

The role of the ACCC

Mr Allan Asher, ACCC Deputy Chairperson
Australian Collectors Association
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INTRODUCTION

Thank you for allowing me the opportunity to speak to you today. The last few years have seen fundamental changes to the scope of the *Trade Practices Act*. In 1991, the Commonwealth, State and Territory Governments agreed to examine a national approach to competition policy. A National Competition Policy Review Committee chaired by Professor Fred Hilmer was established. On completion of this Committee's report in 1993, and after extensive public consultation on the report's recommendations, the various governments, as part of the Council of Australian Governments agreed to implement the recommendations. These processes culminated in the passage of the *Competition Policy Reform Act*.

One of the main elements of these reforms was the removal of the constitutional limitations which had previously prevented application of the competitive conduct rules of the Act to unincorporated businesses engaged solely in intrastate trade. To achieve coverage of these businesses, the amending legislation created, as a schedule to the TPA, a form of text known as the Competition Code. The Code contains the rules set out in Part IV of the TPA, modified to refer to "persons" rather than corporations. The text of the Competition Code is made operative by State and Territory laws which apply the Code within each jurisdiction. This therefore means that unincorporated debt collection businesses, or single-person businesses, which previously would not have been subject to the *Trade Practices Act*, are now compelled to comply with the provisions of Part IV of the Act. These sections restrain the ability of businesses to engage in various forms of anti-competitive conduct. Therefore it is now more relevant than ever for every business in Australia to be aware of their obligations and responsibilities under the *Trade Practices Act*.

This year had seen some more major changes in the operation and application of the *Trade Practices Act*. This is especially so in the applicability of the Act to small business. Briefly, in 1996 the Commonwealth Government commissioned a Parliamentary inquiry into fair trading issues concerning small business. This inquiry revealed small business to be in a very vulnerable position in their dealings with larger or more powerful firms. Largely because of the inequality in the relative bargaining positions of small business, the inquiry found that small business was particularly susceptible to unfair dealings and exploitation by the larger firms with whom they would deal. It was in response to these findings that the moves were made to rectify these difficulties. Through reforms known as the "*New Deal Fair Deal*" package, the *Trade Practices Act* has been amended to strengthen the legal protection available to small business against unfair trading, and to increase their access to effective enforcement mechanisms. It is in this context that I would like to focus much of my discussion with you today.

I would like to focus specifically on 3 areas. Firstly I would like to spend some time considering the Commission's new role and functions in the small business area. Secondly I would like to consider the effect and operation of one of the newly included sections of the *Trade Practices Act*, section 51AC. This section deals with unconscionable conduct in commercial transactions. Lastly I would like to consider section 60 of the *Trade Practices*

Act, and the Commission's role and responsibilities pursuant to this section. Section 60 is a prohibition on the use by corporations of physical force, undue harassment or coercion in connection with the supply or possible supply of goods or services, or in an attempt to extract payment for goods and services. In response to an increasing number of complaints in this area, the enforcement of section 60 is now of high priority to the Commission.

OVERVIEW OF THE COMMISSION AND THE TPA

Before I begin discussing these major issues, it may be useful for me to briefly consider the basic roles and responsibilities of the Australian Competition and Consumer Commission. I would also like to provide a brief overview of the *Trade Practices Act* as a whole. This is really so as to place the specific sections which I intend to focus the rest of my discussion on into some sort of context.

Essentially, the ACCC is a law enforcement body concerned predominantly with the administration and public enforcement of the *Trade Practices Act*. The Commission also administers and enforces other legislation such as the *Prices Surveillance Act*. The Commission is not, in general, a policy advisory body. It has a role in applying trade practices law, in adjudicating authorisation applications, in applying national consumer protection law, in applying access regimes, and in applying any prices surveillance. The Commission's priorities lie in the non-traded goods and services sector, so far as competition issues are concerned. Within that sector, the focus of the Commission is on less competitive areas. As a general rule, the Commission tries to limit direct regulation of business activities as much as possible.

The central focus of the *Trade Practices Act* is the enhancement of competition. The object of the Act, as stated in section 2, is the enhancement of the welfare of Australians through the promotion of competition and fair trading and through provisions for consumer protection. The Act aims at preventing anti-competitive conduct, thereby encouraging competition and efficiency in business, resulting in a greater choice for consumers in price, quality and service. As part of its consumer protection functions, the Act seeks to safeguard the position of consumers in their dealings with producers and sellers and the position of business in its dealings with other business.

