

  <p>Australian Competition &amp; Consumer Commission</p>	<p style="text-align: center;"><b>National Consumer Congress</b></p> <p style="text-align: center;"><b><i>The foundations of good consumer protection policy: strong law, vigorous enforcement and the educated consumer</i></b></p> <p style="text-align: center;"><b>Graeme Samuel, Chairman</b> <b>15 March 2007</b></p>
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## Introduction

In 2007, one of the key challenges for business, consumers and government will be to examine the Australian consumer policy framework to ensure that it meets the needs of a modern economy. Our system of consumer protection is built on a three-pronged approach of strong law, vigorous enforcement and educated consumers. The Productivity Commission review provides a timely opportunity to reflect on the current framework, to examine how it operates in today's economic environment, and to identify what, if any improvements should be introduced.

Our system is made up of a wide range of legislative, co-regulatory and self-regulatory mechanisms designed to address consumer issues.

It relies on a range of enforcement mechanisms including national, state and territory enforcement bodies, ombudsmen schemes, and the courts for enforcement of laws. It also relies on educating consumers to participate in competitive processes to obtain the products they want at a price they wish to pay, to make complaints to traders and enforcement bodies when transactions go wrong, and to take their own private actions when it is appropriate to do so.

But one of the most important cornerstones of our consumer protection regime is the *Trade Practices Act 1974 (the Act)*. Its broad scope, flexibility and adaptability have served Australia well over the last three decades and it continues to be a highly effective foundation for protecting the rights of Australians in many areas.

But much has changed since 1974, and issues such as on-line fraud have emerged that did not even exist when the legislation was originally drafted. For our legislation to remain relevant to a new century, it is necessary to put it under the microscope and consider how it can be enhanced or modified, where necessary.

As outlined in the Productivity Commission's issues paper, this examination needs to consider areas including the role of industry-specific regulation, harmonisation with New Zealand, and whether there is too much "red tape" associated with the framework.

Today I would like to focus my comments on the *Trade Practices Act*, its effectiveness in the past and challenges facing it for the future. I would also like to provide some thoughts on where the ACCC believes there may be scope for improvement.

## **How have markets changed since 1974?**

Considerable changes have occurred in the Australian marketplace since the introduction of the Act in 1974. As a result of a number of factors including technological change, deregulation and competition reform and decreasing barriers to international trade, consumers are faced with a broader range of products and services from a greater variety of sources.

Competition reforms and deregulation have presented consumers with choices in energy, telecommunications and other areas, where previously the only choice was a government-owned monopoly or – in the case of compulsory superannuation – the product simply did not exist.

Not only do consumers have more choice between products, but due to the rapid growth of new technologies they are also presented with far more complex products, such as computers, broadband internet services and other electronic goods. Not only are the products themselves complex, but the pricing structures for such products are often highly sophisticated.

The development of e-commerce and on-line trading has also opened up opportunities for consumers to obtain goods and services from businesses from around the globe.

Within this environment, healthy competition will generally enhance consumer welfare, providing the price/quality of products and services that consumers want, and innovation.

Nevertheless, as choices and competition increases, consumers face the challenge of how to exercise choice wisely.

Consumers must compare increasingly sophisticated products and services, often in new technology areas where it is difficult for them to judge the quality of what they are buying. Trading via the Internet has introduced not only a new range of traders, products, and prices, but also the challenge of dealing with traders in the online environment, in particular, how to deal with online traders when things go wrong. Consumers have access to a greater volume of information than ever before in making their purchases, due to the ability to use the internet to search for information and prices, but also have to manage the volume of information they are receiving in order to utilise it and choose wisely.

Also, as consumers are exposed to more choices, they are potentially exposed to more unscrupulous traders, for example the plethora of scams disseminated via the internet or email.

Nevertheless, while there is a tendency to consider these as new issues, in fact, there are some striking similarities between the issues faced by consumers today and the issues faced in 1974 when the Act was introduced.

It was introduced following growing concerns about the impact on consumers of changes in manufacturing and production arising after World War II. As one commentator has written:

*“Coupled with the technological revolution that the war had inspired, a new range and variety of products rapidly emerged into the consumer marketplace. Many of these were far more complex in engineering and*

*design than their precursors, and because of mass production techniques, far more accessible to a broad spectrum of the community.*

*The rapid expansion of commercial radio, with its enticing advertisements, and the advent of television provided a further impetus to consumer's rapid advance.*

*To complement this new and burgeoning consumer market came new methods of financing products.”<sup>1</sup>*

New technologies, more sophisticated products, geographic separation between traders and consumers. It sounds remarkably similar to the market changes being identified today.

