Trade Practices Compliance Summit 2009

The ACCC's enforcement approach - new and old

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Introduction

Thanks for the invitation to be with you this morning.

You may be familiar with the adage, 'you can't teach an old dog new tricks' My theory is that this particular saying does not apply to watchdogs. Although the ACCC is now getting to be a "more mature" watchdog, it is 35 years old, I know it embraces change and is keenly applying itself to the new enforcement framework.

This year, as the Minister has outlined, we have been required to learn lots of new 'tricks' in the form of changes and proposed changes to the legislative framework. In my view, these changes are likely to facilitate greater compliance with the Trade Practices Act, higher levels of protection for consumers and more competitive markets in Australia.

OUTLINE – SLIDE 3

This morning I want to talk about two big areas of law reform, criminalisation of cartels and the Australian Consumer Law.

Criminalisation of cartel conduct.

Since 24 July, individuals engaging in cartel conduct now face the prospect of imprisonment for up to ten years.

No longer can companies and individuals factor being caught for cartel conduct as purely a business cost – there is no price that can be put on your liberty.

The new laws also bring with it a new dual criminal and civil cartel enforcement regime.

Australian Consumer Law

On the consumer protection side, there are the Australian Consumer Law reforms. These changes represent the biggest upheaval of Australia's consumer policy framework in more than 30 years.

Once fully implemented, the Australian Consumer Law reforms will standardise and nationalise consumer protection laws across Australia with one national law.

This law will impact on all consumer and business transactions throughout the nation.

Before I go into more detail on these important law reforms I want to tell you about some work we have been doing to achieve compliance in two important sectors of the economy, telecommunications and supermarkets. This has resulted in major breakthroughs for both consumers and the state of competition in the telecommunications and supermarket sectors.

These examples will underline the point that achieving voluntary compliance is almost always the most efficient and speedy solution to compliance problems. It can also lead to the most effective solutions for consumers and competition.

SLIDE 4 – VOLUNTARY COMPLIANCE

Voluntary compliance is always the best option

I am a lawyer so I like to start with the law. Let me take you back to section 2 of the Trade Practices Act which underlies all our enforcement activities. That section states the object of the Act is to *'enhance the welfare of Australians through the promotion of competition and fair trading and provision of consumer protection'.*

As many of you in the audience are work as lawyers in-house, you've probably become aware of the various avenues available to the Commission in securing compliance of the Trade Practices Act.

Voluntary compliance is always better for a business than having compliance forced on your business by regulators and the Courts.

Having a trade practices compliance program in place at all levels of your organisation is an ongoing and valuable investment.

Its very success depends on building a compliance culture in your company – simply ticking the boxes is not enough.

Apart from securing voluntary compliance, the Commission may accept an enforceable undertaking or take legal action which may be civil court action or in possibly a criminal prosecution.

How the ACCC approaches a compliance problem always depends on all the relevant circumstances. These include the nature and size of the contravention, what action the relevant party has taken to remedy the breach, whether the conduct is continuing, whether the trader has a history of

contravening the law and the impact of the conduct on consumers and business resulting from the conduct.

SLIDE 5 – PROACTIVE COMPLIANCE RESOLUTION

The new 'breed' of ACCC enforcement – proactive, collaborative resolution

And as the national competition and consumer protection watchdog, our underlying role is to act in public interest.

Recently, the Commission demonstrated its willingness to secure voluntary compliance by major corporations which provides outcomes benefiting consumers and enhancing the competitiveness of the marketplace.

This is part of a proactive strategy by the ACCC to target areas of concern and put in place measures to prevent trade practice breaches and promote fair and vigorous competition.

On 14 September, the ACCC reached a **multi-party court enforceable undertaking** with telecommunication providers Telstra, Vodafone Hutchinson and Optus.

This year, the ACCC has been targeting poor behaviour by all telcos. In our view in this market there has been 'a race to the bottom' in the quality of advertising.

