



**E-commerce: Meaningful regulation and the
information economy**

Speech to
ACCC E-commerce conference

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1. Introduction

Ladies and Gentlemen.

I would like to welcome you to the Commission's e-commerce conference. In convening this conference the Commission recognises the significance of the rapid developments being made in e-commerce and the potential impacts these developments may have on its essential role of ensuring compliance with the Trade Practices Act.

Although we saw the collapse of the expectations held by many investors in the dot com companies in early 2000, e-commerce implementation has continued at a rapid pace. This is driven by the productivity and efficiency improvements potentially achievable by adopting electronic technology.

Strong competition can be expected to encourage further the uptake of e-commerce.

Over the next two days you will have the opportunity to hear from some of the leading voices in e-commerce.

Speakers from government, industry and consumer groups will outline where the e-commerce industry is heading in Australia and internationally. You will be given presentations on the nature of trade practice issues that confront businesses (particularly small business) and consumers. We will hear from regulators and policy makers, and we will hear from experts from the private sector.

Of course, the Commission itself is represented today by all Commissioners.

I would also like to take this opportunity to welcome all our speakers, particularly our representative from the United States Federal Trade Commission, Jennifer Mandigo, whose comments will give us a valuable international insight. Given difficult international times, I especially appreciate her presence here today.

Our speakers hope to interest you with a wide range of issues, which include:

- the implications of technical innovation and network effects on market power;
- the balance between intellectual property rights and competition;
- the pro and anti-competitive effects of price transparency;
- disclosure of terms and conditions in online transactions and scams; and
- the challenges of achieving international coordination to combat competitive and consumer protection issues that cross national boundaries.

The discussion will therefore be both broad and deep. Today, the focus is consumer protection and e-business. Tomorrow, the emphasis will be on-line competition.

E-commerce provides new opportunities for new businesses and more vigorous competition in diverse areas including high technology, Business-to-Business (B2B), and Business-to-Consumer (B2C) commerce.

This may mean more choice for consumers through easier and more instant access to goods and services and information about competing offers for their purchasing needs. It also means more opportunities for business to increase the efficiency of operations and to reach more customers and suppliers through marketing of products on websites and participating in electronic procurement sites.

The overarching theme of this conference is to assist business and consumers in identifying the rights and responsibilities in B2C and B2B transactions under trade practices law. But, equally the objective is to discuss the role of the regulator, and how regulation can assist in the development of e-commerce by creating an environment in

which business and consumers can be assured of their rights, and the effective enforcement of their rights.

To assist in developing understanding of the issues, the Commission issued a Discussion Paper in October, *E-commerce and competition issues under the Trade Practices Act: discussion paper*. Also, Professors Gans and King have delivered a report specifically focussing on issues in B2B electronic marketplaces. These documents provide a good starting point for further industry consultation on these matters.

2 Issues in high technology industries

Carl Shapiro and Hal Varian make the clear point that durable economic principles are a valuable guide in today's electronic world. Technology changes, but economic laws do not. Similarly, Michael Porter has proposed that the Internet is not a separate commercial activity of business, but should be considered merely as part of a business's overall strategy.

To me it follows that new markets and the economic impetus of technology can give rise to old forms of economic abuse.

There is a need to apply the traditional principles of competition and consumer protection law and policy to these cases.

For example, you will be aware of the call that the Internet must not be regulated. However, government has played, and will continue to play a key role in developing a legal framework to assist in the development of e-commerce.

It would be a mistake to say that because the Internet is so different, or so separated from other commercial activities it deserves to be left to its own devices. As well, it would be foolish to assert that the Internet requires a completely new regulatory framework for competition and consumer protection.

At the same time however, we recognise that there might be aspects to e-commerce that could be considered unique. And we enhance our ability to provide effective and appropriate regulation if we acknowledge this to be the case.

One feature of the high technology sector is the rapid growth of new products and services, new suppliers and more competitors. However, the new technology can also give rise to a new important set of competition issues as recently illustrated in the Microsoft case.

One view is that competition law should not apply in these sectors. Some economists, most notably those inspired by the Austrian school of Hayek and Schumpeter, believe that competition law should have no role in high technology areas. They argue that any market power will soon be displaced by further advances in new technology itself. Moreover, they contend that regulators and courts will be quite unable to understand and foresee the effects of technology and their decisions are likely to be mistaken.

