic in competition law. We see it arise daily in the context of mergers, collective negotiations and innovation markets. In the context of mergers, the current merger guidelines take into account pro-competitive efficiencies, and indicate that the Commission accept such claims in rebutting anti-competitive arguments when there is strong and creditable evidence that such efficiencies are likely to accrue. In some cases in Australia, assessment of pro-competitive elements occurs as part of the assessment of efficiency gains and public benefits within the context of authorisation applications which enables the ACCC to take into consideration a broad range of factors in determining whether to allow otherwise anti-competitive conduct to occur. One of the key questions in e-commerce will be what kinds of pro-competition, efficiency and public benefit arguments may be raised in relation to e-commerce and how should they be treated?

- **Identifying market power and market boundary issues in a developing environment.** Often one of the questions raised about e-commerce is to what extent it promotes the development of global markets, and whether online trading falls within the same market as offline trading. These are complex issues which are largely driven by fact situations and there is no “one size fits all” response to this. Also, in many cases, the customers and competitors may not know the answer until an online service or product has been established for some time. What I would hope participants today to focus on is not trying to second guess whether online sale of books, CDs and other goods or services will always be strong competitors to offline sales, but rather to identify elements for a framework of analysis of such issues.

- **Innovation and competition issues.** One of the key points raised by the Gans & King report is whether special consideration needs to be given to eHubs on the basis that it enhances the innovative process. Generally, this type of argument would fit within the public benefit factors taken into account in authorisation applications. The technological innovation and dynamic characteristics of a market may also impact upon the degree of market power any one player is likely to have. I believe that today’s forum provides a good opportunity to take the discussion beyond the somewhat simplistic thinking that new technology markets should not be subject to competition laws, or that Regulator’s don’t understand the dynamic nature of markets, to instead focus on developing an appropriate framework of analysis to deal with such issues. The real questions here include how long is too long from a consumer perspective for market power to exist in new technology markets? Can an incumbent entrench its market position beyond its anticipated lifespan? When is a new technology sufficiently developed to be taken seriously as a new entrant?

- **Network Effects.** Just as telecommunications have become a key area in commercial activity, so has one of the characteristics of that industry – network
effects or demand-side economies of scale. In e-commerce, many emerging applications such as eHubs, technology standards, and peer-to-peer services (e.g., Instant Messaging, music file swapping) work on the basis of network effects—they are attractive to customers as long as they are perceived to be attractive to other customers. Some economic theories suggest that this is a factor in identifying barriers to entry for the purpose of market analysis. Others see this as a somewhat less substantial barrier than, say supply-side economies of scale which are founded upon capital costs rather than consumer perception. This is an area where we need to think more carefully about what constitutes a network effect, how to measure the degree of the effect (as it may be great or small, depending on the nature of the market), and what other factors combined with network effects may result in significant barriers to entry.

- **Price Transparency.** The potential pro-competitive and anti-competitive effects of price transparency is an area which arises in relation to a range of emerging e-commerce products and services. It is a key issue in eHubs—whether the collection of price and other transactional data visible to market participants is likely to facilitate collusion, or edge them on to compete more vigorously. Generally, where price transparency is asymmetric (i.e., transparent to competitors, but not to customers) the arguments supporting price transparency appear weaker. Nevertheless, Gans & King’s report raises some interesting issues regarding the collusive potential of price transparency (or other information) if market participants are still able to transact in a non-transparent fashion. Further in the program, we will also look at issues such as competitors not only looking at each other’s price lists and information, but actually using the information to provide a value-added service to their customers. This raises interesting issues of who controls the customer, and to what extent copyright and technology can or should be used to protect information posted on the Internet.

- **Small Business Issues.** Small business is very much a customer as well as a supplier in e-commerce. Increasingly, policy issues may arise regarding access to eHubs on fair and reasonable terms, as well as fairness in dealings between small business and technology suppliers. While there may not be easy answers to these questions, it is critical that small business is made aware of its rights and responsibilities under competition laws in order to promote confidence in participating in e-commerce. Whether you are involved in e-commerce as a supplier of services to small business, or are involved in a small business enterprise, I would encourage you to consider these issues carefully.

Certainly, there are many more challenging opportunities and issues arising in e-commerce than those I have mentioned above, and I would hope that many more are identified during the course of today.

So again, thank you all for attending today. I am certain that the debate will be lively, and welcome the opportunity to participate.