We have long held concerns about the use of marketing terms such as 'free', 'unlimited', 'no exceptions', 'no exclusions' or 'no catches' when in many circumstances, consumers were bitten with hefty extra charges.

We have been very concerned about the accuracy of headline claims. For example, Phonecard operators offering prices per minute without disclosing other fees or charges relating to internet, mobile phone and international phone card usage.

In the last year or so we have taken an number of court actions including:

- Terracom Limited for misleading advertising of mobile premium services that did not properly explain the nature of the service and the ongoing subscription costs;

- Cardcall, TelPacific and an Optus subsidiary for the similar conduct in relation to international phone cards; and

- Dodo for advertising mobile phone packages with 'free' computers or fuel cards when in fact comparable packages without the free goods were substantially cheaper.

The Commission was concerned if nothing was done to break this ***'vicious spiral'***, new depths of poor consumer practice would be reached.

As part of the enforceable undertaking, the three major telcos will review and improve their advertising practices so that consumers are better informed about the products and services they offer.

However the ACCC recognises there is much more to do and we'll be contacting the next tier of telecommunication companies and encouraging them to adopt the principles that the major telcos have done so in the current undertaking.

Restrictive provisions

Although it's no magic cure for long standing competition concerns in the supermarket sector, another good result achieved by the ACCC in recent weeks was in relation to restrictive provisions in leases for supermarket space.

Australia's major supermarket retailers Coles and Woolworths provided the ACCC with court enforceable undertakings on 18 September. These undertakings oblige them not to include restrictive provisions in any new supermarket leases, and in the case of existing leases, not to enforce them beyond five years after they commenced trading.

This development will reduce the barriers to entry for new and expanding players in the supermarket sector and should ultimately lead to greater choices for consumers to shop and potentially lower prices.

The issue was identified in the ACCC's comprehensive 2008 Grocery Inquiry. We recognise that there is much more to do. We will be speaking to other supermarket players about abolishing restrictive provisions across the supermarket sector.

We recognise that competition in this sector depends very much on state and territory planning bodies planning laws. We hope they are reviewed to ensure the best conditions for competition are in place.

The push for criminalising cartels

SLIDE 6 – THE NEW CARTEL ENFORCEMENT REGIME

It is no secret that the ACCC has been a long supporter for criminal penalties for cartel conduct.

This became a reality on 24 July when The *Trade Practices Amendment (Cartel Conduct and Other Measures) Act 2008* came into effect bringing with it a new dual criminal and civil cartel enforcement regime.

I'll now explain why these changes not only provide sharper teeth in relation to penalties for cartel conduct but also enhance deterrence against such conduct.

For some time, Australia was regarded as somewhat of a 'runt of the litter' among developed nations for not having criminal penalties available to prosecute cartel conduct.

Although substantial civil penalties were available, the reality was that, being caught could be regarded as a business cost, there was often no direct consequence for the individual wrong-doer.

As Justice Heerey noted during the Commission's cartel case against Visy Industries in 2007[1]:

> Critical to any anti-cartel regime is the level of penalty for individual contravenors. …. Heavy penalties are indeed appropriate for corporations, but it is only individuals who can engage in the conduct which enables corporations to fix prices and share markets.

The new criminal cartel powers give effect to the OECD's 1998 recommendations[2] that member countries have laws in place that effectively deter, detect and punish hard core cartel conduct.[3]

We also anticipate that criminal penalties will provide the Commission with greater opportunities to detect cartel conduct through:

- the Immunity Policy for Cartel conduct – which provides immunity from prosecution by the Commission for the first cartelist to self report; and
- enhanced investigative tools – such as search warrants and telephone interception.

How the new cartel regime operates

SLIDE 7 – OUTLINE OF NEW LAW

The amendments provide for a civil cartel prohibition and a criminal cartel offence, both centred upon the definition of 'cartel provision'.

