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**Speaking Notes – 2 June 2010**

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## **INTRODUCTION**

Will deal with four topics tonight:

1. Mergers
2. Tougher sanctions for anti-competitive conduct, cartels and criminal penalties
3. Enforcement actions
4. Product safety

## **MERGERS**

- Refined informal process was set in place in 2004.
- The flexibility of the process allows for responsiveness to individual transactions and circumstances. ACCC always looking to make process as efficient and effective as possible without compromising fundamental principles of transparency of process, protection of confidential information, timeliness and fairness of review process.
- The ACCC has conducted 274 assessments including 147 reviews in the financial year to 1 June 2010.

### **Financial year to 1 June 2010 vs. previous financial years**

Financial Year	Total Reviews	Not Opposed*	Cleared with undertakings	Opposed or concerns expressed confidentially
05-06	272	261	6	5
06-07	390	365	8	17
07-08	397	380	6	11
08-09	412	397	5	10
09-10 YTD	274	256	4	14**

\*This includes reviews not opposed, matters that were assessed and a review was not considered necessary, matters withdrawn before a decision was made, reviews in which no view could be formed on a confidential basis and reviews of variations to undertakings.

\*\*This includes eight reviews that were publicly opposed, and six reviews where the ACCC expressed concerns on a confidential basis.

**Table 2: Time taken to assess mergers.**

Time taken	2008-2009 Financial Year average	09-10 Financial year average*
2 weeks or less	57%	10%
4 weeks or less	79%	50%
6 weeks or less	86%	78%
8 weeks or less	91%	87%
> 8 weeks	9%	13%

\* This does not include matters assessed as not requiring substantive review eg FIRB notifications. All matters now pre-assessed as not requiring a review are dealt with in < 2 weeks, but are not recorded in this table any longer because this table relates only to substantive merger investigations.

**Table 3: Financial year-to-date 1 July 2009 – 1 June 2010**

	CONFIDENTIAL	PUBLIC	TOTAL
Matters assessed – no review required	127	0	127
TOTAL REVIEWS undertaken in 2009 - 2010 FY to 31 January 2010	41	106	147
Reviews can be broken down into the following categories:			
Not Opposed	27	90	117
Finished - no decision (incl. withdrawn)	6	4	10
Opposed outright	0	8	8
Confidential review - ACCC concerns expressed	6	0	6
Resolved through undertakings	0	4	4
Variation to undertaking accepted	2	0	2

- Some pundits (eg Zumbo) have misrepresented merger review statistics to confect an argument that the slc test is ineffective because the ACCC only opposes a few mergers, by effectively letting through 97% of mergers it reviews.
- This statistic is based on a basic table that is in our annual report. For instance, last FY, we reviewed 412 mergers, and opposed (publicly and

confidentially) 10, and accepted undertakings in 5. So far this FY, we have considered 274 mergers, opposed (publicly and confidentially) 14 and accepted undertakings in 4.

- However, such an interpretation of these statistics (ie to assess the effectiveness of the s1c test) is meaningless. It is also just as meaningless to say that the ACCC is "letting through too many mergers". This is because such interpretations have no regard to how we look at mergers and what mergers we look at. In particular the following points need to be made:
  - those mergers which are resolved through undertakings need to be accounted for as well, as those mergers would otherwise have been opposed, if not for a remedy (usually involving a divestiture) to resolve the ACCC's concerns.
  - almost half the mergers that come to us do not come as requests for review/clearance, but come because they have been referred to us by another regulator (often FIRB), or by parties as a courtesy. In most of these cases, there will be no competition concerns and this will be evident without the ACCC requiring a full investigation to determine this (eg. a new overseas entrant). These matters are not reviewed, rather they are quickly pre-assessed without the need for a major investigation.
  - The question might arise - well why do you allow them to be brought to your attention? The answer is that we don't have mandatory notification in Australia, so we have constructed a regime where businesses, other agencies and complainants are encouraged to let us know if there are mergers about to occur if they appear concerning to them. We manage these matters by having a flexible process that can deal with uncontentious matters quickly and without onerous information requirements.
  - The ACCC is now separately recording (from this 09/10 FY) matters pre-assessed as not requiring review and matters reviewed to provide more transparency as to its processes.
  - The fact that there is no mandatory notification means that the ACCC is pro-active in trying to identify as many possible transactions that are occurring, because to not be pro-active like this will mean risking less notification of matters that might actually raise concerns in the future. Accordingly the denominator will always be quite high, but does not reflect that there are anti-competitive mergers occurring that the ACCC is letting through.
  - The 97% disregards another important statistic - the number of matters that are withdrawn after the ACCC has commenced a review, had some engagement with the parties, maybe expressed concerns to the parties. So far this FY around 10 mergers were discontinued

before we could make a final decision. It is probable that a number of those matters would have been opposed. Last FY there were around 12 withdrawn matters.

