

Supplementary Submission No. 46.1

EXECUTIVE OFFICE



**Australian
Competition &
Consumer
Commission**

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(8 December 2009

Ms Jane Hearn
Inquiry Secretary
House of Representatives
Standing Committee on Communications
PO Box 6021
Parliament House
Canberra ACT 2600

Sent electronically to: coms.reps@aph.gov.au

Dear Ms Hearn

Inquiry into the Cyber Crime – Questions on Notice

Please find attached the Australian Competition and Consumer Commission's (ACCC) responses to the questions placed on notice at the ACCC's appearance at the Committee's 18 November 2009 public hearing.

Please also find attached the ACCC's responses to the additional written questions on notice that were received from the Committee on 26 November 2009.

I can be contacted on (02) 6243 1124 should you wish to discuss.

Yours sincerely

Brian Cassidy
Chief Executive Officer

House of Representatives Standing Committee on Communications

QUESTIONS ON NOTICE

Australian Competition and Consumer Commission (ACCC)

Inquiry into Cybercrime

18 November 2009

Topic: Number of cybercrime referrals to other agencies

Hansard Pages: COMM 4 to 5

Question 1

- **How many online scam/e-security matters has the ACCC formally or informally referred to other agencies, and how many has the ACCC itself pursued in court?**

Answer:

As presented to the Committee, the ACCC will often refer alleged scam matters to other agencies or organisations. These referrals may at time be more formal involving the forwarding of specific complaints for investigation and possible action. They may also be less formal – for example – at the point of first contact the ACCC may refer complainants to other agencies where they have specific responsibilities or are better placed to respond to the complaint.

Less formally again, various agency networks provide forums for discussion and sharing of information in relation to emerging matters of concern allowing appropriate agencies to identify and pursue relevant matters.

While the ACCC records the handling of each complaints, it does not have readily available statistics to differentiate between or provide numbers for the various referrals it makes.

Relevant to the question, we would also note that where the ACCC pursues online scam complaints through to the initial and in-depth investigation stage, the ACCC will often work with other agencies to disrupt and prosecute scams rather than refer matters to them completely.

In pursuing investigations and legal proceedings against online scams in 2009, the ACCC has worked with a number of other agencies. Domestically, the ACCC has worked with the Australian Federal Police, Australian Communications and Media Authority, Australian Securities and Investments Commission, Queensland Police, Australian Taxation Office and the state and territory offices of fair trading. Internationally, the ACCC has worked with the United States Federal Trade Commission and the Washington State Attorney-General's office.

In 2009 the ACCC took action or concluded actions against a number of online traders alleged to be involved in misleading and deceptive conduct. These included European City Guide SL (Industry and Commerce), Cosic Holdings Pty Ltd (Emerald Passport pyramid scheme), Jetplace Pty Ltd (www.redhotpie.com.au), Burnan Pty Ltd (Resumé Service), Ozdirect Online Brands Pty Ltd, Leanne Rita Vassallo and Aaron David Smith (health cure ebook), Zanak Technologies Pty Ltd, Australialink Pty Ltd and Bindert (Ben) Kloosterman & Ors (Designer Brand Outlet). A number of these matters remain before the court.

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Recognising the importance of all consumer protection agencies being aware of various online scam complaints the ACCC also participates in the online information sharing website Auzshare, where depersonalised complaint data, including scams, is accessible by participating agencies. Participating Auzshare agencies can also issue alerts to each other about issues of significance and in 2009, the ACCC issued 13 Auzshare alerts regarding online traders.

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QUESTIONS ON NOTICE

Australian Competition and Consumer Commission (ACCC)

Inquiry into Cybercrime

18 November 2009

Topic: Number of cyber crime breaches under the TPA

Hansard Pages: COMM 5 and 6

Question 2

- **Provide details of the two online scam cases concluded by the ACCC in 2009, and describe how these differ from other cases.**

Answer:

Generally speaking, the investigation of online scams often involves significant challenges not always present in other matters the ACCC investigates.

Given the virtual nature of online operations, there are often difficulties in ascertaining the identity and location of scam promoters.

