Law Institute of Victoria Breakfast Series

Some compliance and enforcement issues

Rod Sims, Chairman

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INTRODUCTION

I feel I must start today by apologising for not being a lawyer.

I will add – quickly – that I studied a unit of commercial law in my commerce degree at Melbourne University, although that was back in 1970. And I briefly started a law degree, only to find that I preferred economics.

Then, still feeling that something was missing, I married a lawyer.

Rather than the law, or even economics, however, my career has been in public policy, including competition and regulatory issues, and business.

My first roles were international, often negotiating mining and petroleum agreements on behalf of developing countries.

I then moved to domestic public policy which saw me, among many other things, heavily involved in the Hilmer Competition Policy Review in the early 1990s, and the deregulation of many industries.

I then spent 17 years in business, both as a commercial strategy advisor and as a company director.

In addition, I was on the National Competition Council and, recently, I was the Chairman of the Independent Pricing and Regulatory Tribunal in New South Wales.

Today, there are three main issues I want to discuss.

The first is to set out aspects of our approach to compliance and enforcement at the Australian Competition and Consumer Commission (the ACCC).

I then want to discuss two of the most challenging sections of the *Competition and Consumer Act 2010:* section 46, which prohibits the misuse of substantial market power for an anti-competitive purpose, and sections 21 and 22 of the Australian Consumer Law (ACL) covering unconscionable conduct.

I have to admit that I am intrigued by the questions surrounding these sections of the Act, for reasons I will explain.

Finally, I want to touch on some issues to do with the ACCC's role in preventing and acting upon misleading claims as the carbon price is introduced next year.

1. SOME ASPECTS OF OUR APPROACH

I have described aspects of our approach to compliance and enforcement in recent speeches, so I will only make a few additional points here. Our approach, among other things, includes four aspects.

First, the ACCC needs to be strategic, not simply reactive. That is, we need to identify the substantial problems and find an effective way to address them.

Many of the problems we take on originate from more than 120,000 contacts to our Information Centre. Many also come from firms raising questions or complaints about their competitors. Some come from whistleblowers inside firms.

While important choices need to be made about what to pursue, action on the above matters reflects largely a reactive approach.

The ACCC also needs to be strategic. We will, therefore, watch closely what is going on in the marketplace and we will liaise with many consumer and industry groups, as well as our state fair trading counterparts. We will also closely follow international competition and legal developments.

This will allow us to target particular areas where we judge there is the largest potential for consumer detriment, or where current market structures need most support.

Our choices on what matters to pursue are made formally. Issues are discussed during specially called meetings, or at our regular Commission and Enforcement Committee meetings. The latter is chaired by Sarah Court.

We have a centralised governance model which provides coordination of resources and deliberations across the entire range of cases.

The Commission and its committees is characterised by open debate, both between Commissioners and between Commissioners and staff. Our experts are present, particularly our senior lawyers, and they are encouraged to actively participate in these debates.

A second aspect of our approach is that we need to back our judgment, and take on cases even if the law is uncertain. Our high success rate in first-instance litigation may show that we have been too conservative.

I think a recent example of backing our judgment is the appeal against the first-instance decision in a matter involving Google. We alleged misleading and deceptive conduct.

The issue was the way in which Google characterised advertised content in search results. The law in this rapidly expanding area of commerce needs clarification.

Third, it may be that when we take on cases and gain clarification by the courts, we may see issues that require a policy or legislative response.

If so, we will advocate politely for such a response.

Finally, it is crucial that we communicate clearly what we are, and are not, doing and, most important, why.

Our announcement in early September, that we are appealing the Metcash decision, is a case in point. We put considerable effort into our public statement.

We decided that we had to provide in detail and publicly the reasons we were taking that case further when the Federal Court had found against us in the first instance.

2. MISUSE OF MARKET POWER AND UNCONSCIONABLE CONDUCT

In the early stages of my Chairmanship I have been discussing not only the benefits of a market economy, but the role of the ACCC in ensuring that the strong profit motive works to the benefit of consumers.