- The 97% disregards another important statistic - the fact that a number of matters that would have been opposed were never brought to us in the first place because of the rigorous approach we take to mergers that are anti-competitive.
- On a separate issue, sometimes the ACCC is criticised for not taking many court cases in relation to anti-competitive mergers. This is an illogical statement. The fact that we largely look at merger proposals, not completed mergers that need a court to unravel them, means that we don't need to take court action at all because they almost always don't go ahead in the face of a statement of opposition by us.
- Over the past 12 months a number of complex merger reviews where the ACCC has taken a position of opposition.
  - NAB-AXA – still in play
  - Caltex - Mobil
  - Link - Newreg
  - Thomson Reuters – Ernst and Young
  - Cargill – Goodman Fielder
  - GUD – Breville
- Well aware of the fact that these more complex merger reviews tend to be handled by a few major law firms who have developed expertise in competition law and M&A transactions.
- The ACCC is in continuous engagement with practitioners in these areas to ensure our merger processes are working efficiently.
- Working to achieve the dual objective of providing
  - Practitioners and their clients with an efficient means of dealing with their merger processes, but at the same time
  - Allowing the ACCC to effectively deal with the enforcement of the Act

## PART IV – TOUGHER SANCTIONS

- Recently returned from Europe – discussions with lawyers, judges and regulators from around the world on issues of anti trust enforcement and penalties that apply.
- Considerable focus on the level of financial penalties and imprisonment.
- The Australian Parliament has recognised the critical importance of strong sanctions in detecting, deterring and punish cartel behaviour and other forms of anti-competitive conduct.
- With the introduction of stiffer financial penalties for anti-competitive conduct in general in 2007, and criminal penalties specifically for cartels in 2009, the bar has been raised.

### The new penalty formula

- For roughly 14 years the maximum penalty for anti-competitive conduct, be it a misuse of market power or cartel conduct was \$10 million per contravention.
- We saw cases where the profit from the conduct for the company far outstripped the reach of the penalties being sought by the ACCC and being awarded by the courts - which, to put it crudely, made anti-competitive conduct fairly good business.
- In our view the financial penalties in Australia don't reflect the true damage done by anti-competitive conduct, and this reflects both the level of penalties that have been sought by the ACCC and those that have been awarded by the courts. A cultural change is now necessary.
- In January 2007 the penalty regime for anti-competitive conduct underwent significant change. The maximum penalty became the greater of:
  - – \$10 million; or
  - three times the value of the benefit that one or more persons obtained from the cartel; or
  - where that value cannot be determined, 10% of annual turnover of the company (and its related companies) during the period of 12 months ending at the end of the month in which the conduct occurred.
- **Disqualification of a person from managing corporations** - for such period as the court thinks fit.
- The ACCC is now entering a new era – cases that we are investigating and pursuing are now starting to fall within the ambit of the new penalties introduced in January 2007.

## What this means for investigation of anti-competitive conduct

- Companies will be compelled to open up their books – the ACCC will use its investigative powers to obtain information from firms and establish the benefit gained from anti-competitive conduct.
- Forensic accountants will have a greater role in our investigations.
- The ACCC will be putting information before the courts to assist them to determine what is the greatest of \$10 million, three times the gain or 10% of turnover.
- The ACCC will be pressing for any penalty to be calibrated against whatever might be ‘the maximum’, which will vary depending upon the circumstances of the case.
- The Trade Practices Act now has within it a mechanism for imposing penalties which will more effectively deter unlawful conduct. This is because Courts can now set penalties by having regard to the economic gains associated with unlawful conduct and the size of the business concerned.
- These recent amendments bring Australia into line with significant other antitrust regimes USA, EU, Canada and Japan by focusing on the impact of the conduct to calculate penalties and determine appropriate sanctions.
- Increasingly international co-operation amongst anti trust agencies is proving crucial to securing satisfactory enforcement outcomes.

