Small Business and the TPA

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Background

By way of background to today’s presentations, the following seminar will include brief overviews of the Commission’s Small Business Program and the rights and obligations of small business under the Trade Practices Act, I would like to take a moment to explain why the Commission is making a special effort to get its message across to businesses from non-English speaking backgrounds.

The fact is that around 21% or some 134,000 of Australia’s small businesses are owned or operated by people from non-English speaking backgrounds with the largest individual group being Italian of whom some 37% are in Victoria and 28% in NSW.

Whilst the Italian small business community comprise the largest group, we are also focussing our attention on the Koreans, Greeks, Vietnamese, Turks, Chinese and Arabs. Similar presentations to today’s have already been held for the Korean, Turkish and Vietnamese small business communities in Sydney. This is the first in Melbourne.

Introduction

Small business is at the forefront of growth in employment and growth in manufacturing and service exports. It is therefore critical that the business environment is fair and competitive. The Australian Competition and Consumer Commission has an important role to play by protecting businesses which act competitively and protecting consumers from unscrupulous business practices.

The Commission establishes the environment for competition and fair trading in business in Australia. Formerly known as the Trade Practices Commission, the ACCC has the responsibilities of the former Prices Surveillance Authority, as well as responsibilities for the enforcement and administration of the Trade Practices Act. The Act encourages fair and ethical competition and efficiency in business.

Recent Developments

A great deal has happened in competition policy in recent years.

- The Trade Practices Act has been extended to cover all areas of business from July 21 1996, thanks to legislation enacted by all Australian parliaments;
- a new access law has been included in the Trade Practices Act;
- the ACCC has been formed from a merger of the former Trade Practices Commission and the Prices Surveillance Authority;
the merger law has been strengthened from a test of dominance to a test of substantial lessening of competition. At the same time, there were associated changes in the merger law to introduce economic criteria more explicitly into the Act, to improve and speed up the authorisation processes and to make it more relevant to an economy in which globalisation has been becoming more important;

the Act was amended in 1993 explicitly to refer to additional exports, import-replacement or contribution to international competitiveness as a public benefit.

the penalties under the Trade Practices Act have been lifted by Parliament from $250,000 to $10 million for companies and $500,000 for individuals;

the courts have been regularly imposing far higher penalty levels than in the past for breaches of the Act. Examples include $21m for ready-mix concrete companies and $15m for overnight freight express companies and, more recently, $3.5m for Ampol.

The introduction of legally enforceable undertakings under section 87B has made the Act both more effective and less tied down in court procedures:

the ACCC has been more active both with respect to competition and consumer protection cases.

the Coalition Government has indicated in various ways its strong support for an effective competition policy and has, for example, directed that some additional resources be directed to the ACCC to enhance its microeconomic reform task. It has also reinstated sections 45D&E of the Trade Practices Act.

Competition policy, however, does not just revolve around the Australian Competition and Consumer Commission.

The Council of Australian Governments has agreed that all governments over the next five years will review every form of regulation that affects competition in every department of government in every sector of the economy to determine if it is in the public interest. All governments appear to be strongly committed to the review processes and the Commonwealth has provided state and territory governments with a very large financial incentive to do the job properly.

An important new institution, the National Competition Council, has been appointed to play an important role in reviewing the review process, in administering the access regime and in carrying out other important tasks.

More generally, the climate of general public and political support for the application of a strong competition policy whether at the level of enforcing the Trade Practices Act or at the level of repealing laws that restrict competition has greatly strengthened compared with the 1980s.

The Global Operating Environment

Before I go into any detail I think it is important to examine the operating environment in which strategies for small business and consumer protection/consumer welfare are and will operate.
Today we find an Australia where business is being required to become more competitive as the Hilmer reforms are being rapidly implemented. This means that sectors which have not been fully exposed to competition will be for the first time soon, and where there are very few sectors, if any, of the economy that do not fall under the requirements of the competition provisions of the Trade Practices Act.

In addition, increased import competition over the past ten to fifteen years has placed a great deal of competitive pressure on Australian businesses. In a sense, the relaxation of import restrictions can be thought of as an earlier phase of globalisation relating, by and large, to manufactured products.

Currently, another wave of globalisation is under way through virtual and borderless mediums (like the Internet) and encompass services as well as more traditional traded goods.

The rapid and continuing changes to technology are making technologically based transactions the order of the day for many. This not only means that increasingly more domestic transactions will be carried out through technology, but borders will also become increasingly irrelevant as this technology is responsible for creating a global market.

With the market becoming both more competitive and more technology based, consumers will:

- have greater access to information about goods and services;
- conduct many more of their transactions through electronic/remote mechanisms; and
- more readily spread the word about good and bad experiences with companies.

Because many transactions will not involve personal interface with traders (as has been the case with forms of distance selling) consumers will be looking to deal with companies they can trust, that have a solid reputation with their goods and services and which are responsive and can provide remedies when things go wrong.

Governments, both State/Territory and Federal, are also more predisposed to less regulation of the market place.

In the case of the global market even if they are of a mind to, it is very difficult for governments to both effectively regulate, and cost-effectively take enforcement action internationally.

**Other Global Issues for Small Business Country of origin labelling**

The issue of what can reasonably be described as ‘Made in Australia’ is a matter of lively debate and there appears to be a considerable range of opinions as to what should constitute an appropriate definition.