The definition of 'cartel provision' proscribes four varieties of conduct that constitute "hard core cartels":

- price fixing;

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[1] *Australian Competition and Consumer Commission v Visy Industries Holdings Pty Limited* (No 3) [2007] FCA 1617

[2] OECD, *Recommendation of the Council Concerning Effective Action against Hard Core Cartels*, 25 March 1998 <http://www.oecd.org/dataoecd/39/4/2350130.pdf>.

[3] This is explained at page 5 and 6 of the Explanatory Memorandum to the *Trade Practices Amendment (Cartel Conduct and Other Measures) Act 2008*.

- output restrictions;
- allocating customers, suppliers or territories; and
- bid rigging.

The cartel provision addresses price fixing agreements on a 'purpose' or 'effect' basis, as did the now repealed section 45A.

It remains the case that the prohibition on cartel conduct in the form of output restrictions, allocation of customers and bid rigging is based on 'purpose'.

A company will have contravened the civil prohibition if it makes a contract or arrangement, or arrives at an understanding (CAU) containing a cartel provision with its competitor, or if it gives effect to the cartel provision.

The element that distinguishes the cartel offence from the civil prohibition is the need to establish certain fault elements under the *Criminal Code Act 1995*.

Let me briefly look at the fault elements:

Making a CAU containing a cartel provision
It will be necessary to establish that an individual or corporation *intended* to enter into a contract, arrangement or understanding and that she/he or it *knew or believed* the CAU contained a cartel provision.

Giving effect to a cartel provision
It will be necessary to establish that an individual or corporation *knew or believed* a CAU contained a cartel provision and that she, he or it *intended* to give effect to that cartel provision.

The prosecution will need to prove the case beyond reasonable doubt to secure a conviction under the criminal prohibition. A unanimous jury verdict is also required.

It is likely these cases will be heard in the Federal Court or State Supreme Court with the initial committal proceedings being heard before a state or territory magistrates' court.

For civil penalty prosecutions the onus of proof, the balance of probabilities, and forum for prosecution (the Federal Court) remains unchanged.

The penalties for cartel conduct

For individuals, the cartel offence is punishable by imprisonment of up to ten years and/or fines of up to $220,000 per contravention.

Under the civil prohibition, individuals may be liable to a pecuniary penalty of up to $500,000 per contravention.

Sanctions for corporations under the cartel offence and civil prohibition are to be applied using a very similar mechanism:

For each contravention of the cartel offence or civil prohibition the fine or pecuniary penalty (respectively) will not exceed the greater of:

a) $10,000,000;
b) Three times the total value of the benefits obtained by one or more persons reasonably attributable to the commission of the offence/act or omission in contravention of the civil prohibition;
c) Where the gain cannot be estimated 10% of the corporate group's annual turnover in a 12 month period when the offence/contravention occurred.

Some of the other forms of relief available in relation to the cartel offence and civil prohibition include injunctions, orders disqualifying a person from managing corporations and community service orders.

Slide 9 - Exceptions

Exceptions to the new cartel regime

There are some exceptions that may apply to cartel conduct:

Collective bargaining notices -section 44ZZRL provides if you have a collective bargaining notice in place, businesses will be exempt from the cartel offence and civil prohibition for all conduct other than bid rigging.

Authorisation is available for all cartel conduct if the party seeking the authorisation can prove that the public benefit from the conduct would outweigh any public detriment.

Joint ventures - sections 44ZZRO and 44ZZRP provide an exception for both corporations and unincorporated businesses in relation to the cartel offence and civil prohibition respectively if the cartel provision is for joint production or supply and that the particular cartel provision is contained in a contract. [4]

'Anti-overlap' provisions - the amendments contained 'anti-overlap' provisions along the lines of existing subsections 45(5) to (7), and exemptions along the lines of subsection 45A(4) of the Act.

When and how will the new cartel provisions be prosecuted by the ACCC?