However, another view is that some areas of new technology can give rise to a large accumulation of market power and consumer detriment in a short time and it sees a need for fast, strong and effective application of competition law in these situations. The actions of the antitrust division of the Department of Justice in the United States in launching the Microsoft case reflect that view. Microsoft and the Department of Justice may have reached settlement, but similar issues are likely to arise in the future.

It should not be thought that the Microsoft case is, or was, an isolated one. In recent years there has been a great deal of activity by US regulators in high tech areas, with interventions in mergers being especially notable.

A key focus has been on network economics where the accumulation of market power in sector after sector seems to be very great. The field of network economics raises new and important challenges for competition policy in the utilities area, the high technology areas, and in the financial sector and will be at the centre of much antitrust

action for years ahead. Intellectual property issues often arise in these settings. In this country, like many others, such issues will move to the centre of the debate about competition policy in the years ahead.

The question is not just if innovations are quickly superseded in an abstract, technical sense. The practical concern is whether the existence of network efficiencies **and** intellectual property protection **and** conduct by companies that is calculated to maintain and accumulate market power significantly delays or deters the supply of alternative products.

3. Competition in the B2B electronic marketplaces

How will competition in these electronic marketplaces be expressed?

New technology means that information is more immediately available and up to date for both traders and consumers. It can be easier for competitors to collaborate either directly or by price signalling. This issue is particularly relevant in B2B electronic marketplaces, which are established jointly by competitors. There are a number of such marketplaces developing in Australia including corProcure, Cyberlynx, PeCC and Ausmarkets.com.

Such trading hubs may enable significant efficiencies in supply chain management. It may increase internal efficiencies by reducing errors in processing, reduce time spent leafing through lengthy paper catalogues and increase employee productivity. A buyer may gain the advantage of obtaining price quotes from a range of sellers located anywhere in the world at the press of a button.

In many cases this may have the effect of increasing competition, but there are a number of questions that need to be asked.

Who owns the marketplace?

Could the owners discriminate against third party competitors and damage competition by refusing access to the marketplace?

Could the owners use the marketplace to exchange commercially sensitive information to further a price fixing arrangement or tacit collusion?

Will buyers and sellers be restricted from using other marketplaces or procurement methods that may stifle competition between marketplaces?

The answers to these questions will depend on the structure of the venture, and the combined market power of the owners. That said, deciding what, if any, action to take in such matters is complex. It may be that, in some cases, the potential advantages outweigh potential detriment, in which case the parties may seek authorisation from the Commission.

It is early days yet, and as a result, these structures are at an early stage of development. At the moment therefore the Commission continues to monitor carefully the development of B2B.

4. Emerging trends in consumer protection

These are not just nice academic arguments.

The rise of e-commerce has exposed important issues in consumer protection.

During the year, the Commission received over 800 complaints in relation to Internet or e-commerce activities. This is a figure that has grown substantially. Many complaints relate to issues including disclosure of terms and conditions of Internet access plans and pyramid selling schemes. There are also complaints or inquiries about privacy, security, failure to receive goods, websites that fail to display current prices or stock availability.

Of equal concern is the 'hidden' level of dissatisfaction with e-commerce services, where consumers have simply voted with their feet and decided not to engage in online transactions.

The Commission obtained a further snapshot picture of the situation at the start of the year when it organised the International Sweep Day in which agencies in nineteen countries examined 3,000 sites for basic information disclosure. In areas such as disclosure of refunds and privacy policies, the 250 Australian sites covered failed to cover even basic information. For example 62 per cent did not provide any information about refund or exchange policies.

This suggests a significant problem, not only in dealing with deciding what new or further information should be provided to customers in e-commerce transactions, but even in complying with the most basic of disclosure requirements.

An area which is likely to attract greater prominence with the introduction of new privacy laws in December is compliance with disclosure requirements in online transactions.

Electronic commerce is not a euphemism for abusing the privacy of citizens.

Privacy statements need to be accurate and not omit material information about the collection and use of personal information. Internet transactions may provide traders with a great deal of information about their customers, as well as consumers who merely browse a site. Traders will have increased opportunities to use that information in other ways including direct marketing emails, or supplying it to third party data collectors.

Care needs to be taken to ensure that customers fully understand what information is being collected about them, how it will be used, and what security measures will be put in place to ensure that it is not unwittingly disclosed to third parties.

5. Internet scams

Old fashioned scams such as pyramid selling schemes and miracle cures have been commonly seen on the Internet. On one hand, email offers the potential to be a useful marketing tool. However, it also provides significant opportunities for scammers to obtain millions from unsuspecting consumers.