Recent developments in the law have resulted in a high level of uncertainty amongst both industry and consumers.
The position of the Australian Competition and Consumer Commission is to apply the law as enunciated in a number of Federal Court decisions culminating in the Full Court decision on appeal in the *Bush Friends* case.

‘The ACCC is of the view that a representation that goods are ‘Made in Australia’ or ‘Australian Made’ is misleading and/or deceptive in breach of section 52 and sub-section 53(eb) of the *Trade Practices Act* where either:

1. the place of origin of
   - the entire product; or
   - the bulk of the components/ingredients of the product; or
   - a significant component/ingredient of the product

is not Australia; or

2. the place at which
   - substantially all the manufacturing/production processes involved in the manufacture/production of the product takes place; or
   - a significant part of the manufacturing/production process takes place

is not Australia.’

Sometimes there is an interesting twist to these matters. In a Tasmanian case a distillery there was reported because it was labelling its product "Sullivan’s Cove Whisky" and claiming that it was produced locally, when in fact it was being imported from Scotland. The company concerned and the ACCC are currently involved in a process of mediation designed to achieve, amongst other things, honest labelling and corrective advertising.

The Commission has been developing a strategy to assist industry and consumers to understand the Federal Court’s approach to place of origin claims and its implications. This strategy will involve, amongst other things, the production of a ‘Guide to Country of Origin’ booklet as soon as judgement is handed down on several pending cases and consideration of a proposed amendment to the *Trade Practices Act* is finalised.

**Increased Enforcement Action against Global Scams and Frauds**

As with many new frontiers, the pursuit of global electronic commerce has run ahead of legal and enforcement solutions, attracting ‘bandit’ and ‘cowboy’ elements which have created a genuine concern for consumers and legitimate on-line retailers. It is here that consumer protection agencies and regulators should be focussing their enforcement work, indeed the ACCC has given such matters a high priority in its enforcement activity.

The ACCC continues to pursue enforcement action against international scammers that perpetrate fraud against Australian consumers through a process of international cooperation with other national enforcement agencies. Two recent examples of the
ACCC’s involvement in international enforcement activities are the Golden Sphere pyramid selling scheme and the Destiny Telecomm telecard scheme.

More specifically, the **Golden Sphere** case is a pyramid selling scheme run by a Vanuatu company which was typical of all such schemes in that usually only the promoters, or those at the very top of the pyramid, benefit. The majority of participants who enter the pyramid at a late stage lose their money. The ACCC sought to restrain the promoters and instituted a class action on behalf of participants who lost money in the scheme.

The **Destiny Telecomm** scheme operated out of California and involved consumers purchasing a phonecard for $100 for international, STD and/or mobile telephone use. If those consumers introduced further customers to the scheme, they received a commission. The amount of commission increased according to the number of customers introduced. The Commission was concerned that consumers were providing credit card details and debit authority to an overseas company whose activities may have breached the Act. It had received more than 100 enquiries from consumers concerned about the scheme, and had been informed that more than 14,000 consumers had been signed. The ACCC obtained an injunction to prevent the promotion of the scheme, the signing up of new participants, and the use of credit card details that have already been provided.

**National Scams Targeting Small Businesses**

Scams targeting small businesses are the source of considerable confusion and financial loss to the small business sector.

The promoters of these scams generally rely on the fact that small businesses operators are often confused by their regulatory responsibilities or are so busy that they may not realise they are being conned.

Some operators, whether they pay money to the scam or not, operate their small business under misconceptions created by the scam. This can have serious repercussions for those businesses, such as not quoting for work because the scam creates a misconception about the business’s eligibility or where the business claims a tax deduction for a donation to a charity, which despite the small business operator’s honest belief, doesn’t even exist.

Promoters of these scams generally approach large numbers of small businesses and need only catch out a small proportion of these to be successful.

These scams also result in substantial expenditure by the ACCC and State and Territory Consumer Affairs Bureaux and Offices of Fair Trading on investigations and court processes.

The Commission is currently involved in proceedings against operators of 11 schemes which the Commission claims involve false, misleading or deceptive representations that:

- consumers have agreed to acquire a service or advertising;
the schemes represent a government or have some government affiliation;

- consumers are required by law to purchase the services;
- small businesses will suffer, through loss of government business, if they don’t use the services; and/or
- the service offered are of a particular nature.

Examples of these schemes include the Australian Business Reports (formerly ‘Consumers Business Register’) and the Certified Quality Assured Companies of Australia. The first represents itself as being an official/governmental business register in which participation and payment is compulsory. The second claims that ongoing access to government business is dependent on gaining Quality Certification which can be achieved with consultancy assistance which they will provide.

Because the proliferation of these scams has become so widespread (40 other similar schemes were identified during the Commission’s investigations) the Commission has developed a specific consumer protection strategy with the following objectives:

- to provide small business with the tools that will enable them to take action to avoid being subjected to scams; and
- to increase consumer awareness through media and targeted enforcement action.

The strategy is designed to be pro-active in nature and will include a self-help brochure and wall poster.

**Conclusion**

In closing, I would like to thank the Chamber for this opportunity to address its members in the Italian small business community here in Melbourne and also for the cooperation it has shown in participating in our Ethnic Small Business Education and Awareness Program by organising today’s luncheon seminar on Trade Practices. Thank you all for your interest and attention.