

Natroad 2000 Annual Conference: Coping with Tax and Trucking

FREIGHT RATES AND THE ACCC

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Introduction

The impact of the Trade Practices Act (the TPA) and the Australian Competition and Consumer Commission (the ACCC) has increased significantly over the past decade.

The ACCC has been given additional powers and responsibilities and developed a much higher profile under its current Chairman, Professor Allan Fels, who was first appointed in 1991.

I venture to say if anyone does not know Professor Allan Fels they must be operating without a radio or television - especially with the introduction of GST and the New Tax System.

Nevertheless, I will say a few words about what the ACCC does. The role of the ACCC is to apply the TPA without fear or favour to whomever it applies.

Broadly speaking, the object of the TPA is to enhance the welfare of Australians with the promotion of competition and consumer protection through fair and informed markets. More specifically, the TPA seeks to prevent anti-competitive conduct, thereby encouraging competition and efficiency in business, and resulting in greater choice for consumers (and business when they are the 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.

The ACCC's activities benefit consumer of all kinds. This includes business consumers, such as large freight companies and also small owner-driver trucking businesses. All people, especially small owner-driver businesses, have an interest in being supplied competitively and efficiently at reasonable prices and where they are providing services, to provide those services to customers who have to compete for their product.

The ACCC believes in applying the law properly, and vigorously where necessary. In administering the TPA, the ACCC has a dual role as:

- A provider of education and information for business and consumers in relation to compliance with the Act; and
- A national enforcement agency.

It is this latter role that gains most of this ACCC publicity. But it is the information and support role, especially to small business, that is gaining momentum as the means of securing wider business understanding and acceptance of, and compliance with, the

TPA.

The ACCC is currently involved in 55 cases before the courts, which is a record number. However, the majority of the ACCC's actions do not end up in court but result in court enforceable undertakings being provided by the offending party or other forms of mediated settlement.

In my discussion with you today, I would like to convey the significance of the TPA for all business in the road transport industry, both big and small. Some matters I would like to cover are:

- The TPA and the trucking industry - your rights and responsibilities;
- The ACCC's small business program; and
- The ACCC's role in New Tax System.

The TPA and the Trucking Industry - Your Rights and Responsibilities

The TPA and its implementation by the ACCC is a two edged sword for business. It offers protection from, but demands avoidance of involvement in:

- Price fixing;
- Market sharing;
- Boycotts;
- Misusing market powers;
- Exclusive dealings;
- Refusal to supply;
- Resale price maintenance;
- Misleading or deceptive conduct;
- False and misleading representation; and
- Unconscionable conduct.

In addition the TPA has provisions covering a role for the ACCC in respect of authorising voluntary codes of conduct and the promotion of access and competition in the area of former public utilities, such as gas, electricity, airports and telecommunications.

For the last year and next two or so years, the ACCC is also responsible for ensuring that prices increase by no more than they need to, and where prices fall as a result of reductions in Wholesale Sales Tax and other cost savings related to the GST, that they fall by as much as they should.

Turning to the application of the TPA to the trucking industry specifically, I note that the road transport industry is one of the most competitive sectors in Australia, and as such the ACCC has not had to be heavily involved in this industry in recent times. This is in no small part as a result of the ACCC's predecessor, the TPC, and its actions to clean up the industry.

I am talking about the famous price fixing arrangement between TNT, Ansett and Mayne Nickless. In October 1992 the TPC filed proceedings against TNT Australia Pty Ltd, Ansett Transport Industries (Operations) Pty Ltd and Mayne Nickless Ltd.

The ACCC alleged that the companies had formed, and given effect to, an arrangement to fix prices and regulate market shares in the express freight market.

In 1999 the offenders all admitted to contravening the TPA. TNT was ordered by the court to pay penalties of \$4 100 000, Ansett \$900 000 and Mayne Nickless penalties of \$6 000 000.

The fact that the road transport industry is currently very competitive does not mean that the TPA does not have a significant impact on the industry. The ACCC has an important role in ensuring inputs to trucking industry are supplied competitively. All business, including providers of transport services, regularly purchase a variety of goods and services for use in their business.