Just as pyramid selling schemes in the 'old' economy are illegal, so too are they in a new electronic form.

For example, one scheme involved an offer of global electronic debit cards. This was the World Netsafe case. Thousands of consumers paid over \$2,000 each to join the scheme, and the traders in question had gathered over \$4 million. The response of the Commission was to go to court. As a result, the Federal Court granted worldwide injunctions against World Netsafe to stop the operation of this and any other similar scheme.

Other scams include offers to provide goods and services 'free' in exchange for information about a customer. The Commission instituted proceedings this year against Info4pc. We allege that the company advertised the supply of computers at a substantially reduced price so long as consumers completed a so-called 'lifetime survey' once a month for two years. These computers however, were not supplied and now the matter is waiting hearing.

Technology scams also come in the form of page jacking or modem jacking. Page jacking occurs when an unsuspecting consumer is lured to certain websites - often by deception - only to find that they cannot leave the site, or when they attempt to do so, are redirected to similar sites. In 1999 the Commission assisted the US Federal Trade Commission in breaking a global Internet scam of this nature.

Modem jacking occurs where consumers are caught by websites which divert the user's modem to reconnect with another service provider - at an exorbitant cost. Consumers

are then billed for calls that they did not authorise, or which they did not realise they had authorised.

6. How to achieve compliance in online activities?

Clearly, it is in business's own interest to take action to protect the reputation of trading on the Internet. If businesses run compliance programs for offline activities, then, as a matter of course, these should be extended to online activities.

Increasingly, guidelines are being published to assist in the development of e-commerce compliance programs. For example, the OECD published *OECD Guidelines for Consumer Protection in the Context of Electronic Commerce*, and the Departments of Treasury, and Finance and has released *Building Consumer Sovereignty in Electronic Commerce: A best practice model for business*.

Guidelines and private, industry-driven or consumer driven Codes of Conduct may assist business in developing compliance programs that meet the specific needs of online trading.

However, the ACCC believes that enforcement mechanisms should exist so that consumers can have confidence in such measures. In addition, there needs to be a coherent approach. It is vitally important that consumers are not confused or misled by a plethora of trustmarks and seals of approval which offer different levels of comfort and different redress mechanisms.

Although there are dispute resolution services now being offered to B2B businesses, they are of limited availability. Their cost is high, and they lack transparency. There is also provision for consumer representation on governing boards.

To me, this indicates that private sector self-regulatory models have quite a way to go. If such models are to provide effective assistance to consumers then they must be supported by consumer protection laws.

7. Enforcement & Cross Jurisdictional Issues

One of the Commission's identified priorities is to ensure compliance in e-commerce by raising awareness in this area. Our approach is to take appropriate enforcement actions. This demonstrates clearly to industry that consumer protection and competition laws are applied by the Commission – even in cyberspace.

Increasingly, this means that the Commission - and other regulators – will need to test complex issues such as jurisdictional reach, and develop methods and procedures for coordinating their activities with agencies in other jurisdictions.

On this, the Commission has made important advances. A number of recent cases have assisted in determining the jurisdictional reach of the *Trade Practices Act* in online matters. In the Purple Harmony Plates case, the Federal Court made an important decision that a '.com' website, located in a registry in the USA still fell within jurisdiction because a person who had authority to instruct other people to place information on that website was based in Australia.

In conjunction with the World Netsafe case, the Purple Harmony Plates case illustrates that the Act applies to online traders, even where a site may not physically be based within Australia. To further develop case law, the Commission will continue to test the boundaries of its jurisdiction.

The Commission has also played a prominent role in initiatives aimed at increasing the coordination of agencies at an international level. This involves participation in the work of the OECD, APEC, and the International Marketing Supervision Network. As well, the Commission has negotiated bi-lateral and multi-lateral cooperation agreements with the United States and New Zealand.

The Commission has also been involved in the steering group of the newly launched International Competition Network. The Network will provide a forum to address procedural and substantive issues in competition law enforcement.

8. Conclusion

Ladies and Gentlemen, we are in the middle of a revolution, and seeking to bring order out of what sometimes seems to be technological chaos.

I want to leave you with two important messages. The first is a point I have already made, and that is: new technology does not mean new economic laws. The Commission will be assiduous in applying the law and working to make e-commerce markets work better.

Secondly, for the next two days, I want you to work hard, have fun, learn a lot and take the opportunities offered to you.

I wish you all the best, and I thank you for your time.