## CARTELS

Calendar 2009 was a record year for cartel litigation. The ACCC instituted proceedings in 13 cartel matters and obtained penalty orders totalling over \$20 million for the following cases.

April International Marketing Services Australia Pty Ltd (part completed)	4,000,000
Australian Karting Association (NSW) Inc & Ors	10,000
Martinair Holland NV	5,000,000
Cargolux Airlines International SA	5,000,000
Societe Air France & KLM	6,000,000
	<b><u>20,010,000</u></b>

- As a result of the ACCC's continued investigation into alleged fuel surcharge price fixing in the industry, to date the court has ordered a total of \$41 million in penalties against respondent airlines:
  - On 11 December 2008, the court ordered Qantas Airways Limited and British Airways PLC to pay penalties of \$20 million and \$5 million respectively, as jointly submitted by the parties
  - On 16 February 2009 the court ordered Société Air France, Koninklijke Luchtvaart Maatschappij NV, Martinair Holland NV and Cargolux International Airlines SA to pay penalties of \$3 million, \$3 million, \$5 million and \$5 million respectively, as jointly submitted by the parties.
  
- In addition, the ACCC instituted proceedings in the Federal Court:
  1. **23 December 2008** against Singapore Airlines Cargo Pte Ltd;
  2. **30 April 2009** against Cathay Pacific Airways Ltd;
  3. **18 August 2009** against Emirates;
  4. **2 September 2009** against PT Garuda Indonesia Ltd; and
  5. **28 October 2009** against Thai Airways International Public Company Limited.
  6. **5 March 2010** against Korean Airlines Co Limited
  7. **9 April 2010** against Malaysian Airline System Berhad and its wholly-owned cargo subsidiary Malaysia Airlines Cargo Sdn Bhd
  8. **17 May 2010** against Air New Zealand Limited
  9. **17 May 2010** against Japan Airlines International Co Ltd.

### **Other recent cartel outcomes**

- **Marine hose cartel** - In April 2010 the Federal Court ordered four foreign based suppliers of marine hose to pay penalties exceeding \$8.24 million for cartel conduct. The cartel submitted rigged bids to supply marine hose to customers in Australia.

The penalties imposed relate to 10 tenders in respect of which at least one or more of the respondents sent offers to customers in Australia. This cartel pre-dated the July 2009 amendments to the Trade Practices Act that have added criminal sanctions for serious cartel conduct.

The conduct in Australia was deliberate, ongoing and involved high value transactions. The respondents engaged with other large multinational companies in a highly organised and covert cartel over an extended time to suppress and/or eliminate competition by allocating

tenders (bid rigging), controlling prices and allocating market shares for sales of marine hose sold in certain international markets including in the Australian market.

The ACCC alleged that the respondents gave effect to their international cartel arrangements in Australia from 2001 to 2006 by submitting 'rigged' bids to supply marine hose to customers in Australia such as Woodside Energy Ltd, BHP Billiton Petroleum Pty Ltd and ConocoPhillips (03-12) Pty Ltd.

- **Marine hose and Air cargo** cartel cases demonstrate in a very tangible manner the outcomes that can be achieved through international engagement. Marine hose for example would not have been possible without extensive co-operation with authorities in the United Kingdom and the United States. This included the provision of evidential material that had been gathered in UK investigations
- **Admiral air-conditioning and Ors** - On 13 April 2010 the ACCC completed a major cartel prosecution against 17 companies and 22 individuals involved in collusive tendering for air conditioning contracts for schools, hospitals and shopping centres in Western Australia.

**In total, pecuniary penalties of \$9,271,750** were imposed on respondents in these proceedings. The outcome makes it the largest trade practices case ever run in Western Australia.

Price fixing and bid rigging behaviour the subject of these proceedings affected tenders for air conditioning projects in totalling about **\$129 million. These included contracts for air conditioning in schools, hospitals and shopping centres.**

- Projects affected included: an AMP refurbishment (\$9.49 million), CSIRO - Petroleum and Minerals, Bentley (\$5.23m), Belmont Shopping Centre (\$2.67m), UWA Electronic/Electrical Engineering (\$919,800), Nickol Bay Hospital - Chillers Replacement (\$568,200), Chisholm Catholic College (\$654,383), Rydges Hotel Chiller (\$211,000) and Murdoch University Education and Humanities (\$280,510).