Keeping the costs of these inputs down is obviously vital to the success of their business, so it is essential that anti-competitive practices do not prevent small business from accessing the best deals in terms of quality, price and service. This is where the TPA can act as a positive force to assist competitive industries such as the freight industry.

For example, just as agreements between you and your competitors to fix prices are illegal, so too are agreements to fix prices between your suppliers.

The TPA also provides protection for business, particularly small business, from unfair trading practices. Where small business supply services to customers who are large and have a high degree of bargaining power, the TPA can provide assistance to small business. New provisions were inserted into the TPA to assist small business in its dealings with large businesses. These provisions prevent larger businesses from using unfair tactics or exerting undue pressure on smaller business. I will talk a bit more about these provisions and how they can help owner-drivers later on.

In summary, I would like to emphasise that while business do have a number of obligations under the TPA, the TPA can also assist business to be successful and profitable by fostering a competitive and fair market for business to operate in.

Raising the Small Business Effort

It is often assumed that consumers are the main beneficiaries of our actions. In fact, very often it is small business customers who most directly lose from cartels and misuse of market power and anticompetitive mergers.

The ACCC over the past 18 months has upgraded the level and style of its dealings with small businesses over their rights and responsibilities under the Trade Practices Act. The ACCC program of outreach to small business resulted from the Government's decision in 1998 to strengthen the TPA and provide resources to assist with unconscionable behaviour by larger business dealing with small business.

The activities of the Small Business Unit in the ACCC and the appointment of a Commissioner responsible for small business, have also focussed on demonstrating to small businesses how to avoid or handle TPA related problems well before they require litigation.

The Small Business Unit has developed a considerable network of contacts for getting messages out to small business. The messages emphasise how understanding and compliance in relation to TPA matters reflects good management practice and hence assists business success and profitability. It is a pro business message and one that has good effect.

The law regarding unconscionable conduct between big and small business was strengthened in 1999. Small business now gets the same protection as consumers under a new section of the TPA, section 51AC. Also, in June 2000, new legislation was passed in Parliament that prohibits unconscionable conduct in business transactions for amounts up to \$3 million, an increase from the previous amount of \$1 million. This change will allow small business greater accessibility to the unconscionability provisions.

The new unconscionable conduct provisions under s.51AC of the TPA have had to be tested and the ACCC has already taken three court cases alleging unconscionable conduct. I am pleased to report that on 15 June 2000 the Federal Court of Australia granted a declaration against the landlord of Adelaide International Food Plaza finding that it had engaged in unconscionable conduct toward one of its tenants. This was the first such declaration under the new provision s.51AC which deals with unconscionable conduct in commercial transactions.

This issue appears to be particularly relevant to the trucking industry at the moment in the context of the recent tax changes. Most sub-contractors are small businesses people (owner-drivers) and therefore have difficulty in anticipating cost savings due to cash flow issues. The Commission has received a number of complaints regarding the way in which larger companies are forcing savings through from their sub-contractors without negotiating rates for other factors such as fuel costs increases which have occurred since the last rate review. There are some circumstances where this behaviour may be considered unconscionable.

The ACCC is investigating the nature of these complaints as and is encouraging larger companies to be careful in the way they pursue New Tax System savings. If any of you here today are in a similar situation, I encourage you to lodge a complaint with the ACCC via the ACCC Hotline on 1300 302 502.

Whether the conduct is unconscionable will depend on the specific circumstances of the case. Business that are merely seeking to ensure reasonable cost savings due to the New Tax System are passed through to them, are unlikely to breach this provision of the Act. However, large businesses should take care when negotiating prices and conditions with smaller businesses.

The GST Price Monitoring

The GST implementation has been the biggest challenge facing business in Australia. Business in the freight industry, both big and small, are no exception.

As I mentioned before, the ACCC's task is to ensure that prices rise by no more than necessary and that tax and cost reductions are passed through.

As is the ACCC's standard practice, the ACCC has focussed on assisting business to comply with new legislation relating to the New Tax System. However, the ACCC is always ready, willing and able to take action against those who do not comply.

For the most part, the ACCC believes that the desired outcome has been achieved; there appears to be substantial compliance by business so far. There are two factors which have contributed to this outcome:

1. The first is the market itself. Here I will only say that there are strong forces at work in the market to restrain increases in prices.