My point is not that we can be complacent about our consumer policy framework because “nothing has changed”. While the fundamental issues of concern for consumers in the marketplace may not have changed, what has changed, and will continue to change over time is the magnitude and intensity of the issues faced by consumers.

### **The Trade Practices Act 1974**

The Act focuses on enhancing the welfare of Australians through promoting vigorous competition in the marketplace, fair trading and protecting consumers against particular unscrupulous or unfair practices. The Act is the cornerstone for consumer welfare law in Australia, providing a general standard of conduct for traders dealings with consumers and other businesses.

The Act contains a number of provisions which relate directly to fair trading and consumer protection in the marketplace including:

- Prohibitions on misleading and deceptive conduct in trade or commerce;
- Prohibitions on harassment or coercion in connection with the supply or possible supply of goods or services;
- Product safety and product information standards and enforcement of such standards;
- Liability of manufacturers and importers for defective goods;
- Non-exclusionary implied conditions and warranties in consumer transactions;
- Prohibitions on unconscionable conduct in consumer transactions;
- Prohibitions on the contravention of industry codes of conduct which have been prescribed by regulation.

The Act also plays a direct role in ensuring consumer rights by prohibiting anti-competitive conduct and regulating national infrastructure services. By encouraging competition, the Act plays an important role in empowering

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<sup>1</sup> *In the Consumer Interest - A selected history of consumer affairs in Australia 1945-2000*, edited by Simon Smith, p 34.

consumers to participate in the market – providing an environment where it is possible for consumers to exercise their rights to choose between suppliers and products in order to maximise their own welfare.

The substantive provisions of the fair trading provisions of the Act have not changed greatly since its introduction in 1974.

During the 1980's, state and territory fair trading laws have also been introduced. Each jurisdiction also has established a fair trading agency to administer and enforce the provisions of the state and territory fair trading laws. The Act has evolved over time. In 1976, the Swanson Committee reviewed the Act and made a number of recommendations in relation to the operation of Part V. In particular, this led to the insertion of provisions regarding liability of manufacturers and importers for defective goods. In 1986, substantial changes to the fair trading provisions of the Act were introduced including the introduction of unconscionable conduct provisions, the introduction of the requirement to state cash price under s 53C, and a new product safety and information division. In 2001 further substantial amendments were made, including increasing the maximum criminal penalty levels for offences against the consumer protection provisions from \$200,000 for a corporation and \$40,000 for an individual to \$1.1 million for a corporation and \$220,000 for an individual. These amendments also gave the court power to impose non-monetary penalties such as community service orders, probation orders and adverse publicity orders.

Cases brought by the ACCC and its predecessors have applied the Act to all facets of Australian commerce and have clarified and confirmed its operation in new and emerging areas of commerce. Some of the highlights:

- ACCC v Target: disclaimers at the end of television advertising will not necessarily make a misleading headline statement lawful.
- In the matter ACCC v Chen the Federal Court granted an injunction under the Act against a person operating an internet site from the USA.
- In the Worldplay services case, the Federal court confirmed that the pyramid selling provisions applied notwithstanding that there was no territorial connection between the scheme and Australia - all that was needed was participation in the scheme by promotion or otherwise in Australia.

The broad scope and flexibility of the Act is one of its key strengths in dealing with consumer issues in changing market conditions. Whether misleading or deceptive conduct is occurring in relation to traditional areas of activity, or high technology products, the Act adapts to the context.

In this regard, it is well suited to deliver a general standard of protection for consumers in today's environment.

## **ACCC's role in administering the Act and how it is responding to market conditions**

It is critically important for the consumer policy framework that enforcement of the Act is efficient and effective. Just as today's commercial environment challenges consumers to choose wisely, the ACCC faces similar challenges to choose wisely in developing its approach to promoting compliance with the Act.

The ACCC seeks to ensure compliance with the Act through a range of strategies including court action, administrative settlements, education and liaison programs, the media, and by working with business on specific programs to bring about a change of conduct.

However, it is important to note that responsibility for enforcement of the Act does not lie solely with the ACCC. A person may also bring private action, or participate in a class action in relation to breaches of the fair trading provisions of the Act. Enforcement action for breaches of implied conditions and warranties can only be taken by private parties.