As many of those alleged to be involved in the online conduct are often based outside Australia, jurisdictional issues may often arise in an investigation and subsequent litigation, including where:

- (a) the ACCC requires further evidence where it would ordinarily use its statutory powers but cannot serve those notices in other jurisdictions,
- (b) court documents need to be served on parties outside the jurisdiction. This requires leave of the court and then service of documents in the relevant country once the relevant respondent is located,
- (c) the utility of any discretionary orders the ACCC may seek from a court may be undermined by the difficulty in enforcing those against the respondent.

The ability to quickly transfer funds and the propensity to morph and phoenix without the same reputational issues mainstream traders have make effective enforcement orders very important. Court orders may be sought to secure assets in Australia, such as funds in bank accounts, to ensure money is available for consumer redress.

As suggested above, these challenges are present in a number of consumer protection genres but particularly prevalent in the online scam environment.

More specific information about the two cases noted in Question 2 is outlined below.

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***Australian Competition and Consumer Commission v Vassallo & Anor*¹**

Leanne Rita Vassallo and Aaron David Smith (the Respondents) operated a large number of websites. Each website offered for sale an eBook purporting to contain a cure for a specific illness or medical condition. Jurisdictional issues did not arise in this case as the respondents were based in Australia.

The matter was referred to the ACCC from the Washington State Attorney General's Office (AGO). Specifically, the AGO requested the ACCC's assistance because the Respondents were located within the ACCC's jurisdiction.

The ACCC was concerned that consumers suffering from such conditions may rely on the treatment plans suggested in the eBooks to the exclusion of conventional and proven methods of treatment. In the time that the websites were in place (approximately two years) it is understood that the Respondents sold approximately 60 000 eBooks and generated over US\$1 million in sales.

On 30 July 2009 before Justice Moore, the ACCC obtained interlocutory injunctions, by consent, restraining Ms Vassallo and Mr Smith from engaging in the conduct on any website pending final hearing. The injunctions also required the respondents to take down the websites.

At the final hearing on Thursday 20 August 2009, Justice Graham, in an ex tempore judgment, found that Ms Vassallo and Mr Smith had engaged in false, misleading and deceptive conduct.

He described them as "purveyors of quack medical advice and of quack medicine."

He reached the conclusion that the testimonials were plainly contrived. He noted that the evidence showed that the respondents had received more than US\$1 million from the sale of the eBooks.

Justice Graham also made injunctions on a final basis preventing the respondents from making these or similar representations in the future. The respondents were also ordered to pay the ACCC's costs.

***ACCC v Bindert (Ben) Kloosterman & Ors*² NSD1391/2008**

This matter was brought to the ACCC's attention in June 2008 by the United States Federal Trade Commission (FTC). The FTC provided the ACCC with a number of consumer complaints. In addition to the complaints received from the FTC, the ACCC also received complaints from consumers in the United Kingdom and a number of Australian states. The complaints variously related to Designer Brand Outlet (DBO)

¹ [2009] FCA 954 <<http://www.austlii.edu.au/au/cases/cth/FCA/2009/954.html>>.

² Resolved by consent with final orders available on the Federal Court of Australia website at: <<https://www.comcourts.gov.au/file/Federal/P/NSD1391/2008/3549912/event/25652026/document/150771>>

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accepting payment and not delivering the goods, goods received not matching the goods ordered (including issues relating to authenticity), refunds not being provided and consumers being unable to contact the company.

The ACCC conducted an investigation of the alleged conduct, which included liaising with the ACCC's international counterparts, the major Australian bank (responsible for the credit merchant facilities for the website) and an Australian domain registrar (in relation to the registration of the website).

In September 2008, the ACCC sought interim injunctions against the operators of the website, Mr Bindert (Ben) Kloosterman and Ms Xin Fang (Lucy) Shi, and asset preservation orders to ensure the assets of the company and individuals were not sent off shore.

In December 2008 final orders were made, with the Court declaring that the alleged conduct was in breach of ss. 52, 53(a), 53(d), 53(g), 55 and 58 of the *Trade Practices Act 1974*. Injunctions restraining the operators of the website from engaging in similar conduct in the future on any website were also made, and a timeframe for negotiating a compensation scheme for affected consumers was also set out.