Essentially the Act is divided into 3 major parts, as well as various other subsidiary parts. The major parts of the Act are:

- Part IV which deals with anti-competitive practices
- Part V which deals with unfair trading practices and
- Part IIIA which deals with access to natural monopolies.

The subsidiary parts of the Act can be summarised as follows.

- Part IVA which deals with unconscionable conduct. Section 51AC, which I will spend some time discussing, falls within this section.
- Part IVB which contains some of the new small business provisions, specifically providing for the formulation of industry codes of practice.
- Part VA which deals with the liability for defective goods
- Part X which deals with international liner cargo shipping

- Part XIB which deals with anti-competitive conduct in the telecommunications industry and
- Part XIC which sets up a telecommunications access regime.

There are two broad principles which underlie Part IV of the Act. The first principle is that any behaviour which has the purpose, or effect, or likely effect of substantially lessening competition in a market should be prohibited. Secondly, Part IV is based on the idea that such behaviour should be able to be authorised on the basis of the current authorisation tests, if the circumstances are such as would satisfy the criteria, including the important “public benefit test”.

Part IV contains the main competitive conduct rules of the Act. Essentially these rules contain prohibitions on the following types of anti-competitive conduct:

- Agreements that have the purpose or effect or likely effect of substantially lessening competition in a market (section 45);
- Agreements that contain an exclusionary provision. These are sometimes referred to as primary boycotts and involve competitors agreeing not to deal with another party (section 45 and 4D);
- Price fixing agreements. These are agreements that have the purpose, effect or likely effect of fixing, controlling or maintaining prices (section 45A);
- Secondary boycotts. This refers to actions by two or more people which hinder or prevent a third person from supplying goods or services to a business, from acquiring goods or services from a business, or from engaging in interstate trade or commerce (section 45D);
- Misuse of market power. This refers to a business taking advantage of a substantial degree of power which it has in a market, for the purpose of eliminating or substantially damaging a competitor, preventing the entry of a person into any market, or deterring or preventing a person from engaging in competitive conduct in any market (section 46);
- Exclusive dealing. This refers to the situation where one person who trades with another imposes restrictions on the other’s freedom to choose with whom, or in what, to deal (section 47);
- Resale price maintenance. This is the practice engaged in where suppliers specify a minimum price to a reseller (section 48, and sections 96 - 100);
- Mergers which have the effect or likely effect of substantially lessening competition (section 50).

Again I would reiterate that since the reforms to the *Trade Practices Act*, these provisions now apply to unincorporated bodies as well as corporations.

Part V of the Act deals directly with the interests of consumers, and businesses which qualify as consumers in particular transactions. This Part provides a means of promoting fair competition by protecting consumers' rights, especially the right to full and accurate information when purchasing goods and services. It provides an important safety net in markets where vigorous competition might tempt some businesses to cut corners to gain a competitive advantage, for example by making misleading claims about a product's quality or value.

Part V contains a range of provisions aimed at protecting consumers as well as businesses that qualify as consumers. These include:

- A general prohibition on misleading and deceptive conduct (section 52)
- Specific prohibitions on various types of false and misleading statements (sections 53 - 65A). For example these include the prohibition of false representations that goods are of a particular standard or quality under section 53. It also includes a prohibition on bait advertising which is when goods or services are offered at a particular price when in fact the corporation is not able to supply those goods or services at that price, under section 56. It also prohibits pyramid selling pursuant to section 61.
- Product safety provisions. Pursuant to this power the Commission enforces the mandatory product safety standards and mandatory information standards.
- Various conditions and warranties are implied into consumer transactions, pursuant to Division 2 of Part V.
- It is in this Part that section 60, which I will spend some time considering, fits in.

SMALL BUSINESS

As mentioned before, the primary purpose of the recent amendments to the Act was to strengthen the position of small business. The scope of the *Trade Practices Act* has been broadened, and the level of protection available to small business increased, as part of a concerted effort to strengthen the position of small businesses in the course of their commercial transactions and dealings.

It should be borne in mind that even prior to the reforms, the Commission already took many actions that were of direct benefit to small business. It is often assumed that consumers are the main beneficiaries of our actions. In fact, very often it is small business customers who most directly lose from cartels and anti-competitive mergers and misuse of market power.