## **The ACCC's approach to compliance**

The ACCC receives approximately 75,000 telephone and email contacts per annum. Many of these will not raise issues pursuant to the Act, or may be inquiries which can be dealt with on the spot by the ACCC Infocentre. Others will be referred to ACCC officers for further investigation, or recorded in the ACCC's database for the purposes of monitoring issues that may be of relevance and trends arising in the marketplace.

The ACCC's choice of action is informed by whether the matter involves conduct that:

- Constitutes an apparent blatant disregard of the law;
- Is by a person, business or industry with a history of previous contraventions of competition or consumer law, including overseas contraventions;
- Causes significant detriment to consumers and/or businesses, and/or a significant number of complaints or having a disproportionate effect on disadvantaged groups;
- Is of major public interest or concern; and/or
- Where the potential for action to have a worthwhile educative or deterrent effect and achieve a likely outcome that would justify the use of the resources.

As can be seen from the above factors, the primary goal of the ACCC is to ensure its regulatory responses are tailored to addressing issues that cause significant detriment to consumers, or those affecting disadvantaged groups which have the least opportunity to help themselves.

There are matters that the ACCC believes can only be dealt with by litigation. Litigation provides a strong deterrence to the offender, and to others who may be engaging in similar conduct. It is the most effective way to clarify how the

law operates in a particular area, and what can happen if the law is breached. The ACCC believes that litigation is important, particularly in cases involving widespread consumer detriment, or blatant contraventions and a lack of cooperation with the ACCC to satisfactorily resolve an issue. For this reason, it is a critical element of vigorous enforcement of the laws.

However, the ACCC's approach recognises that the role of ensuring compliance goes well beyond litigating alleged breaches of the Act. While litigation is an important element of any compliance strategy, it is not necessary to prosecute through the courts every matter in order to achieve the desired outcomes. Furthermore, sole reliance on litigation may not achieve the optimum level of compliance. Litigation is resource intensive by nature, and accordingly, there are a limited number of matters that can be litigated. To encourage a culture of compliance over a broader range of activities and to achieve results quickly, the ACCC seeks to persuade traders to comply with the laws through court enforceable undertakings, administrative settlement and participation in the development of self-regulatory codes, and educates and informs consumers and businesses about their rights and obligations.

### **Competition and consumer issues – dual roles or one and the same?**

There exists in some circles a perception that the ACCC has two core roles – looking after the welfare of consumers and addressing competition issues in the economy. I would argue that dealing with competition issues such as shutting down cartels *is* looking after the welfare of consumers.

The reality is that everything happening in our competitive markets eventually filters down to customers and influences them directly. Every Australian is in some way a consumer.

Take cartels as an example. Where businesses agree to keep prices at a certain level, be it through bid rigging or price-fixing, it is their customers, the consumers, who end up paying more for the products on sale than if there had been genuine competition in that market. It may be directly through the price they pay for products at the shopfront, or indirectly through artificially inflated prices paid by business customers. Ultimately, these additional costs all find their way back to the pocket of the consumer.

Likewise, opposing mergers that risk substantially lessening competition in a market has a direct impact on the public. Competition is what drives businesses to keep prices as low as possible. Just because consumers do not realise they are being ripped off by a cartel or that the good prices they are paying at the local store are the result of strong competition does not mean they are not receiving a benefit. To see the link more clearly, imagine the impact on consumers if businesses did not need to compete with each other for customers and were allowed to agree on what price they thought would be appropriate to charge.

As such, competition issues are central to protecting the economic welfare of consumers and cannot be seen as a somehow unrelated or separate function.

## **How the ACCC is refining its approach to compliance to meet the needs of the modern economy**

It is true to say that the compliance priorities of the ACCC have not changed significantly in several years.

However, in the modern economy just as consumers are facing the challenge of exercising choice wisely in the marketplace, the ACCC faces the equal challenge of exercising its powers wisely to ensure vigorous enforcement of the Act.

In particular, to promote compliance in a modern economy, the ACCC believes it is critical that the regulator:

- Be well informed of the latest trends in market developments and consumer issues;
- Have the ability to manage its resources to allow it to respond quickly to emerging issues;
- Ensure that it is using the most effective mix of litigation, enforceable undertakings, administrative settlements, persuasion and education that will lead to compliance with the law in a growing number of areas.

In recent years the ACCC has focussed on developing sophisticated procedures to enhance its capacity to apply its compliance priorities wisely.