In April 2009, the ACCC reached agreement with the respondents as to terms of compensation for affected consumers.

In June 2009 the monies received by the respondents was returned to consumers that had provided a valid claim for compensation.

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QUESTIONS ON NOTICE

Australian Competition and Consumer Commission (ACCC)

Inquiry into Cybercrime

18 November 2009

Topic: Details of the Australian Consumer Fraud Taskforce

Hansard Page: COMM 9

Question 3

- **Who are the members of the Australian Consumer Fraud Taskforce, how often do they meet, and what does it do?**

Answer:

The members of the Australasian Consumer Fraud Taskforce are:

Federal Government Agencies:

Attorney-General's Department

Australian Bureau of Statistics

Australian Communications and Media Authority

Australian Competition and Consumer Commission

Australian Institute of Criminology

Australian Taxation Office

Australian Securities and Investment Commission

Department of Broadband, Communications and the Digital Economy

Australian Federal Police

State and Territory Government Agencies:

Consumer Affairs and Fair Trading – Department of Justice, Tasmania

Consumer Affairs Victoria

Office of Consumer and Business Affairs – South Australia

Department of Commerce (Consumer Protection) – Western Australia

Office of Regulatory Services – Australian Capital Territory

Consumer Affairs Northern Territory

Department of Fair Trading – Queensland

Office of Fair Trading – New South Wales

New South Wales Police Fraud Squad

State and Territory Police Commissioners

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New Zealand Agencies:

Ministry of Consumer Affairs

Commerce Commission

The members of the ACFT meet 3 times a year for Agency Forums focussing on Research, Enforcement and Education. These forums are an all day event where members and external presenters discuss issues that affect ACFT members relevant to these three areas.

In addition to the Agency Forums, ACFT members meet intermittently throughout the year to discuss member activities and share information, or for presentations relevant to the ACFT's work.

Further, the ACCC, on behalf of the ACFT, maintains and updates the SCAMwatch website (www.scamwatch.gov.au) which provides information on prominent scams and "radar" alerts on new or recurring scams. Information on new or prominent scams can come from a variety of sources, including ACFT member agencies, the media, or private partners.

The purpose of the ACFT³ is to help government members to work together to:

- enhance the Australian and New Zealand governments' enforcement activity against frauds and scams;
- run an annual coordinated information campaign for consumers—the Scams Awareness week in February and March (timed to coincide with Global Consumer Fraud Prevention Month);
- involve the private sector and community groups in the information campaign and encourage them to share information they may have on scams and fraud; and
- generate greater interest in research on consumer frauds and scams.

³ See <<http://www.scamwatch.gov.au/content/index.phtml/itemId/725675>>

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QUESTIONS ON NOTICE

Australian Competition and Consumer Commission (ACCC)

Inquiry into Cybercrime

18 November 2009

Topic: Details of the review of TPA warranty provisions

Hansard Pages: COMM 12 and 13

Question 4

- **Provide details of the review of the TPA's warranty provisions.**

Answer:

On 26 July 2009 the Minister for Competition Policy and Consumer Affairs, the Hon. Dr Craig Emerson MP, released an Issues Paper, *Consumer rights: Statutory implied conditions and warranties*, on behalf of the Commonwealth Consumer Affairs Advisory Council (CCAAC).

Under its terms of reference, CCAAC was asked to examine the existing laws on implied terms in the TPA and state and territory fair trading and goods legislation.

On 30 October 2009 CCAAC presented the Minister with its report *Consumer rights: Reforming statutory implied conditions and warranties* (<http://www.treasury.gov.au/contentitem.asp?NavId=035&ContentID=1682>).

The report is being used to inform the development of the [Australian Consumer Law](#), led by the Ministerial Council on Consumer Affairs (MCCA). MCCA considered CCAAC's report at its meeting in Perth on 4 December 2009.

