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Compliance and Enforcement

Internet scams and enforcement

3.1 In combating the growing problem of cyberspace scams, the Commission has developed and implemented a number of strategies. One of the most effective has been the utilisation of greater international cooperation via treaties and memoranda of understanding.[12] This approach has improved ACCC enforcement in this area considerably, by better enabling the Commission to enlist the assistance of foreign regulators in bringing about enforcement against many of the overseas based internet frauds operating within Australia.[13]

3.2 One of the most challenging aspects of targeting this area is the issue of jurisdiction. Currently the ACCC's authority is limited to parties that are incorporated in Australia, resident in Australia or carrying on business in Australia. Mr Samuel advised the Committee that the first two of these criteria are relatively straightforward to satisfy; but the latter criteria is slightly more complicated given that if the party concerned is resident outside Australia, there is a judicially untested issue as to whether business transactions entered into by Australians with these overseas parties via the internet would constitute the carrying on of business in Australia.

3.3 The limitations of legal remedies in the area of internet scams were noted by the Chairman at the public hearing in the following terms.

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12 An example of this being seen with treaties entered into with the United States as well as cooperation agreements with New Zealand.

13 *Official Hansard*, 5 March 2004, Melbourne, p. 12.

> You can get all the injunctions and court orders in the world, but it is very difficult to enforce them when you are dealing with parties outside the jurisdiction of Australian courts.[14]

Public education and warnings

3.4 Following a Committee query as to whether greater emphasis should be placed by the ACCC on educating and cautioning the public in relation to scams and cons, the Chairman, in stating his desire to better inform the community, noted the key limitation associated with the use of public warnings and education campaigns; namely that regardless of how effective an education strategy is, there will always be an element of society which will disregard cautionary advice and fall prey to fraudulent activities.

> …all of us would wish we could inform and educate the Australian public about these scams and the merits of ignoring them. But as we all know there is always a section of the public that will ignore warnings; there are always going to be those that will make their bank accounts available to the Nigerian money scam.[15]

3.5 In relation to the funding of education programs, the ACCC advised the Committee that it does allocate financial resources to this important function but that these are limited given that there are a number of competing demands on available funds.

3.6 The Chairman further stated that two of the Commission's best educative tools in informing society are enforcement and compliance. He noted that the ACCC information centre has been integral to fulfilling the Commission's education function given that it has fielded 53,500 complaints and inquiries, as well as approximately 80,000 phone calls each year.

Sanctions

3.7 The Dawson review of the Trade Practices Act recommended that the courts should have the option of sending to prison those involved in hard core cartels. The government accepted this proposal in principle, setting up a working group to examine this issue further. Mr Cassidy

14 *Official Hansard*, 5 March 2004, Melbourne, p. 12.

15 *Official Hansard*, 5 March 2004, Melbourne, p. 12.

informed the Committee that the working group is nearing completion of its task, following which a report will be submitted to the Treasurer for consideration.

3.8 The merits of attaching criminal sanctions to the Trade Practices Act in order to combat cartel behaviour were also discussed at the public hearing, with the Chairman noting that such an amendment would offer a far more effective deterrent than the current penalty regime in tackling this type of behaviour.

> The cost-benefit analysis at the moment is: millions of dollars to be earned from the cartel as against millions of dollars that you might have to pay in a fine. The cost-benefit analysis is changed when on the latter side there are several years in jail, even when it is risk weighted very significantly indeed.[16]

3.9 The Committee has previously commented that serious consideration should be given to the concept of introducing criminal sanctions for participants in hard core cartels.[17] The current Committee continues to hold that view.

Recommendation 2

The Committee recommends that the Government give serious consideration to introducing criminal sanctions for participants in hard core cartels.

3.10 In relation to the Dawson recommendation that there be an increase in penalties for corporations involved in anti-competitive conduct,[18] Mr Cassidy advised that the ACCC would wholeheartedly support such a move, as the current pecuniary penalty system would appear to be somewhat insignificant in the context of punishing large corporations.

