Law Institute of Victoria President's Luncheon

Current Issues at the ACCC

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Introduction

Thank you for the opportunity to address the Institute today on a number of recent issues at the Australian Competition and Consumer Commission (the Commission).

Amendments to the Trade Practices Act

The Commission is now in a better position to assist small business after Federal Parliament passed changes to the Trade Practices Act (the Act) in late June. The new legislation fills in gaps in the protection already given to small business with unconscionable conduct provisions passed in 1998.

The amendments to the Act not only enhance the role of the Commission in responding to cases of unreasonable exploitation, they also recognise the benefits of more flexible access to the courts and state tribunals.

In summary the amendments cover a range of elements:

- Court discretion to allow the Commission to intervene in private proceedings
- Maximum monetary penalties for a breach of the Consumer Protection sections of the TPA (Part V) have been increased to $1 million for corporations and $200,000 for individuals
- Giving Commission the right to seek declarations in contraventions of the Act by the Court. Previously the Commission was only able to intervene in existing matters. Declarations are relatively quick and inexpensive providing binding authoritative statements as it applies to the parties involved.
- Removal of doubts about application of the Section 51 AC Unconscionable Conduct provisions to State/Territory jurisdictions
- Extension to 6 years for the period in which a claim under the Act can be commenced
- Extending the Commission's right to take representative action under Part IV of the TPA relating to restrictive trade practices (except the secondary boycott provisions Section 45 D& E). Previously this was restricted to part IVA (unconscionable conduct) and Part V (consumer protection).

- Courts to have discretionary power to ensure compensation for victims of a TPA breach receives priority over recovery of a fine or penalty
- For mergers and acquisitions, the definition of a market will now include a substantial market in regional Australia
- The Court will also be able to award an extended range of non-financial remedies including orders in respect of Probation , Community Service, Corrective Advertising and Adverse Publicity

As a result of the changes the Commission will be allowed to intervene in private proceedings brought under the Trade Practices Act where the issues are of public interest.

The Commission will also have the right to undertake representative actions and to seek damages on behalf of third parties for most contraventions of the Restrictive Trade provisions of the Act. This will allow the Commission to assist small business in protecting its rights in relation to anti-competitive conduct such as price fixing by cartels of large businesses.

Small business will also benefit from the 'drawing down' of 51 AC or the unconscionable conduct provisions in the Act. This amendment will remove any doubt that States as well as the Commonwealth can use legislation in relation to unconscionable conduct.

For example, the New South Wales Government is now able to proclaim the unconscionable conduct provisions in its *Retail Leases Amendments Act*. This will give small business retailers cost-effective options, such as access to State Tribunals, should there be a need to resolve disputes with their landlords.

The amendments also address some of the time constraints that faced small business when it comes to initiating court action.

The Act previously stated that action for damages must be taken within three years and in some cases two years, of the breach. This created difficulties where problems take some time to become apparent. For example, signing an insurance contract where the problems surface later; or lengthy investigations. The time has now been extended to 6 years, placing small business in a better position to deal with unfair business practices.

By filling in gaps in existing legislation and clarifying some important anomalies, these changes as a whole emphasise Parliament's recognition of the need to support small business against unconscionable and anti-competitive behaviour of larger organisations. The Commission welcomes its broadened role in providing that support.

Extending Commission Powers

Court action by the Commission can produce judgements that extend its powers under the Trade Practices Act and this is particularly true with section 46. This section prohibits a company with a substantial degree of market power from using it to damage a competitor. One main weapon is predatory pricing, that is, selling below cost until the weaker competitor is driven out of business. Consumers may cheer the initial drop in prices but they do not last.

There have been several landmark cases where the Court has recognised that predatory pricing can constitute a misuse of market power and therefore unlawful under section 46. The Court's interpretation of predatory pricing is stronger than that of the US and Europe. There predatory pricing only becomes unlawful where a business charges supra-competitive prices to recoup losses once rivals are eliminated. In Australia a later recoupment of losses in the market in question is not necessarily essential to contravene section 46. This is the verdict of the recent Boral case.

Last February the Court declared unanimously that Boral Besser Masonry Ltd's pricing below cost breached section 46. The Commission took action alleging that Boral had slashed prices below manufacturing cost to drive the smaller C&M Bricks out of the concrete products market. Justice Finklestein went further declaring that "psychological pressure" had accompanied predatory pricing. Boral had not only sold below cost but publicised the fact that it was increasing manufacturing capacity. It was signalling to its rivals that it was willing to wage the price war for some time and could bear the losses.

Another important Court decision concerns Melway Publishing Pty.Ltd's refusal to supply Robert Hicks Pty Ltd with its Melbourne street directory for distribution, arguing that it had a long-established, exclusive distribution system in place. While the High Court said that Melway had not breached section 46 the important point is that the Court appears to have accepted the ACCC submission that it is sufficient to establish

that the existence of market power made it easier for the firm to act in a prohibited manner. This lowers the threshold for breaching the Act.