SLIDE 10 – WHEN AND HOW …
The Commission does not interpret the new laws as extending the Commission's reach to new forms of conduct; rather it sees the new powers

[4] Or at least what the parties intended and reasonably believed to be a contract.

as extending the penalties and consequences available for those that choose to engage in serious cartels.

Cartel conduct was already illegal under the Trade Practices Act, the difference now is, serious cartels may now be prosecuted either civilly or criminally.

That said, the Commission takes the view that whenever possible serious cartel conduct should be prosecuted criminally.

The parallel criminal and civil regime for cartel conduct will ensure that serious cartel conduct can be prosecuted criminally while less serious breaches can be pursued under the civil prohibition.

A memorandum of understanding between the Australian Competition and Consumer Commission and Commonwealth Director of Public Prosecutions in relation to serious cartel conduct sets out a number of matters which the Commission will have regard to in deciding whether to refer a matter to the CDPP.[5]

SLIDE 11 – INDICATORS OF SERIOUS CARTEL CONDUCT

Among the factors to consider include whether:

- the conduct was longstanding or had a significant impact on the market in which the conduct occurred;
- the conduct caused, or could cause, significant detriment to the public;
- one or more of the alleged participants has previously been found by a court to have participated in any cartel conduct;
- the value of the affected commerce exceeded or would exceed $1 million within a 12 month period; and
- in the case of bid rigging, the value of the bid or series of bids exceeded $1 million within a 12 month period.

The Commission will be taking a holistic approach to any potential referral of a matter for consideration of criminal prosecution. Following a referral, the CDPP will advise the Commission whether a criminal prosecution should be commenced.

In considering whether a criminal prosecution would be appropriate the CDPP will have regard to the *Prosecution Policy of the Commonwealth.*

There will be no point trying to negotiate resolution of a serious cartel matter in the way that may have been done when civil proceedings were the only available option.

[5] The MOU was signed on 14 July 2009: www.accc.gov.au/cartels.

The Commission will simply not negotiate when a criminal prosecution is available for such conduct.

We will never allow the prospect of a criminal prosecution to be traded away by an attractive offer to resolve the matter through civil penalty proceedings and the payment of a large penalty.
For serious cartel conduct, the Commission would only be willing to begin negotiations for a resolution of an investigation through a civil penalty proceeding after the possibility of a criminal prosecution has been ruled out.

There will be no change to the way minor matters are currently treated. They will not be pursued through the criminal regime.

The Immunity Policy

SLIDE 12 – IMMUNITY POLICY

Integral to the success of any cartel enforcement regime is an effective immunity policy. Such a policy encourages businesses and individuals to be the first to disclose cartel behaviour in trade for immunity.

This assists the Commission to stop the harm caused by such conduct while also putting the fear in participants if I'm not the first to report, who will be?

The Commission will receive and manage requests for immunity and conditional immunity from both civil and criminal proceedings and will make a recommendation to the CDPP as to whether the applicant meets the criteria set out in the Immunity Policy, available on the ACCC website.[6]

The decision of the CDPP whether to grant immunity will be communicated to the applicant at the same time as the Commission's decision whether to grant conditional immunity.

Recent cartel matters

To date, proceedings brought by the ACCC against six airlines has resulted in the Federal Court handing down penalties totalling $41 million for price fixing in the international air cargo market from 2002 to 2006. The court also restrained the parties from conducting in similar conduct for various periods.

Participants included:

- Qantas,
- British Airways,
- KLM,
- Air France,
- Martinair, and

[6] http://www.accc.gov.au/content/index.phtml/itemId/879795

- Cargolux.

The ACCC has instituted proceedings against:

- Singapore Airlines on 22 December 2008;
- Cathay Pacific on 30 April 2009;
- Emirates on 18 August 2009; and
- Garuda on 2 September 2009.

In each case seeking pecuniary penalties, injunctions and declarations for alleged price fixing between 2002 and early 2006.