> …to be quite honest, if you are dealing with a large company, even if they get the maximum fine of $10 million, that is

16 *Official Hansard*, 5 March 2004, Melbourne, p. 5.

17 Standing Committee on Economics, Finance and Public Administration, *Competing Interests: Is there a balance? Review of the Australian Competition and Consumer Commission Annual Report 1999-2000*, September 2001, p.55.

18 Dawson recommended that the fine be increased to be the greater of $10 million of three times the gain from the contravention or, where the gain cannot be readily ascertained, 10 per cent of turnover.

neither here nor there for them. We would certainly support the increase.[19]

Cartels and the leniency policy

3.11 As of 5 March 2004, the ACCC had 31 suspected cartels under investigation, ranging from small town price fixing arrangements through to large international cartels. These cartels involve a variety of illegal conduct ranging from price fixing and market sharing through to collusive tendering - particularly that for government contracts. In addressing this problem, which was characterised by the Chairman as 'a cancer on the economy', the Commission advised that it has been 'substantially assisted by the leniency policy [that it] announced last year'.[20] The reason being that the policy has encouraged a number of insiders to inform on cartels, by providing a path of leniency for the first whistleblower to assist the Commission in its investigations.

3.12 The ACCC's leniency policy is designed to break the shroud of secrecy which has long existed in illegal cartels. The Commission has previously had a history of working with whistle blowers via its cooperation policy. However, the new leniency policy is far more effective due to the fact that it grants informants greater certainty should they cooperate, by guaranteeing legal immunity if they are the first to inform on a particular cartel. The company concerned will still have to pay compensation to any victims of its actions that can be identified.

Mergers

3.13 The Dawson Report's recommendation that the merger approval system be formalised was also discussed by the Commission at the Melbourne public hearing. The Chairman commented 'that to proceed down the Dawson formal voluntary clearance process will not bode well for the future conduct of merger hearings and merger matters in this country'.[21]

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19 *Official Hansard*, 5 March 2004, Melbourne, p.33.

20 *Official Hansard*, 5 March 2004, Melbourne, p. 5.

21 *Official Hansard*, 5 March 2004, Melbourne, p. 6.

3.14 Mr Samuel, in countering the push to formalise the current clearance process, noted that:

> at a seminar held last year involving most, if not all, of the leading practitioners –both legal and economic –in the merger arena, the practitioners spent nearly an hour and a half lauding the informal iterative merger process that we currently engage in.[22]

3.15 The Chairman also suggested the perceived reasons behind the shift to formalise the merger approval process, these being:

- a desire to ensure greater accountability on the part of the ACCC; as well as
- potentially, a way of putting more pressure on the Commission to approve some of the proposed mergers which have been blocked by the current informal clearance system.

3.16 In response to the call for greater accountability on the part of the ACCC in terms of its merger approval procedure, the Commission countered that this need is already met by the Federal Court's power to grant a declaration that section 50[23] of the Trade Practices Act would not be breached by a proposed merger. In illustrating the effectiveness of this accountability mechanism the Chairman noted that in the case of AGL and the Loy Yang power station purchase, AGL had been able to obtain a declaration 'in a matter of something like six to eight weeks' with a minimum of legal costs.

3.17 The Chairman advised the Committee that should a more formal clearance system be introduced as proposed by the Dawson review, then it would be highly likely that in a similar fashion to the New Zealand experience, the informal approach will diminish significantly and potentially cease to exist altogether.

3.18 On a related matter, on 28 May 2004 the ACCC announced proposed changes to its informal merger clearance guidelines. The additional guidelines would include factors such as timeframes and information requirements, as well as public reasons for a decision. In outlining these planned measures Mr Samuel commented that they would 'engender a greater level of accountability, transparency, efficiency

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[22] *Official Hansard*, 5 March 2004, Melbourne, p. 5.