One of the key changes has been the implementation of a sophisticated matters management system that enables senior management within the organisation to perform a continuous stocktake of existing investigations and cases, to ensure that investigations are progressing in a timely manner, and that the overall 'mix' of matters is meeting the organisation's aim to maximise compliance with the Act, particularly in areas which give rise to significant consumer detriment.

Another change has been the continuous work done over the past few years to develop the ACCC's liaison network. Liaison initiatives are targeted at consumer and business organisations, other domestic regulators, particularly those with similar roles to the ACCC such as State and Territory Fair Trading Offices, and the Australian Securities and Investments Commission, and international bodies.

Liaison is critical to the ACCC's compliance role in a number of ways. First, it provides a conduit for business and consumer groups to highlight to the ACCC issues of concern to the community. This may occur through specific referrals of matters to the ACCC, or provide a more general alert regarding an emerging issue. Strong liaison channels with other domestic and international regulators also provide intelligence on emerging issues and how to deal with them. Thirdly, liaison work provides the ACCC with an opportunity to educate consumers and businesses about their rights and obligations under the TPA. Finally, it provides the ACCC with ongoing feedback on whether it is meeting the expectations of the community.

The ACCC also recognises that that traditional methods of identifying arising issues, such as through complaints, does not always provide an accurate picture of what the enforcement agency should be doing. While complaint data

is an important tool for identifying compliance issues, it makes up only part of the picture. The ACCC recognises that to base its priorities solely on a large number of complaints in relation to a particular issue may not achieve the desired result. Complaints data is notoriously influenced by the issue of day, including media exposure of the ACCC's own activities, meaning other important issues may be missed by focussing solely on complaints.

## **How is this reflected in the work the ACCC is doing today?**

### ***Enforcement***

Potential breaches of the Fair Trading provisions of the law are by far the largest category of conduct where the ACCC achieves results through litigation, court enforceable undertakings or administrative resolutions. In 2005/06 87 percent of total enforcement outcomes related to alleged breaches of Part V, the consumer protection provisions of the Act.

A high proportion of matters are settled by court enforceable undertakings for a number of reasons. First, litigation may not always be capable of providing the best solution for consumers. In particular, because the current legislative framework limits the ability of the ACCC to obtain orders for consumer redress for large numbers of consumers, court enforceable undertakings can be used to obtain compensation when it would not be practical to do so through litigation. Second, court enforceable undertakings provide for a quicker resolution of matters. If too many resources become tied up in expensive and time-consuming litigation, then the ACCC will not be in a position to respond quickly and decisively to emerging issues.

Examples where enforceable undertakings are able to achieve a result for consumers that would not be possible through litigation include the LG Electronics matter where undertakings were given which enabled rebates of up to \$3.1 million to be made available to eligible consumers who bought air conditioners that did not comply with the energy efficiency values claimed on rating labels. In the Collection House matter, ex gratia payments of up to \$660,000 were provided to a group of about 500 NSW debtors in relation to the ACCC's concerns about representations made by Collection House regarding its rights to collect old debts that were potentially extinguished.

In selecting enforcement matters to pursue, the ACCC has a focus on new or emerging issues for consumers, including vulnerable or disadvantaged consumers, online trading, and environmental claims.

In the area of vulnerable or disadvantaged consumers, the ACCC has recently taken proceedings in two significant matters. The first matter involved proceedings against Mr Ramon Keshow for engaging in unconscionable conduct and misleading and deceptive conduct in a number of indigenous communities in the Northern Territory. In that case, a number of indigenous women paid substantial sums of money for maths tutorials and received little or no goods in return. In one instance, one woman paid over \$10,000 from 1998 to 2004 through fortnightly automatic deductions. Justice Mansfield found that the woman in question was indigenous and living in relative poverty, she had little or no experience in business dealings and did not fully understand the



consequences of signing the automatic deduction forms. The court banned Mr Keshow from entering Northern Territory indigenous communities to conduct his business, and ordered compensation to eight indigenous women. The second matter, the Fox Symes case, involved alleged unconscionable conduct and misleading and deceptive conduct in relation to debt administration services. This was a matter of particular concern to the ACCC because of the financial or social vulnerability of the customers of these services. In that case, the defendants provided undertakings to the court, including undertakings not to make certain statements in relation to debt agreement proposals, and would bring to the attention of customers and potential customers the amount of all fees payable in respect of a debt agreement.