Last week, the ACCC began proceedings alleging three construction companies - T.F. Woollam & Son Pty Ltd, J.M. Kelly (Project Builders) Pty Ltd and Carmichael Builders Pty Ltd - had engaged in price fixing and misleading or deceptive conduct in tendering for Government construction projects in Queensland between 2004 and 2007.

Entrepreneurialism in the legal profession

In Europe, law firms have taken a 'think outside the square' attitude to preparing their clients for cartel investigations.

Some law firms have dressed up as European Commission regulators and have conducted fake "dawn raids". In one case one firm pretended to be the regulator executing a search warrant. So keen were they to simulate reality that they wore corduroy suits that apparently are favoured apparel among some German cartel investigators.

I heard a story about a manager taking his briefcase and driving as far away as possible until he heard from his secretary, that the raid was not real.

Then there was one company that contacted its regional office and ordered staff to shred legitimate documents.

Of course what can we learn from this? Don't get involved in cartel conduct!

Now I'd like to take you on a different path and highlight a significant legislative change that will change the structure of our nation's consumer law framework. I'm talking about the Australian Consumer Law reforms.

Australian Consumer Law overview

SLIDE 13 – ACL

As I speak, traders in Australia, a nation of just 21 million people have to comply with a complex set of consumer protection laws made by each state and territory Parliament, the ASIC Act and the Trade Practices Act.

This means that businesses trading across borders face differing obligations. Let's not forget the confusion this can cause consumers.

Last year, the Productivity Commission conducted a review of Australia's consumer policy framework.

Although concluding that in several respects the framework was sound, the Productivity Commission concluded that the current division of responsibility between the Australian, State and Territory Governments led to 'variable outcomes for consumers, added costs for businesses and a lack of responsiveness for policy makers'. It also found 'gaps and inconsistencies in the policy and enforcement tool kit' and weaknesses for consumer redress. [7]

What resulted were recommendations to unify Australia's consumer policy framework under a single national consumer law and enhanced cooperation in enforcement activity.

The Productivity Commission estimated the economic benefits to the community of the reform package, including a single national consumer law, to be between $1.5 and $4.5 billion each year.

The Council of Australian Governments agreed to move forward with a single national consumer law through the Australian Consumer Law reforms.

On 24 June this year, Minister for Competition Policy and Consumer Affairs, Dr Craig Emerson, introduced the *Trade Practices Amendment (Australian Consumer Law) Bill 2009* into the House of Representatives. This is the first bill of the Australian Consumer Law reforms.

It was referred to the Senate Economics Committee for review which reported earlier this month that the bill be passed.

SLIDE 14 – ENFORCEMENT POWERS

The bill will introduce new provisions for unfair contract terms, enforcement powers and remedies including:

- civil pecuniary penalties;
- disqualification orders;;
- substantiation notices;
- public warnings;
- infringement notices; and
- non-party consumer redress.

A second bill is expected to be introduced in early 2010. This bill will provide the bulk of the Australian Consumer Law reforms including:

[7] Productivity Commission 2008, *Review of Australia's Consumer Policy Framework*, p2

- a new national product safety system;
- the introduction of best practices taken from State and Territory consumer laws; and
- the introduction of the remaining Australian Consumer Law provisions drawn from existing consumer protection provisions of the Trade Practices Act.

By the end of 2010, States and Territories are expected to apply the reforms in accordance with the timeframe agreed by COAG.

It is likely that the Australian Consumer Law will be fully implemented by 1 January 2011.

One national consumer law

The very basis of the Australian Consumer Law will be the consumer protection provisions of the *Trade Practices Act*.

Where it is generally agreed that the current provisions of the Act are inadequate, the Australian Consumer Law will incorporate into the Act provisions based on best practice in various state and territory consumer laws.

Enforcement of the national consumer law will be shared between the Commission and state and territory offices of fair trading.