## **Sanctions for cartel conduct**

### **Civil penalties**

- Under the penalties for cartel conduct a company may be ordered to pay the greater of:
  - \$10 million, or
  - three times the total value of benefit 'obtained by one or more persons' from the cartel, or



- when the value of the illegal benefit cannot be ascertained, 10 per cent of the turnover of the corporate entity (including related corporate bodies) in the preceding 12 months.
- **Disqualification of a person from managing corporations** - for such period as the court thinks fit.

### **Criminal enforcement**

- All cartel conduct (entering into or giving effect to a cartel) post 24 July 2009 are being treated as a potential criminal prosecutions and are initially investigated under the criminal investigation process – with a potential penalty of up to 10 years jail.
- There have been a number of matters that have come before us having a post July 2009 element.
- At a point in time we make a decision at either the Enforcement Committee level or in more complex matters at the Commission whether to relegate to civil investigation, either under the terms of the MOU with the CDPP (if the matter is not considered serious), or taking into account the criteria set by the CDPP under the Commonwealth's Prosecution Policy.

### **Plea bargaining – the ACCC's position**

- Our inflexible position is that a criminal cartel prosecution is not negotiable – you will not be able to buy your way out of a criminal conviction and gaol.
- The ACCC will not put itself in a position where there might be a perception that it is using the possibility of a referral of a matter for consideration of criminal prosecution to obtain cooperation or resolution of civil proceedings.
- The ACCC will not engage in discussions with parties under criminal investigation as to the possibility of a civil resolution (financial penalty), until it has formed the view as to the seriousness of the conduct and either the ACCC or the CDPP have formed that view that a criminal prosecution should not be commenced. We will not even discuss the proposition: "Is there a way that we can pay a significant penalty, that is a financial penalty, to avoid the prospect of a jail sentence?" **We will walk out of the room.**
- In the case of serious cartel activity, no matter how fat the cheque book, nor to what lengths a corporation will go to defend the position of its executives, there is no amount of money that will remove the risk of executives implicated, going to jail.

## SMALL BUSINESS

- Fundamental philosophy underpinning the Trade Practices Act is the promotion of competition, not protection of competitors or any sector of the economy from competition.
- Small business protections available with –
  - codes of conduct - Franchising Code, Horticulture Code,
  - unconscionable conduct prohibitions (small dealing with big customers/suppliers) and
  - section 46 misuse of market power
  - predatory pricing, but need to show, substantial market share, below relevant cost, sustained period and predatory purpose.
- Small business can help itself through **collective bargaining** – united we stand in strength, divided we fall in weakness

### Recent action by the ACCC

The ACCC remains active in the **difficult but important area of unconscionable conduct** with four recent business unconscionable conduct litigation outcomes.

#### 1. Seal-A-Fridge Pty Ltd – judgment – 28 May 2010

The Federal Court has found that franchisor, Seal-A-Fridge, engaged in unconscionable conduct by unilaterally imposing fee increases on its franchisees for use of the Seal-A-Fridge national phone number. The phone number is used by franchisees to receive customer enquiries and work. SAF used the tactic of disconnecting franchisees from the phone number to procure agreement to pay the increased fees. The Court also found that Seal-A-Fridge breached the Franchising Code of Conduct (FCC) by failing to provide adequate disclosure to a franchisee prior to them entering into a franchise agreement and by failing to provide current disclosure documents to franchisees after receiving written requests.

The Court found that Seal-A-Fridge's behaviour surrounding attempts by franchisees to transfer (sell) their franchises was not unconscionable. Logan J will make final orders on 4 June 2010.

#### ***Importance of case in terms of unconscionable conduct***

- there is a limited amount of case law relating to unconscionable conduct under the TPA.
- this outcome will serve to provide the ACCC with better guidance in respect of the unconscionable conduct provisions; in particular, what type and level of seriousness of conduct would be likely to contravene the TPA.

- the Court held that (in relation to the unilateral fee increases) the Respondent's conduct viewed as a whole amounted to unconscionable conduct: *'What was revealed overall, so the ACCC submitted, was "misstatement, non-disclosure of information, threats and intimidation of Seal-A-Fridge's position of strength in relation to being able to cut off the phone number". I agree.'*
- In this case, it was the overall factual matrix that revealed unconscionable conduct, rather than specific individual aspects of the conduct.
- The Court held that moral turpitude is an inherent element in the finding of a contravention of s51AC of the TPA.
- In relation to the transfer aspect of the ACCC's unconscionable conduct case, the court found that, although '...SAF had no right, on the basis it stated, to refuse to give its consent to an assignment of the interest of [the franchisee] its conduct in withholding that consent involved no moral turpitude.'