Pursuant to the "*New Deal, Fair Deal*" reforms however, the law regarding unconscionable conduct between big and small business has been further strengthened. Small business now is entitled to significantly more protection than previously. The Commission is engaged in two significant unconscionable conduct cases, both predating the new legislation, one involving the Shell Oil Company, the other involving a retail shopping centre "Farrington Fayre" in Leeming in Western Australia. We are looking for further suitable cases to test the law through litigation.

Many small business issues cannot be satisfactorily resolved by litigation. What is required is special action in those “hot spot” areas of the economy where there are constant disputes between small and big business. Examples include shopping centre tenants and shopping centre owners; franchisors and franchisees; oil companies and service stations; independent film exhibitors and film distributors. Typically these areas involve chronic problems about disclosure and dispute resolution. Disclosure practices need to be improved, ie. small business needs to understand what it is in for when it starts up as a tenant or franchisee. Likewise if a dispute arises during the life of a tenancy, it is better to adopt low cost effective dispute resolution mechanisms than force people into expensive court litigation. The Commission believes that the best way of dealing with the “hot spot” areas is to adopt codes of conduct applicable to the whole industry which forces that industry to adopt good practices on disclosure, dispute resolution and other standard problems. There is a successful voluntary oil code to build on.

Parliament has accepted that this is a good way of dealing with many small business problems. The Government can now mandate codes for particular industry and also make the provisions of those codes enforceable under the *Trade Practices Act*. Similarly an industry can voluntarily adopt a code but have it made enforceable under the Act. Already the Franchise Code has been mandated, likewise the Oil Code is expected to be mandated.

The Commission has expanded its small business unit in order to deal with its new responsibilities. It has appointed a National Small Business Manager to manage the small business program. The Commission is also in the process of appointing small business officers in each State/Territory Office to augment the work of the Canberra based small business unit. The Commission has established links with a wide range of small business organisations and has set up a Small Business Advisory Group to discuss trade practices issues affecting small business.

SECTION 51AC

The 1996 inquiry and the resulting “*New Deal, Fair Deal*” reforms have seen the introduction of a new provision protecting small business from unconscionable conduct in the course of commercial transactions. Section 51AC, which came into effect on 1 July 1998, was enacted in an attempt to address the problems that small businesses were identified as experiencing in the course of their dealings with larger businesses. Section 51AC prohibits a stronger party dealing with a disadvantaged party in a harsh or oppressive manner. Specifically, it prohibits a stronger party exploiting its bargaining advantage to impose contractual terms or to engage in conduct that would be unreasonable, given the particular commercial relationship between the parties. This provision is really aimed at strengthening the level of protection available to small business under the Act.

Whether conduct is unconscionable will be determined by examining all of the circumstances. Section 51AC itself lists a number of factors which Courts may have regard to in considering whether there has been a contravention of the section. For example courts may consider the relative commercial strengths of the parties, whether any undue influence was exerted, whether the contract exceeded what was reasonably necessary for the protection of the

legitimate interests of the supplier, whether there was evidence of disclosure, good faith and a willingness to negotiate, and what the requirements were for the application of any relevant industry code.

Fundamentally, the aim of section 51AC is to ensure that business conduct is fair.

There are a few limits to the operation of this provision. It is really aimed at assisting small businesses, hence there is a cap of \$1 million per transaction to which the section can apply. Further, publicly listed companies cannot take advantage of the provision.

SECTION 60

Let me turn my attention now to section 60 of the *Trade Practices Act*. As most of you would know, this section prohibits the use of physical force, undue harassment and coercion by corporations in connection with the supply or possible supply of goods or services, or in connection with the payment for goods and services. This section can therefore be used to remedy unfair debt collection practices in individual cases. This is a provision that has existed in the *Trade Practices Act* for some time, however it is one which has been the subject of recent increased attention by the Commission. Contravention of this section is a criminal offence. It can lead to the court awarding damages, penalties, injunctions, or other orders.

The scope of section 60 has never been tested by litigation. On one hand this may be an indication that there is general compliance with the provision. However it is not clear whether this is in fact the case. The Commission has been receiving increased correspondence from the public and feedback from community organisations which seems to indicate a prevalence of debt harassment and non-compliance with section 60 in the market place. The Commission is continually receiving evidence that tends to suggest that undue harassment and coercion continue to be serious problems for consumers, particularly in relation to debt collection. Hence while the enforcement of section 60 has not been of very high priority to the Commission in the past, this has changed in recent times.