2. Second, the ACCC's own actions have been very significant in constraining prices. I will say a brief word about some of our activities and powers relevant to the transition.

- The Government passed an extremely strong law, the corner stone of which is the creation of the offence of price exploitation. The new law has heavy penalties of up to \$10 million for companies per offence, and \$500,000 for any individual executive involved. There is also provision for the ACCC to publish notices in the media where the ACCC thinks prices are excessive.
- The ACCC published guidelines that outline for business what price movements may contravene the price exploitation prohibition. The guidelines are very simple and clear, and can be encapsulated by two simple rules: first, no price should rise by more than 10% as a result of the new tax system, and, second, that there should be no increase in profit margins as a result of price changes associated with the New Tax System.
- The ACCC made a concerted effort to ensure that Australian business, particularly small business, and consumers were well informed of the their responsibilities under the New Tax System law and also what the likely effect on prices would be. This included dealing with industry groups and publishing industry specific brochures identifying the relevant issues for each industry. One such publication was the GST News for Business newsletter which dealt with pricing issues for the trucking industry.
- The ACCC released a 'small business pricing kit' to help small business pass on cost savings as a result of the new tax system changes. In essence, the small business kit assisted small business to determine which costs should rise and fall and by how much. The ACCC recognised that small business has less resources to seek advice and assistance during the transition and therefore are a risk area for not passing on savings. The ACCC's pricing kit therefore gave small business, such as owner-drivers in the trucking industry a viable alternative to simply adding 10% to goods and services (which of course would have been illegal).
- The next step taken by the ACCC was its role in informing and educating business and consumers by providing a range of likely price outcomes. The ACCC published a price guide for 185 common household goods and services. Informed consumers are able to assist the market to function properly by deflating high inflationary expectations.
- The ACCC established a GST Hot Line which gives the 19 million consumer watchdogs an avenue to seek further information and to report any illegal

activities of business. The ACCC has received more than 60 000 calls since July 1, which has been well within the capabilities of the call centre.

All of these factors combined have ensured that the transition to the New Tax System was very smooth.

The ACCC's investigations of the complaints it has received since July 1 are well advanced.

While it is too early to predict the final outcome, the fact that the ACCC's Hot Line has not been bombarded with millions of calls is an indication that most businesses have acted responsibly.

Where to from here? Post July 1 Activity

To date, the ACCC's activities have emphasised compliance with the new law. So where to from here? Now that the changeover is well advanced, and most business have made the necessary changes to their prices in relation to the new tax system, the ACCC has an central role of combining the promotion of compliance with enforcement of the law.

In the road transport industry, a key focus will be ensuring that the cost savings related to the New Tax System are passed on. The ACCC expects business to factor cost savings realised as a result of the tax changes into pricing as soon as possible.

The New Tax System will deliver significant savings to the road transport industry, such as:

- The Diesel and Alternative Fuel Grants Scheme, which delivers a grant for part of the excise paid on diesel and some alternative fuels for vehicles over 4.5 tonnes in non-metro areas and vehicles over 20 tonnes in metro areas. Once input tax credits are claimed, the saving is approximately 24 cents per litre of diesel.
- Road transport operators will also benefit from the removal of 22% WST on parts, new tyres and vehicles, which should fall in price.
- The phasing in of input tax credits on new vehicles will mean that benefits will continue to flow through the industry in the next two-three years. (NB: Businesses cannot claim input tax credits for vehicles used in that business in the first year after the tax is introduced July 2000 - June 2001. Businesses can claim half input tax credits in the second year July 2001 - June 2002, and can claim full input tax credits from July 2002. This phasing in of input tax credits is peculiar to vehicle purchases and was designed to make the buyers strike before the abolition of WST less severe.)

The ACCC recognises that the New Tax System changes have not occurred in isolation. Other factors such as rising fuel costs, which are linked to rising crude oil prices, have put upward pressure on freight rates. Anecdotal evidence suggests that other costs to road transport are increasing such as insurance costs, vehicle registration, and the costs associated with the safety initiative Truck Safe.

Businesses are entitled to pass on the higher cost of inputs in their prices. They can

maintain their net dollar margins, but the New Tax System savings must be reflected in prices.