Both of these cases were important cases to litigate, not just because they involved vulnerable or disadvantaged groups, but because they illustrate the potential issues for vulnerable people when dealing with new kinds of products they are unfamiliar with, and serve as a warning to traders that the ACCC will take action if they target particular vulnerabilities in this way.

The ACCC has also focused considerable attention on matters involving Internet sales and e-commerce products. One example is the 1Cellnet case, a pyramid selling scheme involving discounted telephone calls. Another is the recent action taken against StoresOnline in relation to the promotion of e-commerce software. Both cases involved overseas traders, and demonstrate clearly that the ACCC will not hesitate to tackle cases involving international traders. In the StoresOnline case, the trader refunded \$679,000 to Australians.

Environmental claims is another area where the ACCC has reacted to a new type of issue arising in the market. With concerns for the environment growing, consumers are choosing to purchase more environmentally friendly products. At the same time, this provides scope for misleading and deceptive conduct, as traders have an incentive to make these types of claims in order to sell their products at a premium price. The damage associated with such conduct is not just the higher price that consumers are paying, but that traders have no incentive to develop environmentally friendly products, which ultimately has detrimental effects on society as a whole. In a recent matter concerning labelling of energy efficiency ratings on air conditioners, LG provided court enforceable undertakings to compensate purchasers of affected models for the potential increase in operating costs resulting from purchasing air conditioners with a higher energy consumption than rated. LG also undertook to implement a new testing procedure. Another court enforceable undertaking was obtained from Hagemeyer Appliances in relation to claims that particular air conditioning units were 'environmentally friendly' when this was not correct.

### ***Information and Education***

The ACCC believes strongly that informed consumers are empowered consumers. Where they are aware of their basic legal rights they are much more able to protect their own interests and are more likely to complain when they believe their rights have been breached. Educating traders is the other side of the coin. It reduces inadvertent breaches of consumer protection laws, means retailers will be more aware of their obligations to customers. It also

raises awareness of the serious potential consequences that may flow from breaching those laws.

On both the customer and trader side, increased awareness is likely to result in greater compliance, meaning less unnecessary follow-up by regulators and more importantly greater likelihood of consumer's rights being observed. Other benefits may include less unnecessary disruption for businesses and better results for consumers.

Education has become an increasingly important tool in consumer protection since the introduction of the Act, where it was a relatively minor component of our work. In 2005/6, the ACCC issued 315 media releases – of which 86 related to specific enforcement activities, 19 to product safety issues, and 36 to educational activities. It undertook 162 speaking engagements and produced 37 consumer and small business articles for external publications.

But it is important to note that it is not just the volume of media releases or publications issued that is important, but how education and information tools are being used to combat serious fair trading issues.

In developing educational material, the ACCC looks at a range of factors including:

- Who should the material be targeted towards to achieve the best result – consumers or business or both?
- How should material be presented – booklets, newsletters, media releases, websites?
- When should material be released in order to achieve the best outcome – for example, is it better to provide information about refunds and warranties just before the Christmas or mid-year sales so consumers have their statutory rights in mind when shopping; or is it better to launch these materials just after the sales at a time when consumers are more likely to be experiencing problems with faulty goods?
- How should material be distributed – ACCC regional offices, businesses, consumer organisations, State/Territory Offices of Fair Trading?

One particular area where the ACCC has focused on educational initiatives for consumers is in relation to scams. Scams are a high priority for the ACCC, because they can have a real detriment for consumers, and Internet and email are making it easier for scammers to contact consumers than ever before. At the same time, scams are difficult to litigate – often it is very hard to find the perpetrator – and consumers are often embarrassed to complain. Accordingly, much of the ACCC's work in this area relates to arming consumers with the capacity to recognise and protect themselves from scams.

Scams are also an area which touches on a number of other Commonwealth regulators including ASIC and the Australian Federal Police, as well as state and territory Fair Trading agencies, so our efforts need to be coordinated with others. Accordingly, the ACCC participates in the Australasian Consumer Fraud Taskforce which brings together Australian and New Zealand agencies to use a whole-of-government approach to enhance enforcement activity against consumer frauds and scams, and share information and generate

interest in research on these issues. The ACCC performs a secretariat role for the Taskforce, and Commissioner Louise Sylvan is of course Chair of the Taskforce. The Taskforce's activities include running an annual coordinated information campaign for consumers – which is occurring all through this month.