The decisions are a warning to companies tempted to use their muscle to crush their competitors that section 46 is as vital in the quest for competitive economy as are other sections of the Act dealing with cartels and company mergers.

Legal Privilege

In all the Commission's investigations of possible breaches of the Trade Practices Act it is vital that all relevant information is placed on the table. I welcomed the recent decision by the Full Court of the Federal Court to uphold the Commission's claim that its powers under section 155 of the Act to gain access to documents extends to those subject to legal professional privilege.

The Court determined that a person or company under investigation by the Commission couldn't refuse to provide information by relying on legal professional privilege. Justice Wilcox said that without information about contacts between the person under investigation and the person's lawyer, it might be impossible for the Commission to see the whole picture. While the Commission has rarely sought to override legal privilege to seek documents the Court's decision means that the cloak of legal privilege cannot inhibit investigations.

Call for an increase in penalties

The Commission believes the time has come for serious consideration of criminal sanctions, including imprisonment, in relation to hard-core collusion.

Such penalties are the only realistic deterrent for hard-core cases of collusion. They would apply to the most serious and profitable acts of collusion such as price fixing, bid-rigging and market-sharing.

In the worst cases they are deliberate, secret acts of dishonesty, which indirectly impact on consumers and small business through over-charging. Price-gouging of this kind is a form of theft but it also seriously impairs the operation of free markets which are intended to operate in the interests of the public.

Such a move would bring Australia into line with a number of its major trading partners including the United States, Canada, Japan and South Korea that regularly impose criminal sanctions for collusion.

Let me make it clear that these stronger sanctions would not apply to small business or trade unions – they would be aimed at major business engaging in practices such as price-fixing or market sharing.

The relative leniency of Australia's penalty regime leaves us exposed to enormous risks in the global economy. Because Australian markets are comparatively small by international standards and tend to be characterised by high levels of concentration, they are particularly vulnerable to the detrimental effects of hard core cartels. It is crucial to the future integrity of Australian markets that these multinational firms, which operate in major foreign markets with much tougher penalties, do not come to see Australia as being soft on serious hard core collusion and anti-competitive conduct.

If the Commission, as the competition law enforcer, is to effectively deter and properly punish this sort of behaviour in the future, it must follow the lead of several of our major trading partners and consider imprisonment as an additional sanction for executives who engage in these highly profitable, hard core breaches of the restrictive trade practices part of the Act, specifically, conduct that is caught by sections 45A (contracts, arrangements or understandings in relation to prices) and probably 4D (exclusionary provisions).

The vast majority of Australian businesspeople have nothing to fear from a stronger law, as the vast majority is not engaged in anti-competitive behaviour. They, in fact, should welcome it. Moreover, it is not proposed that the criminal sanctions would apply across the board to all breaches of the Trade Practices Act but just to defined acts of collusion the burden of proof would be criminal ie. proof beyond reasonable doubt.

For the most part, the Trade Practices Act works well and it is not suggested that the present system be radically altered. It is just that it has a weakness for extreme collusive behaviour and the possibility of imprisonment would have a more powerful deterrent effect than fines as other countries have found.

There are troubling signs of an increase in hard core collusive activity internationally (and locally) which will not be deterred by anything other than true criminal sanctions, including imprisonment.

When one considers the large and quick potential gains to be made from cartels, the current maximum penalties are not sufficient to deter deliberate, determined hard-core collusive activity by large, profitable multi-national companies. Just look at the recent vitamins price-fixing cartel, which reaped multi-millions of dollars for its participants over many years.

With a rise in such international cartels, Australian executives of powerful multi-national corporations, should be given the clear message that their participation in hard-core collusive activity would see them facing the same serious criminal consequences as in the US, Japan, Canada or South Korea, that is, imprisonment. Also, the current maximum penalty of $A10 million could be reviewed with an alternative provision for a 10 per cent penalty on turnover, as is the case overseas.

Collusion is still occurring on a significant scale in Australia. For example, the Commission's recent court action against the largest price-fixing cartel in Queensland resulted in penalties and costs exceeding $15 million. The case involved 38 individuals and more than 20 companies in the Queensland fire protection industry. At industry meetings known as the "Coffee Club" decisions were made on pricing and who should submit the lowest bid for fire sprinkler installations projects as they came up for tender. The "lowest" tender was higher than it would have been if there had been no collusion.

There was obviously some merriment because the coffee club met at sports clubs, golf clubs and hotels, no doubt having a convivial ale before discussing how to conspire against the public and raise prices.

The representatives of companies penalised by the Federal Court last July for the price fixing of fittings and valves for DICL pipes actually met in a coffee shop in the Brisbane suburb of Hamilton. It is alleged that one general manager declared that "if we all maintain our market shares and lift prices, everyone should be happy". The term "everyone" is rather sweeping, the company's clients would not have been happy at discovering they were victims of a conspiracy.