The ACCC has encouraged businesses wherever possible to separate New Tax System related price changes from other price changes and to explain to customers how they have adjusted their prices on account of the New Tax System.

If businesses link other price rises to tax related ones, there is a higher possibility of some public misunderstanding and a greater possibility of ACCC investigation. Indeed the ACCC may want to satisfy itself that a particular price rise is not just due to the New Tax System. In any event, the reasons for and the sources of the changes should be explained.

The Commission has anecdotal evidence that the participants in the trucking industry are in the process of passing on cost savings. The Commission has reviewed and accepted a public compliance commitment from Toll. Further, some companies have indicated to the Commission their willingness to negotiate rate changes for non-tax related changes subsequently (ie Pivot) in accordance with the Commission's recommended approach.

The Guidelines state that where prices (rates) are set for long periods of time, businesses may be required to anticipate some savings that will flow over the period. This issue has caused larger prime contractors to actively seek savings from their sub-contractors.

The ACCC recognises that companies should seek savings from their suppliers. Given that road transport is a significant component of other goods, it is imperative that genuine savings in the industry are passed on. However, companies seeking cost savings must be careful that they do not act unconscionably.

Price Monitoring - Petrol and LPG

As part of its GST role, the ACCC has commissioned price surveys on a comprehensive range of goods and services. The ACCC is monitoring prices for two purposes:

- to assess the 'general effects' of the Government's indirect tax changes on prices; and
- to assist in the identification of potential cases of 'price exploitation' by businesses.

In total the ACCC will collect well over 3 million prices in its specially commissioned surveys.

These surveys focus on a variety of common goods and services. The ACCC is also looking closely at some particular products, such as petrol and LPG.

The ACCC already monitors petrol prices under the Prices Surveillance Act. The ACCC has expanded its monitoring program as part of its responsibilities under The New Tax System changes. The new program increased the number of towns in which

prices are collected, the number of service station sites within those towns and the range of fuels.

The monitoring of unleaded petrol, diesel and auto LPG prices at around 2,500 petrol service stations in the 5 largest capital cities continued through the GST transition period. This monitoring was also expanded to include Darwin, Canberra and Hobart prices on a daily basis.

The ACCC also extended its monitoring activities in regional areas, with a weekly collection being taken in 150 country towns across all States and Territories for unleaded petrol, diesel and auto LPG. The total number of sites covered was around 1400, reflecting about 70% of the rural population in Australia.

An initial assessment of prices is made through comparisons before and after the introduction of the GST and with price expectations determined through indicative pricing model.

Monitoring pass-through of the Fuel Sales Grant

Retailers of petrol and diesel will be expected to pass on to consumers the benefits of the grant. To assist in this process the Government has indicated that the grant will be prescribed under the Price Exploitation legislation. The ACCC will carefully monitor petrol and diesel prices to ensure that retailers comply with this legislation.

The ACCC wrote to the operators who may apply for the grant advising the operators of the information they were required to keep to enable the ACCC to determine if the grant was passed on to consumers. The information that the ACCC would require is essentially what a business would keep for its own purpose.

The ACCC would be interested in any information that the truck drivers have in relation to this levy not being passed through.

What about honest mistakes by small business?

The ACCC has been administering the TPA for over twenty five years and has vast experience of dealing with small, as well as large, business in an appropriate and balanced manner when breaches of the law occur.

Generally the ACCC's approach to law enforcement where it encounters a breach of the law is to raise the matter with the business concerned to satisfy itself whether there has been a breach.

If there has been a breach, it makes sure that the unlawful behaviour ceases immediately, then it seeks a remedy for any consumer damaged by the unlawful action often linked with corrective advertising to advise all relevant consumers. These are the priorities. If a penalty is sought it is generally for deliberate, blatant breaches of the law and court penalties are usually proportionate to the size of the firm.

Conclusion

Sound businesses thrive on strong and vigorous competition and fair and informed

markets. That is the ACCC's goal.

The ACCC seeks to promote a culture of compliance with the TPA in Australian business. However, the ACCC is always ready, willing and able to take action against those businesses who do not comply with the TPA. Finally, I would like to emphasize that while business do have a number of obligations under the TPA, the TPA can also assist business to be successful and profitable by fostering a competitive and fair market for business to operate in.