[23] This section relates to a prohibition of acquisitions that would result in a substantial lessening of competition.

and timeliness in merger decisions, which would be to the advantage of both business and the Commission'.[24]

Litigation and negotiated settlements

3.19 One of the key elements of the ACCC's enforcement process is the use of litigation. The Chairman advised that litigation will be employed:

> without any question where we know or detect that we have a problem that can only be resolved through the litigious process.[25]

3.20 The ACCC informed the Committee that on occasion litigation is also applied to bring about a negotiated settlement on behalf of the relevant parties, provided they acquiesce. In utilising this approach, the Commission stressed that no negotiated settlement is ever 'done in secret'.

3.21 In terms of the rationale behind the ACCC's use of negotiated settlements, the Chairman advised that the primary reason behind their use is the effectiveness of outcomes which they offer, when compared to traditional remedies available through the courts.

> The reason… is that often you can achieve more by negotiating a settlement, particularly in the context of restitution for consumer harm, than you could otherwise achieve through the courts.[26]

3.22 The ACCC noted that of the 53,500 complaints and inquiries last year, only 262 matters were escalated to serious investigation, with only 39 court cases commenced.[27] Hence, as Mr Samuel commented, 'you can therefore imagine that a vast number of these issues were resolved by reaching some form of negotiated settlement'.[28]

3.23 In qualifying the use of negotiated settlements, the Chairman stated that the ACCC will be reluctant to utilise this approach in those cases where there has been a serious breach of the Trade Practices Act, in addition to those situations where there is clearly a non-compliance culture or attitude on the part of the alleged offender.

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24 'ACCC Moves to increase transparency, certainty and accountability in merger decisions', 28 May 2004, http://www.accc.gov.au/content/index.phtml/itemId/510651

25 *Official Hansard*, 5 March 2004, Melbourne, p. 3.

26 *Official Hansard*, 5 March 2004, Melbourne, p. 3.

27 *Official Hansard*, 5 March 2004, Melbourne, p. 4.

28 *Official Hansard*, 5 March 2004, Melbourne, p. 4.

Speed of enforcement

3.24 The Chairman, in his opening address at the hearing, noted that speed is one of the key principles underlying the ACCC's enforcement policy, given that it is often essential to achieving appropriate and effective outcomes. Mr Samuel drew attention to the recent Danoz Direct case which involved the selling of alleged electronic muscle stimulants. Even though the Commission obtained a 'very successful court outcome' in this case, the overall result was undermined by the fact that because the result took over 18 months to achieve, it led to thousands of consumers being defrauded as by that time over 94,000 units had been sold, with the company taking over $15 ½ million from consumers.

3.25 Following the experiences of the Danoz Direct case, the ACCC has focused greater attention on achieving swiftness in enforcement. The Commission cited as an example its recent action against investment property promoter Henry Kaye.

> from the beginning of the investigation to the institution of court proceedings and an effective stopping of the alleged misleading advertising…took about 3 ½ weeks.[29]

Negotiating penalties

3.26 The Chief Executive Officer, in response to the view that perhaps some of the ACCC's agreed penalties have been on the 'low side', stated that the Commission is examining this matter as a general proposition. Moreover, Mr Cassidy stressed that all proposed penalty agreements are judicially accountable, as they are subject to being overruled by the court should it determine an agreement to be inappropriate; a power which has been exercised on ACCC negotiated penalties on a number of occasions.

> It is open to any law regulatory agency to put an agreed penalty to the court, although there is no obligation on the court to accept it. It is up to the court to decide whether they think it is right or not. On occasion we have had our penalties both increased and decreased by the court.[30]

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29 *Official Hansard*, 5 March 2004, Melbourne, p. 4.

30 *Official Hansard*, 5 March 2004, Melbourne, p. 28.

3.27 The status of agreed penalties has recently been decided before the full bench of the Federal Court in the case of *Minister for Industry, Tourism and Resources v Mobil Oil Australia Pty Ltd.*[31] Given the importance of this class of penalty to the ACCC, particularly in the context of combating cartels, the Commission successfully sought leave to intervene in the hearing. The outcome of the case in relation to agreed penalties was successful from the perspective of the ACCC in that the court approved the current negotiated settlement system, subject to the overruling power of the court to strike down any agreement should it determine it to be inappropriate.