### ***Important case in terms of the Franchising Code of Conduct***

- One of the purposes of the FCC is to facilitate franchising relationships and protect the rights and interests of both franchisees and franchisors.
- The ACCC took action in relation to breaches of the FCC in order to highlight this to all parties who are subject to the FCC.
- The ACCC's success in this matter will serve as an example to franchisors that the FCC has the force of the law and as such, must be complied with.

## **2. Allphones Retail Pty Ltd – consent orders – April 2010**

The ACCC alleged that Allphones engaged in unconscionable conduct by failing to disclose or pay certain income to franchisees; implementing policies targeting certain classes of franchisees; and threatening or engaging in a pattern of harsh conduct against franchisees. The ACCC also alleged that Allphones failed to comply with the Franchising Code and engaged in misleading or deceptive conduct towards franchisees. The Federal Court declared that Allphones Pty Ltd engaged in misleading and deceptive conduct, contravened the Franchising Code of Conduct and engaged in unconscionable conduct.

The Federal Court also ordered a number of injunctions to prevent similar conduct in the future and declared that three executives had been knowingly concerned in the unconscionable conduct. The court also ordered that 55 current and former Allphones franchisees be paid \$3 million in damages.

The \$3 million will be divided amongst the franchisees represented by the ACCC according to the timeframe they were a franchisee and duration and performance of their business. The amount paid reflects underpayment of rebates and commissions and implementation of charges by Alphones. **This was a case of sustained and systemic unconscionable conduct and one of the worst cases in a franchising system encountered by the ACCC.**

### **3. Australialink Pty Ltd – consent orders – September 2009**

The ACCC alleged that Australialink engaged in misleading or deceptive conduct and unconscionable conduct, in breach of sections 52 and 51AC of the TPA, in relation to false billing for an online business directory. The court declared that Australialink acted unconscionably towards businesses by intentionally misrepresenting that it had instituted, or was in the process of instituting, court proceedings against those businesses that had been invoiced for the directory listing but had not paid.

The court ordered that Australialink must write to each person it contacted between 1 January 2007 and 3 December 2008 advising them of the outcome and their right to private action. The court also declared that Australialink's director and general manager were knowingly concerned in the conduct.

### **4. Dukemaster Pty Ltd – contested hearing – June 2009**

The ACCC alleged Dukemaster, a landlord of retail outlets engaged in unconscionable conduct in breach of the TPA by taking unfair advantage of its stronger bargaining position, exerting undue pressure and using unfair tactics against four tenants in connection with their leases. The court found that Dukemaster had engaged in unconscionable conduct. The court declared that Dukemaster's general manager was knowingly concerned in the conduct and ordered injunctions restraining Dukemaster from engaging in similar conduct in the future. The court also ordered Dukemaster and its general manager to pay compensation to the affected tenants in excess of \$275,000.

### **Franchising education program**

- In addition to our activities in the courts to protect franchises the ACCC in conjunction with Griffith University has established a one-stop shop free education program for people buying a franchise
- The program, provides potential franchisees with a better understanding of their rights and obligations under the Franchising Code, and some of the practical issues they could face as a franchisee,

- As has been recognised in the Expert Report on Franchising Code of Conduct, early education of potential franchisees is a critical factor in their business success and compliance with the code.
- In addition, the need for earlier and better information was underscored by recent research from Griffith University, which revealed that 49 per cent of the franchisees surveyed relied heavily on their 'gut feeling' when deciding to go into franchising.
- Participants will leave the program with a list of questions to ask franchisors, existing and former franchisees. The program will also direct prospective franchisees to further self-education resources.

## Consumer protection - Part V

Our consumer protection work has seen litigated outcomes in a number of cases.