The Trade Practices Act specifies that the Commission's role is to "enhance the welfare of Australians through the promotion of competition and fair trading and the provision of consumer protection". The coffee shop conspirators rarely have consumers, domestic or business, in the forefront of their minds. Their thoughts are on market domination that can mean charging higher prices to consumers and paying less to suppliers.

The cost to consumers can be enormous either directly in what they pay to the offending companies for goods and services or indirectly in the higher prices charged for the products of third companies who deal with the conspirators.

The Federal Court of Australia earlier this year, fined three multinational suppliers of animal vitamins a record $26 million for a price fixing conspiracy that had continued world wide for over a decade. The Court banned company representatives from meeting to discuss market pricing for four years while customers will proceed with a $100 million class action. The business customers were mainly farmers and, in many cases, their higher costs would have been passed on to those buying their produce at supermarkets.

We must also continue to review and revise civil penalties to ensure they remain a relevant and effective deterrent in the global economy.

We must also look again at the application of civil penalties to Part V [consumer protection]. The consumer protection part of the Act has curiously almost the reverse position and problems of the competition part of the Act. Breaches of consumer protection provisions do not attract the kinds of civil penalties that currently apply in the restrictive trade practices part. It is possible to get criminal penalties in the form of fines (but not jail sentences) for Part V offences. However, the arguments that justified the application of civil penalties to Part IV [restrictive trade practices] are equally compelling in relation to Part V. The Commission sees case after case where companies have breached Part V through a failure of compliance that is so serious and widespread that it cries out for a pecuniary penalty, but still does not amount to the type of conduct that would justify criminal action. As with Part IV, civil penalties for contraventions of Part V will ensure that would-be offenders are deterred, victims are compensated and justice is done promptly, effectively and at the lowest possible cost to the taxpayer.

Recent Enforcement Action

Target

The Commission has for many years warned about the need for truth in advertising and for great care with qualifying statements. Advertising and selling guidelines were prepared by the Commission in consultation with radio and television broadcasters, publishers and the advertising industry.

Despite this, retailers have been tempted to use fine print to avoid giving the "downside" of their offers. This is unfair to those businesses that do advertise the facts - as it can cost them business especially during the "sales" season when competition can be particularly fierce.

It was especially disappointing that the Commission was forced to take legal proceedings against Target last year after the company had been warned that the Commission was considering it.

By its initial hostile reaction to the Commission, Target has put itself in the embarrassing situation of having, under Court orders, to print and broadcast corrective advertising declaring it had breached the Trade Practices Act and mislead consumers. It has apologised for failing to adequately inform consumers of the fine print that excluded many items of clothing from the offer of "25 per cent off every stitch of clothing".

The Commission is also taking action against Medibank Private, the Medical Benefits Fund and Quality Bakers Limited (Buttercup). It has obtained court orders against Goldby Motors and resolved matters involving American Express and Pocket Money Ltd.

Telstra

Last Thursday, the Commission instituted proceedings in the Federal Court in Melbourne alleging that Telstra engaged in unlawful misleading and deceptive conduct when dealing with former One.Tel mobile phone customers.

The court action concerns statements allegedly made by Telstra call centre representatives to consumers about early termination fees payable by One.Tel Next Generation customers. Since 9 June Telstra, which has the lists of One.Tel customers,

has pursued an active program of contacting them. Some 200, 000 customers are involved.

In the break up of One.Tel's assets, the Commission is charged with ensuring that the consumer protection provisions in the Trade Practices Act prohibiting misleading and deceptive conduct are strongly enforced.

The Commission welcomes the court making the interim injunction order that the Commission was seeking. The ordered by the Court against Telstra states that there be no further representations made to One.Tel Next Generation customers that if they transferred their business to Telstra's competitors, or failed to transfer to Telstra, or failed to transfer to Telstra by a specified date, they may be liable to pay termination fees to One.Tel. This vindicates the Commission's swift action

The Commission will continue with this case seeking declarations of unlawful conduct, a permanent injunction to ensure the behaviour is not repeated, an opportunity for consumers who may have been misled to rescind their new Telstra contracts without penalty, corrective advertisements and a compliance program by Telstra.

Following the Commission's announcement of the case, a considerable number of calls have been received on the ACCC hotline by other One.Tel customers claiming similar behaviour to that alleged in the case.

There have been some recent allegations that ‘prosecution by media release’ is eroding the relationship between business and the Commission. The Courts themselves have recognised that "a moderately worded, accurate news release" published by the Commission serves a very useful purpose in ensuring that the media is not left to make its own inquiries and compile its own summaries with the risk that, by accident, inaccuracies might occur and greater harm done to defendants.