Voluntary codes of practice

3.28 The ACCC recently issued draft guidelines on voluntary codes of conduct to a number of stakeholder interests, ranging from consumer groups through to representatives of both small and big business. Following this release, interested parties met to discuss the guidelines. This meeting revealed three differing opinions:

- the consumer movement suggested that codes of conduct will never be able to combat rogues in each industry / sector;
- sections of business indicated that they felt that the proposed guidelines were too tough and that they imposed too significant an obligation on business, which could lead to them not being adopted;
- whilst other elements of the business community stated that they would like to pursue this option and attempt to develop codes of practice as they felt that it might assist the operation of their business activities within their respective industries.[32]

3.29 The Chairman also outlined the various rationales behind the institution of voluntary codes in Australia, these being:

- assisting with compliance with the Trade Practices Act, an example being seen with orange juice codes and labelling codes as they underpin the legislative requirements under the Act, in particular those relating to misleading and deceptive conduct;
- improving dealings between business, industry sectors and consumers. This is principally because a code of practice could potentially pressure companies / businesses to improve standards

31 *Minister for Industry, Tourism and Resources v Mobil Oil Australia Pty Ltd* [2004] FCAFC 72

32 *Official Hansard*, 5 March 2004, Melbourne, p. 30.

of conduct, as non conformity with the code may lead to them facing a consumer boycott of their product/service. In qualifying this factor Mr Samuel noted that it will only have the desired impact 'if the vast majority of industry concerned is prepared to comply with [a] code of conduct';[33] and

- creating a framework to deal with how behaviour might be conducted to 'meet tensions, community expectations and evolving aspirations on the part of producers, processors and retailers'.[34]

3.30 The ACCC further advised that there are a number of problems which could potentially undermine the establishment and use of voluntary codes of practice. One of the most significant is that some industries may be opposed to such an approach given that it 'would impose on them certain standards of behaviour that they are simply not willing to engage in'.[35] A further problematic issue associated with the use of a code of practice was outlined by the Committee at the Melbourne hearing:

> if a code of conduct is not strong enough in terms of what it does then there is the potential for a business to have it as a seal of approval that will in fact misrepresent what is does. [36]

3.31 In endorsing industry and sector voluntary codes of conduct, the ACCC stressed that it exercises a high degree of caution. Indeed, when the Commission authorised the mortgage industry code of conduct, it drew attention to the fact that it was not endorsing the code of conduct; rather, it ensured that the code passed a statutory test under the Trade Practices Act.

Media

3.32 According to the Chairman, the ACCC will work with the media to bring about behavioural change in industry. The Chairman did however stress that the Commission will only do so if the media's use is consistent with a range of principles, including:

- being very public about the issues i.e. the behaviour that in the Commission's view is in breach of the Act, in addition to how the said behaviour ought to be rectified;

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33 *Official Hansard*, 5 March 2004, Melbourne, p. 30.

34 *Official Hansard*, 5 March 2004, Melbourne, p. 30.

35 *Official Hansard*, 5 March 2004, Melbourne, p. 30.

36 *Official Hansard*, 5 March 2004, Melbourne, p. 30.

- not participating in rumour, innuendo and allegation or in other words refraining from improperly damaging reputations; as well as
- maintaining the confidentiality of the parties involved.[37]

3.33 The application of these principles was illustrated when the Commission recently tackled the real estate industry. In this case it did not name, either by background briefing or media release, any particular offender; instead the ACCC stated that it was concerned about specific questionable activities which were occurring in the industry, in particular dummy bidding, under/over quoting, two-tier marketing and property investment scams. Following on from this, the Commission issued a brief media release indicating both the behaviour in question that was to be targeted, in addition to the fact that a task force was to be assigned to combating these practices.