- **Powerball Win** - A scammer, Constantine 'Con' Barris, and his company, Powerballwin.com.au Pty Ltd, set up a website - the scheme claimed to predict numbers to help win all the divisions of Powerball. But the predicted numbers failed to produce any dividend for subscribers to the service. An internet website and servers located in the UK and USA were used to promote and run the scam. Justice Tracey in awarding compensation of \$48,163 labelled the scheme as "bogus", saying "*All too often unscrupulous individuals seek to enrich themselves by devising schemes under which unsuspecting victims are induced to part with their money and other property.*" Proceedings were instituted three working days after the first complaint was received. The ACCC sought and received ex parte orders to freeze bank accounts.
- **Pyramid selling scheme 'TVI Express'**- the ACCC acted quickly - ex-parte injunctions - to obtain orders restraining three individuals from promoting an alleged pyramid selling scheme called TVI Express.

The ACCC will now prepare the matter for final hearing. The ACCC will be seeking orders declaring that the individuals engaged in contraventions of the *Trade Practices Act 1974* and injunctions restraining them from engaging in similar conduct in the future. The ACCC will also be seeking civil pecuniary penalties against the individuals.

- **StoresOnline** - the Federal Court found that e-commerce marketing companies StoresOnline International, Inc. and StoresOnline, Inc made misleading and deceptive representations regarding the price of their business e-commerce software packages, which were promoted through a series of seminars, primarily to those wishing to set up small businesses operations.

- These proceedings showed the ACCC's willingness to pursue proceedings against overseas corporations when such corporations engaged in conduct in Australia which affected Australian consumers.
- **Through international assistance the ACCC was able to obtain final orders, by consent, in the Federal Court for false and misleading conduct in relation to an international health scam**, claiming cures for a wide range of health conditions including acne, asthma, multiple sclerosis, menopause and prostate cancer which were sold to more than 60,000 consumers internationally. The scam was brought to the ACCC's attention by the Washington State Attorney General's Department. The ACCC's investigation was carried out in conjunction with the Washington State Attorney's Department, who also filed their own proceedings in the matter.
- **In the Canadian case R v Stucky fraudulent conduct related to the marketing of lottery programs only targeted at international consumers**
  - The case went through many avenues of appeal, particularly on the issue of whether there was jurisdiction to take the case as there were no Canadian consumers affected. The Court of Appeal ruled that those who make false and misleading representations to the public can be prosecuted in Canada even if they make the representations only to people outside the country.
  - This case involved international cooperation from the ACCC and other ICPEN members (ACCC now Chair) in the form of information sharing, investigation assistance, gathering of witness statements and providing witnesses for video link testimonials to the court in Canada.

### **Court Enforceable undertakings**

Through section S 87 B undertakings the ACCC has achieved excellent consumer outcomes in matters including:

- **Heinz (Golden Circle)** which donated an estimated \$1.8 million worth of canned fruit) after it had continued to distribute incorrectly labelled product claiming that Golden Circle was an Australian owned company when it had been purchased by Heniz.
- **Austar Port Lincoln Pty Ltd t/a Austar Seafood Warehouse** provided a court enforceable undertakings to the ACCC in relation to alleged misleading claims made about the place of origin of some of its seafood.

## Continued strong consumer protection in the communications sector

The ACCC has warned mobile telephone service providers to play fair with consumers whose handsets fail during the term of a service contract.

Consumers who buy a mobile telephone as part of their service contract have the right to expect that the handset will last the length of that contract.

Some companies are seeking to avoid their responsibilities by arguing that if a handset fails, it's not part of the service contract, and the consumer is up for the cost of repair or replacement.

- **VHA 87B undertaking (January 2010)** – Misrepresentations by Hutchison (pre-VHA merger) about consumers' rights to a remedy for faulty mobile phones – namely that the only remedy available to customers for a faulty mobile phone was a repair. Generally the only time a customer was able to obtain a replacement mobile phone was during the 'early life failure' period, which was normally 14 days after purchase
- **Nokia / Fone Care Administrative Resolution** – customers advised by Nokia Care Centre (Fone Care) that to return a faulty battery they would be required to sign a service agreement, which limited their statutory warranty rights. The Fone Care refund policy also represented that there was a 14 day limit on statutory warranty claims.
- The ACCC has also **taken action** on several matters in relation to **mobile premium service advertisements**, including against overseas content providers.

These actions are on the back of upgraded and improved advertising practices from the big three – Telstra, Optus and VHA – following ACCC intervention last year.