The ACCC revised and relaunched its SCAMwatch website in October 2006. SCAMwatch is an educative tool to help consumers and small businesses identify and protect themselves from scams. The site also provides advice for consumers and small businesses who have been targeted by scams (including details on how to report a scam). SCAMwatch serves as a website portal for the ACFT campaigns. SCAMwatch differs from many of the ACCC's information and educational programs because it is very much focused on enabling consumers to recognise scams in the many forms that they take, rather than simply focusing on the relevant sections of the Act or providing a mechanism to make complaints. This decision was taken because it was felt this was the best way to help consumers protect themselves from scams and prevent the problem occurring in the first place.

The ACCC also decided to take this approach because it provided a more effective initial use of resources to combat what had become a significant issue, rather than try to deal with multiple complaints about specific scams. However, this is by no means the end of the ACCC's strategy in this area. The ACCC continues to monitor this area very closely and will not hesitate to take stronger measures, including escalating individual cases to enforcement action where it is appropriate to do so.

### **Relationship between competition and consumer protection**

While I have spoken primarily about the fair trading provisions of the Act and the ACCC's role in administering those laws, it is important not to overlook the role of the anti-competitive conduct provisions of the Act in the consumer policy framework.

Competition and fair trading provisions are both regulatory tools designed to enhance consumer welfare.

Competition drives traders to offer consumers a diverse range of products and services at competitive prices. But it is well recognised that competition and consumer welfare can be severely damaged through anti-competitive conduct such as price fixing and mergers that result in a substantial lessening of competition in a market. Equally, competition does not work well to enhance consumer welfare if consumers cannot participate effectively in the competitive process. Consumers cannot participate effectively when they are subject to false or misleading claims about products, or coerced into buying particular products due to a particular vulnerability.

The nature of competition laws as an aspect of consumer policy is illustrated by the fact that many competition matters involve direct consideration of consumer issues. The authorisation process contained in the Act is a clear example of the flexibility that has allowed it to remain relevant and responsive to evolving situations.

The Act provides a process for authorisation of conduct that could be anti-competitive where the potential benefits of the conduct outweigh the potential detriments. This includes consideration of consumer welfare benefits associated with the conduct. For example, in relation to the WA Funeral Directors Association's arrangement to provide fixed-price discount pre-paid funerals to members of Retirees WA, the ACCC has issued a final decision allowing the arrangement on the basis that it allows participating funeral homes to provide basic services to a section of the community, some of which are financially disadvantaged, at a lower price. In this case, the ACCC's findings indicate that these benefits outweigh potential competitive detriment associated with such a scheme.

Another area commonly considered to fall within the category of competition rather than fair trading laws that has a direct consumer policy element is the regulation of telecommunications pursuant to the Act. While this work is rarely reported on outside of the business pages, it has very real benefits for all Australian consumers. For example, in July 2006 the ACCC decided that the unconditional local loop or ULLS, which allows Telstra's competitors access to the copper wire between an end-user customer and a telephone exchange, should remain a declared service. This means that telecommunications companies can access the ULLS to offer innovative services to consumers such as ADSL high speed broadband. This has provided consumers with more choice, and also, due to the competition it faces, prompted Telstra to remove limits on its ADSL speeds, thus enhancing the quality of service it provides to its own customers.

A third area is resale price maintenance, which prohibits a supplier from requiring a business customer to sell the supplier's goods at a minimum price specified by the supplier. The ACCC has taken a number of cases in this area recently that directly impact on the price of goods sold to consumers. Examples include Digital Products Group – inducing a retailer not to advertise certain digital set top boxes below a specified price, and Optima Technology Solutions – dealers told to stop discounting Optima computer products. In February 2007, the ACCC obtained the highest penalty to date for resale price maintenance against Jurlique of \$3.4 million.

Because of the close relationship between competition and fair trading policies and law, it is important that the primary responsibility for administration of these two aspects of regulating for consumer welfare is carried out by a single agency such as the ACCC. There are a number of reasons why various jurisdictions including the US, Canada and the UK have combined the responsibilities of administering competition and fair trading laws within one entity.

First, as outlined above, many aspects of the administration of competition laws involve direct consideration of consumer issues, and the agency is better placed in terms of its own understanding of the issues if it is also exposed to fair trading issues on a regular basis.

Second, an understanding of competitive issues can assist in informing priorities for the organisation. For example, an understanding of competition issues informs the importance of combating false environmental claims.