3.34 Following a Committee query as to what safeguards the ACCC has implemented to protect the confidentiality of parties under investigation, the Chairman commented that it would be highly unlikely that even industry insiders would have any knowledge of parties under investigation. Only relevant participants are involved in inquiries (complainant and witnesses etc) and ACCC investigation information is generally not permitted to be publicly disseminated. In relation to this final matter the Committee noted that some elements of society have contended that it would be better if the ACCC were to publicise investigations, in order to reduce the number of scams and frauds perpetrated. Mr Cassidy remarked that this view has to be balanced against the possible damage to a party's reputation should the ACCC announce an investigation where ultimately it cannot substantiate a breach of the Trade Practices Act.[38]

Section 46 of the Trade Practices Act 1974

3.35 Section 46 of the Trade Practices Act deals with misuse of market power. The question of whether section 46 provides small business with sufficient protection against misuse of market power by big business has been a controversial issue in recent years.

3.36 A recent Senate Economics References Committee report into the Trade Practices Act handed down unanimous recommendations dealing with the issues of market power and purpose. However, in

37 *Official Hansard*, 5 March 2004, Melbourne, p. 9-11.

38 *Official Hansard*, 5 March 2004, Melbourne, p. 11.

relation to the topic of taking advantage of market power, the CEO noted that there was a lack of agreement. Mr Cassidy stated that the ACCC believed that this issue had been clarified by the High Court in the Melways case,[39] which held that 'take advantage' means 'to use'. Yet, he noted that this outcome appeared to have altered considerably in light of the subsequent Rural Press case[40] which also went to the High Court. In this case the court, whilst acknowledging its ruling in Melways, appeared to apply a different test, namely the 'could test' which revolves around determining whether a firm *could* still have conducted the subject behaviour in a competitive market. If yes, then it has not been utilising market power. Following this ruling the ACCC commented that it is now quite concerned that the court has left the interpretation of 'take advantage' in an ambiguous state.

3.37 Given the confusion which has surrounded this section, in conjunction with the fact that the High Court has held that this provision does not mean what Parliament intended it to,[41] the ACCC has recommended that the section be redrafted and clarified.[42]

3.38 The need for a redrafting of this section was also justified by the Chief Executive Officer who noted that besides 'the Commission never winning a section 46 case that has gone to a full hearing',[43] each case potentially poses it with considerable financial costs:

> We are finding section 46 as it is currently drafted a challenging section to work with, and the costs of cases to us, particularly if we lose, can be double digit million dollar figures.[44]

However, in qualifying this remark Mr Cassidy stated that in the Safeways case,[45] which dealt with breaches of section 46, the ACCC has been relatively successful in that the full bench of the Federal Court found in favour of the Commission on a number of counts.

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39 *Melway Publishing Pty Ltd v Robert Hicks Pty Ltd (trading as Auto Fashions Australia)* (2001) ATPR 41-805

40 *Rural Press v ACCC* [2003] HCA 75

41 In *Boral Besser Masonry v ACCC* (2003) 77 ALJR 623 the High Court held stated that parliament's drafting of s.46 had not achieved its objective.

42 ACCC Submission to Senate Economics References Committee Inquiry into '*the effectiveness of the Trade Practices Act 1974 in protecting small business*', March 2004.

43 *Official Hansard*, 5 March 2004, Melbourne, p. 23.

44 *Official Hansard*, 5 March 2004, Melbourne, p. 21.

45 *Australian Competition & Consumer Commission v Australian Safeway Stores Pty Limited* [2003] FCAFC 149

3.39 The Senate Economics References Committee's report contained a number of significant recommendations on these matters, including that:

- the Act be amended to state that the threshold of 'a substantial degree of power in a market' is lower than the former threshold of substantial control; and to include a declaratory provision outlining matters to be considered by the courts for the purposes of determining whether a company has a substantial degree of power in a market;
- the Act be amended to include a declaratory provision outlining the elements of 'take advantage' for the purposes of s.46(1); and
- that s.46 of the Act be amended to state that, in determining whether or not a corporation has a substantial degree of power in a market for the purpose of s.46(1), the court may have regard to whether the corporation has substantial financial power. 'Financial power' should be defined in terms of access to financial, technical and business resources.

3.40 The Government has yet to respond to the report. This Committee will further consider its position once that response is tabled.