It seems that the consumers most likely to be the targets of undue harassment are those facing some sort of disadvantage. Such forms of disadvantage can range from consumers with low incomes particularly due to changed circumstances, to consumers with limited formal education or limited numeracy or literacy skills. The consumers targeted also tend to be unaware of their rights with regard to debt recovery.

As a result of concerns expressed by consumer groups about non-compliance with section 60, the Commission is presently conducting a research project on this section of the Act. Through this project the Commission is aiming at developing strategies for increasing both the effectiveness of the provision and the general level of compliance with it. The Commission is engaging in 2 strategies as part of this project - firstly market review, and secondly enforcement action. The Commission ultimately hopes to clarify the scope of section 60, possibly through taking on a test case in the area.

What the Commission needs is some sort of certainty about the scope of the legislation in this area. This is quite a difficult issue, as there is very little guidance as to what the terms of section 60 mean. While the Commission might hold particular views, it will ultimately be the responsibility of the courts to provide definitive interpretations of the terms. However in assessing whether certain conduct does run the risk of contravening section 60, the Commission has formulated certain interpretations to the terms used in section. I will briefly run through the Commission's current interpretation of these terms.

We have defined physical force to include any assault, battery or deprivation of liberty against a person, or any threats of such physical force to the person or their property.

We have defined harassment to include conduct that causes distress, agitation, anxiety or worry to the recipient. We have also considered it to include conduct which interferes with the recipient's peace and quiet, as well as conduct which amounts to plaguing the recipient, through repeated requests or demands. *Undue* harassment is considered to be harassing conduct which is either persistent, or if it one-off, is excessive, improper, inappropriate or unnecessary. These will all, of course, depend on the circumstances of the case. It could in fact be the case that conduct which would not be considered to amount to undue harassment in one case would amount to such conduct in another case if the target of the conduct is in some way disadvantaged. In such a case, the conduct may have a greater impact on a disadvantaged recipient than it would on another person.

The Commission considers that coercion occurs when some sort of unacceptable pressure is exerted on one party by another, and where that pressure is a factor which persuaded the recipient to undertake a particular course of action. Coercion can either be created by physical means, such as threats of violence, or non-physical means such as threats to the person's reputation or peace of mind.

To give you some indication of conduct which the Commission would consider to risk contravening section 60, it would include such conduct as:

- telephone communications or visits by debt collectors or other traders between 9.00pm and 8.00am, unless the trader has been told by the recipient that calls during these hours are acceptable.
- repeated communications during normal business hours.
- attempting to extract payment of a debt by using threats of violence to the person or their property. This would also tend to amount to physical force.

- the disclosure of information, or the threat of such disclosure, to third parties who do not have a clear and legitimate interest in receiving the information, would risk contravening the section.

These are of course just examples. And the Commission does not yet have a view on whether one instance of these examples would amount to undue harassment. However there are many forms of conduct which the Commission would consider to run the risk of contravening the section.

I know the ACA has provided a submission to the ACCC on their own views of section 60. We would welcome further comments either from the ACA or from individual members in relation to developing guidelines on this issue.

The Commission has experienced some difficulty in applying and enforcing section 60. This can mainly be attributed to a general community unawareness firstly as to the existence of the provision at all, and secondly, even as to the scope and operation of the provision. However I do not think that any problems being experienced by the Commission in applying the section are insurmountable. The Commission is going to be very pro-active in this area in the future. We are very interested in exploring this area. We are interested in taking on work which deals with these issues, in an attempt to define the scope of the legislation.

One final point I would like to make today concerns the relationship between the ACCC and professional bodies such as the Australian Collectors Association. One of the Commission's stated objectives is to inform the community at large about the *Trade Practices Act* and its implications for business and consumers. In achieving this objective, the Commission's strategy involves undertaking extensive liaison and education programs with State and Territory Governments and authorities and peak industry organisations. Whilst the Commission does take action for non-compliance with the Act, it recognises that awareness by organisations of their legal obligations is certainly facilitated by an environment of liaison, co-operation and co-ordination with the Commission. The Commission looks forward to working with reputable industry members to ensure that compliance with the law is achieved.

I would like to thank all of you for your attention today.