MCCA agreed, as part of the development of the Australian Consumer Law, to improve the legal framework for consumer rights that apply to the acquisition of goods and services. This will be a single national law guaranteeing consumer rights in relation to their acquisition of goods and services.

This new system of consumer guarantees, supported by effective redress, will foster a greater ability to inform and educate all Australian consumers and businesses about their rights and obligations, and will reduce the compliance burden for businesses, particularly those that operate in more than one state or territory.

Ministers noted CCAAC's finding that a national system of consumer guarantees will provide much-needed clarity for consumers dealing with motor vehicle lemons. Ministers agreed that consumer agencies should develop national guidance for the new law.

These reforms will also align Australia's law with the existing New Zealand law. This will advance one of the objectives of the *Australia New Zealand Closer Economic Relations Trade Agreement* by developing common approaches to shared market issues.

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Inquiry into Cybercrime

18 November 2009

Topic: Capacity of the TPA to ensure the security of hardware

Hansard Pages: COMM 13 to 15

Question 5

- **Should amendments be made to the Trade Practices Act that allow consumers to be protected from software or hardware being sold that makes them susceptible to attack without their knowledge? Does the TPA currently address any of the issues?**

Answer:

Whether an amendment should be made to the TPA is ultimately a matter of policy for the Government and Parliament.

While the TPA does not contain specific provisions which deal with the issue of specific performance criteria with respect to on-line security, it requires traders to comply with the broad protection for consumers regarding misleading or deceptive conduct under section 52 and not wrongly represent that a product is more secure than it actually is.

There are also provisions under section 53 that prohibit a corporation in trade or commerce from making false representations with regards to a number of characteristics of goods or services including standard, quality, value and grade.

In certain scenarios, failure to disclose inadequacies or qualifications may, depending on all the circumstances, give rise to concerns as to misleading behaviour. These need to be considered on a case by case basis.

The statutory warranty provisions implied in consumer transactions provide for products being of merchantable quality, fit for their purpose and matching descriptions. If the product does not meet these criteria the consumer may have the right to rescind the contract with the trader and seek a refund.

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QUESTIONS ON NOTICE

Australian Competition and Consumer Commission (ACCC)

Inquiry into Cybercrime

18 November 2009

Topic: Legality of embedded hardware and software

Hansard Page: COMM 16

Question 6

- **What is the ACCC's view regarding embedded hardware or software which is provided on a machine without the customer's consent, and which may perform functions to which the customer has not consented? Does the TPA have provisions to deal with this issue?**

Answer:

It is not uncommon for certain consumer products such as motor vehicles and high cost electrical items to contain software and hardware that perform certain functions (i.e. diagnosis of product failure) which consumers may not strictly be aware of, but which nonetheless can be of consumer benefit.

The mere fact that a customer has not consented to the inclusion of such software or hardware does not mean that its inclusion contravenes the TPA. If, however, a trader wrongly represents that such software or hardware or the functionality associated with it is not present, when it actually is, that trader may be engaging in misleading or deceptive conduct, in breach of the TPA.

Similarly, where failure to disclose information highly relevant to a consumer's decision to acquire such products may in many circumstances be considered misleading. These would need to be considered on a case by case basis having regard to the specific facts and evidence.

Should there be concerns that software or hardware is embedded for the purpose of facilitating future conduct that might be misleading or deceptive, such conduct might also be considered under the consumer protection provisions of the TPA. Again, this would need to be considered on a case by case basis having regard to the specific facts and evidence.

ADDITIONAL QUESTIONS ON NOTICE

Australian Competition and Consumer Commission
Inquiry into Cyber Crime

Topics: Various

Malicious spyware vs. commercial consumer intelligence gathering

1. There is a widespread problem of the installation on PCs of software that steals personal information, including online browsing activity. Some of this activity is clearly criminal and some is regarded as a legitimate commercial activity:
 - a. What protection, if any, does the *Trade Practices Act 1974* provide consumers from the unauthorised installation of this type of software?
 - b. Is there a case for making the unauthorised installation of any software explicitly illegal? In your view, is it best to do this through consumer protection laws, privacy laws or the criminal law?