Because the truth of such claims are often undetectable to consumers, it is important to take a strong enforcement stance on the issue, otherwise traders will have no incentive to respond to market signals to make their products more environmentally friendly. The detriment associated with such claims is not just the detriment to one consumer, but to the community as a whole.

Third, from an operational perspective, combining the two functions provides a critical mass of resources to respond to issues as they arise, and enables resources to be deployed to resources to the areas where it is most needed at any particular time.

David Cousins, Director Consumer Affairs Victoria in his Consumer Affairs 2007 Lecture on Tuesday night said:

*“...In practice, competition and consumer protection matters are readily distinguished when it comes to enforcement. Separating the functions would avoid the perception of the ACCC being biased in favour of consumers in its competition assessment work.”*

What is wrong with making consumers our number one priority? The whole point of competition regulation is to deliver efficient and effective markets to protect the interests of all 20 million Australians. Competition regulation and consumer protection are inextricably linked.

### **Scope for Future Improvements**

The broad scope and flexibility of the law is one of its key strengths, which makes it well suited to its task.

The institutional framework established by the Act also enables the ACCC the flexibility to respond to changing market conditions and issues. It does this through its selection of enforcement matters and its ability to engage in a broad range of activities to promote compliance including liaison, education and information and research.

Nevertheless, there are a number of potential areas where improvements could be made which the ACCC will outline in its submission to the Productivity Commission review. Given that we have limited time available today, I don't propose to address every possible issue, but mention a few of the areas that are key to the effectiveness of consumer policy in Australia.

### ***Civil Pecuniary Penalties***

The first issue I would like to mention is the need for the introduction of civil pecuniary penalties into the Act. Currently, penalties for wrongdoing can only be obtained through criminal proceedings. The ACCC is committed to taking criminal actions where the conduct warrants such a response. However, criminal actions are slow and require significant resources, not to mention the need to meet a very high standard of proof to achieve a result. The ability to obtain civil pecuniary penalties, declarations, injunctive relief, and other measures such as corrective advertising within a single action would

significantly enhance the ability of the ACCC to obtain effective outcomes and provide a higher degree of deterrence.

### ***Consumer redress***

The second issue is the need for the ACCC to have the ability to seek court orders to obtain consumer redress for large numbers of consumers. Currently, the ACCC can only obtain consumer redress in relation to persons who provide written consent. This limits the ability of the ACCC to obtain such redress, due to the administrative difficulties associated with locating relevant consumers prior to taking an action. In cases involving large numbers of consumers over a broad geographic region – exactly the type of case the ACCC is best placed to take, and increasingly likely to arise as markets become more national and international in character – the difficulties of obtaining written consent from thousands of consumers is prohibitive.

The ACCC can still obtain consumer redress where the trader offers a section 87B Undertaking to the ACCC. While this can provide a speedy and flexible result, it will not provide a satisfactory outcome in all cases.

Accordingly, it would greatly enhance the effectiveness of the Act if the ACCC were given the ability to seek orders for redress for consumers. This would increase deterrence against wrongdoing, and provide consumers the ability to gain redress, particularly in situations where many consumers may have lost small amounts.

### ***Uniformity of fair trading laws***

The third issue I would like to raise today is the need to reduce the level of inconsistency between state, territory and commonwealth fair trading laws.

Since the introduction of the current form of state and territory fair trading laws during the 1980's, the benefits of uniformity have been well recognised by all parties concerned. In June 1983 agreement was reached at a meeting of Commonwealth and State consumer affairs ministers that there should be uniform fair trading law throughout Australia.

However, in practice, uniformity has been difficult to achieve. Some of the areas of inconsistency include:

- Unfair contract terms legislation in Victoria;
- Different standards for what constitutes harassment or coercion;
- Different requirements in relation to the conduct of door-to-door and telemarketing activities;
- Different definitions of pyramid selling schemes;
- Different jurisdictions have different enforcement powers – for example some have the power to issue public warning statements, issue infringement notices in certain circumstances and issue notices requiring a trader to substantiate published claims or representations.

At the same time as the level of divergence between laws appears to be increasing, the need for uniformity is becoming more urgent.

The costs of increasing lack of uniformity are significant. For business, there are costs associated with meeting different requirements in different jurisdictions. While business may be able to minimise its costs by complying with the jurisdiction with the highest level of protection, there may be considerable 'hidden' costs associated with this – because business is taking on the burden of meeting a standard that perhaps the majority of Australian jurisdictions do not even believe to be necessary.