These new arrangements will allow for renewed abilities to work more closely and collaborate on enforcement action.

Each jurisdiction will be given the same enforcement tools under the new consumer law. The various agencies will sign an MOU which commits each agency to co-operation in enforcement and compliance.

Let me now briefly go through some of the new enforcement tools under the Australian Consumer Law reforms.

Unfair contract terms

SLIDE 15 – UNFAIR CONTRACT TERMS

Unfair contracts legislation will address situations where terms in a standard form consumer contracts cause a significant imbalance in the rights and obligations of the parties and they are not reasonably necessary to protect the legitimate interests of the business.

In considering whether a term is unfair a court must consider if they cause, or are substantially likely to cause detriment. .

In the first ACL bill, a number of terms are listed that may be considered unfair, including:

- unilateral ability to avoid or limit performance of a contract or terminate the contract;
- penalising only one party for a breach or termination of the contract
- unilateral power to vary the terms of a contract by a business.

As I understand the policy behind these changes, this is not an attempt to restrict the use of standard form contracts, which in many markets are a very efficient way of providing goods and services. Rather, it is intended to provide a more effective regulatory mechanism for ensuring that such contracts are fair.

A similar regime has been operating in Victoria since 2003 under the *Fair Trading Act 1999*.

Civil pecuniary penalties

The introduction of civil pecuniary penalties will bridge the existing gap between the remedial measures currently available for consumer protection matters and the criminal penalty provisions.

I expect these new penalties will change the mindset of those involved in contravening the Act, as they will soon feel the pinch in their hip-pocket if they continue behaving the same way.

Disqualification orders

SLIDE 16 – DISQUALIFICATION ORDERS

Disqualification orders will be a valuable tool to address those repeat or serious offenders who contravene consumer protection laws.

They would operate by restricting individuals from managing corporations.

Disqualification orders are already a well recognised enforcement tool under the *Corporations Act 2001* (Cth) and have been introduced into the Trade Practices Act in relation to certain breaches of the anti-competitive conduct provisions.

Other remedies

Other new remedies and enforcement tools that may be available to the Commission if the Australian Consumer Law is passed include:

- *substantiation notices* – will require a trader to give information to substantiate a claim or representation and can be used as a quick, efficient way to identify whether an alleged misrepresentation is true or not;

- *infringement notices* – this power will provide the ACCC with the ability to more efficiently deal with smaller matters that warrant a regulatory response; and
- *public warning powers* – will provide the ACCC with a timely tool to warn consumers about market risks such as emerging scams.

Non-party consumer redress

Finally, turning to consumer redress, the Federal Court's decision in *Cassidy v Medibank Private Ltd*[8] has placed certain constraints on the Commission's ability to seek redress for consumers.

In particular, the Commission cannot obtain compensation for consumers that are not named in proceedings and needs to obtain written consent from each affected consumer to do so.

This is a particular problem in cases involving large numbers of consumers and/or consumers who may not be readily identified.

The Commission is keen to have an effective and appropriate legal framework in place to ensure the court can adjudicate on contested matters while also enabling all affected consumers to obtain redress.

Conclusion

As you can see, compliance with competition and consumer protection laws is likely to be enhanced by new enforcement powers and a targeted proactive approach to competition and consumer concerns in particular markets when that is appropriate.

The amendments to the cartel provisions of the Trade Practices Act provides the ACCC with a dual criminal and civil enforcement regime which allows us to pursue the appropriate penalty proportionate to the harm caused by cartel conduct.

The Australian Consumer Law reforms, not only unify the nation's consumer laws but equip the ACCC with extended powers to address consumer detriment.

The recent enforceable undertakings by telecommunication providers and major supermarkets demonstrates that effective voluntary compliance can be secured in an expeditious manner.

When necessary we will intervene in particular markets to end the 'race to the bottom' and improve consumer and competition outcomes.

Thank you.

[8] [2002] FCA 315