Answer:

- a) While the TPA includes provisions that deal with misleading or deceptive conduct and false representations it does not specifically deal with the issue of unauthorised installation of software. Whether the installation of unauthorised software on a PC contravenes the TPA is nonetheless a matter to be determined on the facts of each case. Please see question 6 above for more detail.
- b) The merits of specific provisions or the legislative vehicle in which they might be delivered are best directed to relevant policy departments and/or the Government. This said, the ACCC notes that the provisions of the TPA are, for the most part, general in nature reflecting the broad regulatory role of the ACCC across all sectors. Careful consideration is needed to determine the best policy approach, particularly whether it would be appropriate to apply industry specific regulations rather than the general prohibitions in the consumer protections provisions of the TPA.

ADDITIONAL QUESTIONS ON NOTICE

Australian Competition and Consumer Commission
Inquiry into Cyber Crime

Remedies

2. Does the ACCC have the power to order the removal of material that is deceptive or misleading from a website or must it seek a Federal Court order? Can the ACCC get orders against a third party service, such as a web hosting company, if the business will not voluntarily cooperate and the individual website owner cannot be traced?

Answer:

The ACCC does not have the power to order the removal of a website. The ACCC can seek orders from the Federal Court if it has reasonable grounds to do so. This said, the ACCC can and does work with relevant third parties who might voluntarily assist ACCC investigations. ⁴

⁴ *Australian Competition and Consumer Commission v Chen* [2003] FCA 897
<<http://www.austlii.edu.au/au/cases/cth/FCA/2003/897.html>>

ADDITIONAL QUESTIONS ON NOTICE

Australian Competition and Consumer Commission
Inquiry into Cyber Crime

Global cooperation and enforcement

3. The global nature of e-commerce requires that consumer protection laws can now be enforced globally. The *Foreign Judgements Act 1991* allows for reciprocal registration and enforcement of court orders:⁵
- a. What are the obstacles to enforcement of Australian consumer protection laws in overseas jurisdictions?
 - b. Has the ACCC ever enforced a pecuniary penalty against a perpetrator in a foreign country?
 - c. Would it assist the enforcement of consumer protection law if the *Foreign Judgements 1991* allowed for injunctions or other mandatory orders to be registered and enforced in foreign countries?

Answer:

- a) Given the virtual nature of online operations, there are often difficulties in ascertaining the identity and location of scam promoters.

As many of those alleged to be involved in the online conduct are often based outside Australia, jurisdictional issues may often arise in an investigation and subsequent litigation, including where:

- (i) the ACCC requires further evidence where it would ordinarily use its statutory powers but cannot serve those notices in other jurisdictions,
 - (ii) court documents need to be served on parties outside the jurisdiction. This requires leave of the court and then service of documents in the relevant country once the relevant respondent is located,
 - (iii) the utility of any discretionary orders the ACCC may seek from a court may be undermined by the difficulty in enforcing those against the respondent.
- b) While pecuniary penalties (as opposed to criminal fines) are not currently available in relation to consumer protection matters under the TPA there are currently legislative reforms before the Parliament providing for such. In the competition provision context, the ACCC does have recent experience in obtaining pecuniary penalties from respondents outside of Australia. The ACCC also has experience in obtaining compensation from those based overseas.⁶
- c) These are matters best addressed to the Attorney-General's Department.

⁵ The reciprocal registration and enforcement of overseas judgements is dealt with under the *Foreign Judgements Act 1991* but the scheme only applies to 'enforceable money judgements' unless the regulations also provide for 'non-money' judgements. To date declarations of breaches of the Trade Practice Act, and injunctions to prevent future violations are not covered by the scheme.

⁶ See answer to COMM 5 and 6, Question 2.

ADDITIONAL QUESTIONS ON NOTICE

Australian Competition and Consumer Commission
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4. The ACCC has a bi-lateral agreement with the US Federal Trade Commission on Mutual Enforcement Assistance in Consumer Protection Matters:
 - a. How effective is the Agreement with the US Trade Commission? Would you seek to strengthen it in any way?
 - b. Has this model been replicated with other countries

Answer:

The ACCC and US Federal Trade Commission (FTC) have over time established an effective working relationship. The nature of this relationship is reflected in but not limited to the mutual assistance agreement providing a framework particularly for the exchange and protection of evidential material.