The current system also imposes an increased burden on consumers to be aware of the different standards that may exist between jurisdictions, and can raise false expectations that protections that may exist in their home jurisdiction apply when dealing with traders in other jurisdictions.

There is also a cost for governments and regulators in developing laws separately rather than pooling resources.

As markets become more national and global in nature, the costs for business and consumers in particular are increasing.

Australia is not the only jurisdiction to recognise this. For example, in the European Union, it has been identified that a significant proportion of EU retailers surveyed think harmonisation of consumer protection laws within the EU should have a positive effect on their cross border sales, and that consumers are less confident about making purchases from businesses located abroad. For these reasons, the EU has developed a strategy to develop a uniform approach across the EU<sup>2</sup>.

There are of course benefits associated with a federal system for fair trading laws, including the advantages of sharing government's and regulators' ideas and experiences to develop appropriate laws, and the advantages of entrusting administration of laws to regulators operating at different levels. The issue will be to craft a model for uniformity that retains these key benefits of the federal approach.

It may be argued that a non-uniform legislative approach has the benefit of allowing a particular law to be "test driven" in one jurisdiction. However, there are some drawbacks with that approach, particularly in today's market environment. Because many businesses now operate on a national scale, there is no such thing as a small experiment in one state or territory. If a law is introduced in one area, business is bound to apply the requirements of that law to avoid the burden of dealing with diverse regulatory requirements in various jurisdictions.

Developing a uniform legislative approach does not necessarily mean that the good ideas that a particular jurisdiction may have will not be heard. Rather, the model for developing uniformity should continue to draw on ideas and

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<sup>2</sup> Commission of the European Communities, *Green Paper on the Review of the Consumer Acquis*, COM (2006) 744 Final, 8 February 2007.

experience from each jurisdiction to deliver the best national, uniform legislation for Australia.

Within a uniform legislative framework, there is still a fundamental role for national, state and territory regulators. As discussed above, the primary role of the ACCC is to promote compliance by taking up systemic issues of national significance that are causing widespread detriment to consumers. But many consumer issues arise on an individual or local basis, whether the issue is one of breach of the law, or resolvable misunderstandings between consumers and traders. In aggregate, these issues are no less important to the overall wellbeing of consumers. Accordingly, within a uniform legislative framework, there is still an important role for state and territory fair trading agencies, particularly in dealing with local issues, and assisting consumers to obtain fast, effective justice in individual cases.

### ***Consumer information, education and research***

As outlined above, there is an increasing emphasis placed on the role of information and education in compliance strategies undertaken by the ACCC.

Of course, information and education is not the answer to every problem. Ultimately, even the most educated consumer cannot always protect themselves against traders who deliberately provide misinformation. However, as products become more complex and unfamiliar new products and services are introduced more rapidly, it is important that consumers are in a position to take their own precautions to the extent it is possible to do so. Information and education are fundamental tools that empower consumers. Some of the ways that information and education can assist consumers include:

- To identify the type of information they should find out about products and services before purchasing;
- To assist them in making complaints;
- To assist them in comparing products and services on objective grounds;
- Identifying issues to be wary of in relation to certain products and services.

### **Conclusion**

I would like to leave you with the following observations.

First, while marketplaces are changing, the issues for consumers are in fact similar to the types of issues that raised concerns when the Act was introduced in 1974. The Act is as relevant to those issues today as it was in 1974 and continues to do a good job of protecting consumers.

While the issues appear to be much the same, we should not discount the importance of the fact that they are growing in magnitude. While our system is essentially sound, there is scope for some significant change.

For our laws to remain relevant they need to address concerns including ensuring consistency across jurisdictions, applying the appropriate level of penalties to allow for a swift response to arising problems and being able to



respond effectively on behalf of a large group of consumers that may be affected by particular conduct.

The flexibility the Trade Practices Act provides to the ACCC in how it undertakes its role has allowed it to remain a successful tool in protecting the welfare of consumers.

With the appropriate changes, it will continue to be an effective safety net for consumers and allow consumer protection agencies like the ACCC the ability to deal with issues quickly and decisively.

The Productivity Commission's review promises to deliver a better system than the one we currently enjoy, allowing regulators and other consumer protection bodies to work effectively.

Armed with the right tools, the ACCC will be able to continue responding to new challenges in a number of ways in particular by refining its approach to compliance to ensure that it is exercising its compliance role wisely.

What is on offer is an improved, better coordinated and stronger protection regime. At the centre of the changes the winners will of course be all Australian consumers – as they should be.