This point, of course, raises the fine line between behaviour that represents combative capitalism and that which represents a breach of the Act.

Two provisions of the Act stand out in my mind when trying to decide which side of the line particular behaviour sits. These are the provisions relating to the misuse of market power (section 46) and unconscionable conduct (sections 21 and 22). Both involve:

- unilateral conduct
- some imprecise definitions of what behaviour is meant to be covered.

Let me share with you some observations on these fascinating sections of the Act.

The misuse of market power

Section 46 presents the ACCC with a notable perception gap. On one side we have high public expectations as to what we can do in markets where, say, one or two firms are dominant.

Many are the social events I attend where people tell me that such-and-such a big firm is engaging in predatory pricing, or that it is using its weight to force someone else out of business, and that the ACCC should be doing something about it.

That is one perspective.

On the other hand, section 46 sets very high hurdles. And that is as it should be – because the implications of the section, for business and the economy, are considerable.

For the ACCC to determine that there has been a misuse of market power it must demonstrate that:

- a company has market power
- the company has taken advantage of that power, and

- the power was used to damage or eliminate a competitor, prevent market entry or prevent competition.

Further, over the years only a handful of cases under section 46 have succeeded in court. Indeed, section 46 cases are always hard fought, as major companies are necessarily involved, and they are usually defending what they may see as a key part of their business strategy.

The guidance to be derived from case law – at least in successful cases – is relatively modest.

So, the ACCC finds itself in the middle, with high public expectations on one side and high legal standards and few successful cases on the other.

However, the law has evolved in recent years, providing the ACCC with a clearer view of what is intended by section 46 and misuse of market power to gain advantage.

Over 2007 and 2008, and in response to the 2003 Boral and Rural Press cases in particular, the section was amended and extended.

Very broadly these amendments provide:

- that a company must not take advantage in any market, not just the one in which they have market power

- a series of questions to allow us to identify the use of market power.

They also clarify that absolute freedom of behaviour does not need to be demonstrated, and that more than one company may have a substantial degree of power in any given market.

These represent important changes.

The ACCC still needs, however, to ask itself searching questions about whether there was an anti-competitive purpose in a firm's conduct.

Indeed, even with these amendments, establishing a section 46 case will be difficult.

At the moment, we are awaiting the outcome of a Federal Court case, where the respondents are Cement Australia, Pozzolanic Enterprises and others, which alleges contravention of section 46 over an ingredient in ready-mix concrete.

That decision is likely to provide judicial guidance and it comes after the amendments made to the Act in the last few years.

We also currently have a number of investigations on foot which may or may not go the distance, but they tick a number of boxes.

So it is a careful evolutionary process, as it should be.

A final point I would like to make is that, in my view, we need to resolve the questions around section 46 as it currently stands. I am not, therefore, making a case for further amendments or additions to section 46 at this stage.

Unconscionable conduct

Unconscionable conduct, like misuse of market power, is also a provision that demonstrates the difficult task of deciding the line between the cut and thrust of participation in the market and what behaviour should be prohibited.

This again sits in an environment where there are expectations placed on the regulator by those affected by the conduct and their representatives.

As this audience will be well aware, there is no clear definition in the Act of what constitutes “unconscionable conduct”.

What we do know, however, is that in broad terms the courts have considered the threshold for unconscionable conduct to be conduct that goes beyond robust commercial dealings or the notion of unfairness, to that which shows no regard for conscience and is irreconcilable with what is right or reasonable.

I am well aware of the complexities – conduct that might be “irreconcilable with what is right or reasonable” to one party, may be simply the rough and tumble of a robust commercial negotiation for another.

In addition, unconscionable conduct matters are often difficult to investigate, and involve a web of allegations and counter-allegations. Witnesses are, by nature, often vulnerable, disadvantaged or confused.

It is sometimes difficult to elicit the real story of what has happened. Having said that, these are precisely the types of consumers the ACCC should engage with.

In business-to-business transactions, however, the issues become even more interesting.