More generally, the ACCC liaises with the FTC on specific and general consumer protection issues and participate in development opportunities such as regulator forums and staff exchange.

The “Undertaking Spam, Spyware and Fraud Enforcement with Enforcers Beyond Borders Act of 2006” or the “U.S. SAFE WEB Act of 2006” enhanced the FTC’s enforcement against cross border fraud and deception particularly by broadening their reciprocal information sharing ability and ability to cooperate on investigations including to collect information and evidence for certain foreign agencies.

No strengthening at this stage is considered to be required.

A number of MOUs exist between the ACCC and its international counterparts which facilitate international cooperation, including with agencies in the United Kingdom, Korea and New Zealand.

ADDITIONAL QUESTIONS ON NOTICE

Australian Competition and Consumer Commission
Inquiry into Cyber Crime

5. The ACCC makes reference to the International Consumer Protection and Enforcement Network, established by Memorandum in 2006.
- a. Would this Network provide a basis from which to develop a treaty on mutual recognition and enforcement of consumer protection laws that recognises the special challenges of the e-commercial environment?
 - b. What are the pros and cons of developing a treaty to deal with this particular area of cyber crime?

Answer:

[Note of clarification: The International Consumer Protection and Enforcement Network (ICPEN) was established in 1992. The Memorandum of Establishment, which was amended in 2006, provides the framework for the Network.]

- a) No. ICPEN is an informal network of enforcement agencies. Any such initiatives are best undertaken by forums involving relevant policy departments. The merits of any such treaty and the forum that would best progress are questions one best addressed to the relevant policy department.
- b) The merits of any such treaty and the forum that would best progress are questions one best addressed to the relevant policy department.

This said, we note that the development of a government level agreement for independent statutory authorities may present numerous difficulties. A treaty involving a multitude of agencies, at different stages of development and administering different legislation, is likely to raise difficulties. We note that many agencies are already party to various agency to agency level agreements.

The ACCC does not consider a treaty necessary at present due the many other mechanisms available for the ACCC to use.

ADDITIONAL QUESTIONS ON NOTICE

Australian Competition and Consumer Commission
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Future trends

- 6 The ACCC warns that increased use of mobile phones/internet will lead to a proliferation of malware and scams. The increased use of social networking sites also opens up more opportunities for marketing companies and for scammers. What kind of policy response could Australia consider to deal with the problem of scams in these new environments?

Answer:

Again, questions as to policy response are best directed to the relevant policy department.

For its part, the ACCC will continue to employ dynamic approaches to enforce the provisions of the TPA with particular focus on new and emerging issues that have the potential to cause significant detriment to Australian consumers. For example, the ACCC is currently actively working with a range of on-line traders, including the operators of certain social networking sites, to build protections for consumers against scam activities.

ADDITIONAL QUESTIONS ON NOTICE

Australian Competition and Consumer Commission
Inquiry into Cyber Crime

ACCC Staffing and Resources

- 7 What has been the impact on the ACCC of the growth of online activity over the last five years:
- a. Has the ACCC had to recruit more staff?
 - b. Does the ACCC need to train staff specifically to deal with the online environment?
 - c. Are more resources needed e.g. to deal with increased international co-operation aspects of ACCC's work.

Answer:

- a) The ACCC has managed the growth of online activity within its overall staff profile. When considered appropriate it has allocated extra staff to particular online matters.
- b) Online issues have been the subject of ACCC investigation for a number of years. Many staff are familiar with the online environment and the potential issues associated with that environment. As part of the corporate training program offered to all ACCC staff, specific computer based training is undertaken to ensure that investigators have the requisite skills to investigate and obtain evidence in relation to cyber based conduct.
- c) The ACCC currently conducts investigations (and where appropriate, commences litigation) in relation to online conduct within the current budget allocation and in accordance with the enforcement priorities set out in its Compliance and Enforcement Policy.