Unconscionable conduct allegations may involve a breakdown of a longstanding relationship between franchisor and franchisees, or between landlord and small business tenant – where contractual issues might be at the heart of the dispute, and rights and wrongs have been committed by both parties. In these circumstances it can be difficult to ascertain where the truth lies when unconscionable conduct is alleged.

However, despite these complexities, I view the unconscionable conduct provision as an important component of the consumer protection / fair trading provisions of the Act.

I am interested in exploring their potential application to a broader range of circumstances than may have previously been the case; for example, in areas such as door-to-door energy selling, and perhaps even the dealings of major supermarkets with their suppliers.

We already have a number of cases before the court tackling important issues and making the unconscionable case in different ways. You may see more cases that come at these provisions from different angles.

I am also interested in exploring the relationship, if any, between unconscionable conduct provisions and section 46. While the unconscionable conduct provisions are in the ACL, and section 46 falls within the competition provisions, both, in effect, involve potentially unilateral and egregious conduct.

For example, could the taking advantage of market power for the purpose of substantially damaging a competitor also amount to conduct that is unconscionable in all the circumstances?

Clearly this will not happen often, as the unconscionable conduct provisions require a direct trading relationship between the two parties and this would be unusual between competitors.

Nonetheless, if there is behaviour that the ACCC considers to be egregious, but which does not sit squarely within the complexities of section 46, could that behaviour nonetheless attract the unconscionable conduct provisions? Is this an alternative way for the ACCC to consider the same conduct?

At this stage I do not have answers to these musings, but it is an area that I propose to consider in further detail in due course.

3. THE ACCC'S ROLE WHEN CARBON PRICING BEGINS

Finally, let me expand on the ACCC's role in preventing and acting upon misleading claims as carbon pricing is applied.

I anticipate this subject will occupy the ACCC heavily over the next 12 to 18 months and, as professional advisors, many of you will be asked about this by your clients.

Under the legislation that the Government has introduced to the Parliament, carbon pricing begins midway through next year.

The ACCC's role is to ensure that businesses are not making misleading claims when attributing price increases to the carbon tax.

The Treasurer has given us a direction under the Act to make this a priority.

Generally, this is the same role we have with regard to any representations that businesses make – we will be asking whether certain claims are misleading or deceptive and, if they are, we can take action.

So, if a business raises it prices, and says that the increase is a result of carbon pricing, or partly a result of carbon pricing, it must ensure that the representation is true and accurate.

Of course, businesses are entitled to increase their prices as they see fit. They have the right to increase their prices at any time.

But claiming an increase is to one extent or another the result of carbon pricing, when it is not, is misleading. In particular, we do not want consumers being duped into accepting price increases they would normally question.

We anticipate some businesses will be faced with price rises from their suppliers, and some suppliers might say those price rises are due to carbon pricing.

Our suggestion to businesses is this: if you are not confident with the claim we would expect you to check – and seek further information from suppliers – if you plan to attribute, fully or partly, a price increase – by you – to carbon pricing.

The good-practice rule of thumb is this: If you are making a representation, make sure it is right.

In line with our normal practice, we will give greatest priority to complaints that reveal significant or widespread consumer detriment, or which demonstrate a blatant disregard for the law.

A key investigative tool we will use in this area will be Substantiation Notices. These are a new power under the ACL and have so far been rarely used by the ACCC.

Under section 219 of the Australian Consumer Law, a Substantiation Notice may be issued to a trader that requires them to give information or evidence to substantiate a claim or representation.

Let me make a few points about Substantiation Notices:

- They are a preliminary investigative tool.
- They do not require a “reason to believe” as with our other information gathering powers (section 155), and if someone receives a Substantiation Notice it does not necessarily mean they have done anything wrong.
- Such notices help the ACCC determine if further investigation is warranted.
- The person receiving the notice does not have to prove that a claim is true, only that they had a reasonable basis for the claim.
- A person must comply within 21 days and penalties apply if they do not.

We will have more information on this subject for businesses in the next few weeks.

Thank you for your attention today. I am happy to take questions.