## Unfair contract terms

The ACCC has received additional resources for the implementation of the unfair contract terms provisions of the Australian Consumer Law: This funding is designed to:

- generate compliance with the new unfair contract terms provisions
- undertake consultation with industry and consumer stakeholders on the structure and content of the unfair contract terms guidance.
- liaison, coordination and cooperation with the Australian Securities and Investments Commission as well as State and Territory agencies to aid consistency

On 1 June 2010 the ACCC released an electronic copy of *A guide to the unfair contract terms law (the Guide)*. The guide was jointly developed by the ACCC, ASIC and state/territory fair trading agencies (as per in the

MCCA communiqué of 15 August 2008). It explains the nature of the unfair contract terms (UCT) laws, how they apply and their effect.

Wide-ranging consultation was undertaken with business and consumer groups to ensure the information in the guide is relevant, clear and easily understood.

The ACCC and other regulators will work with businesses and may seek a business' cooperation to remove terms they consider potentially unfair, but ultimately no regulator can endorse or 'clear' contract terms, nor deem a term to be unfair.

The ACCC, ASIC and state/territory fair trading agencies are working closely to ensure a nationally consistent approach to regulation of the new law

**From 1 July** (commencement date of the law) the ACCC will undertake additional education and outreach initiatives with this new area of the law.

- ***UCT for consumers, release – 1 July***  
A consumer publication, explaining the key aspects of the law and providing information on what action consumers can take against unfair contract terms
- ***UCT, a small business snapshot – release 1 July***  
Summary publication to explain the key concepts of UCT law to small businesses
- New pages and hot topics on ACCC website

In addition to new education material, the ACCC is conducting an extensive outreach to ensure that specific audiences understand new law. This will include:

- Presentations, speeches and seminars
- Development of industry-specific guidance as required
- Provision of articles and other guidance to industry associations and consumer groups for dissemination to their members

### **Approach to enforcement and compliance**

The ACCC has identified two main approaches it will take to unfair contract terms:

1. Proactive industry reviews
2. Using UCT as a tool in broader enforcement activity.



## Product Safety

The ACCC's work in product safety is an important and expanding task for the agency. Notable recent interventions include

- **Woolworths Ltd t/a Big W** providing a court enforceable undertakings in relation to the supply of children's nightwear products that carried the incorrect fire warning label. Woolworths Ltd has undertaken to:
  - refrain from supplying children's nightwear products that do not comply with the Standard;
  - implement an Action Plan developed by Big W
  - conduct a review of its recall procedures
  - develop and implement a training program for its buying and quality assurance staff for the purpose of ensuring compliance with the Standard
  - provide \$200,000 towards a research project into the Standard
  - donate \$200,000 to the Sydney Children's Hospital Randwick.
- **Philip James Robinson** – on 26 May 2010 the ACCC began criminal proceedings in the Federal Court, against Philip James Robinson of South Australia.

The ACCC alleges that on eight occasions between December 2007 and July 2008, Mr Robinson supplied infant sleeping bags that did not comply with a consumer product safety standard in that they did not have a fire hazard information label, contrary to section 75AZS of the *Trade Practices Act 1974*.

The charges are being prosecuted by the Commonwealth Director of Public Prosecutions. Mr Robinson has been summonsed to appear at the Federal Court Adelaide on 25 June 2010 at 9.15 a.m.

## Recalls website and Product Safety Australia

- Significant changes to the way in which consumers are being informed of product recalls are underway.
- In a major report, the Review of the Australian product safety recall system, the ACCC analysed the effectiveness of the current recall system.
- Product recalls are a crucial part of the Australian consumer product safety system – over the past 23 years, more than 10,000 recalls have taken place. In 2009 there were 779 recalls in Australia, some involving many thousands of products. However, consumer responses to product

recalls have varied widely and in some cases have been nearly non-existent.

- The ACCC's report gives a blueprint for changes to the recalls system, particularly about how consumers are alerted to recalls, with the aim of increasing awareness and recall response rates.
- There is a real need for suppliers to implement tailored communications strategies in the event of a recall. The days of relying just on newspaper advertisements as the major method of communication are past.
- Highlighting the importance of utilising new communication methods, the ACCC has taken a leaf out of its own book to announce the release of this report. It has:
  - sent 'tweets' on a newly established Twitter account: @productsafetyAU.
  - blogged on a range of relevant sites
  - developed a new recall 'widget'\* which will be trialled on a range of relevant websites shortly, and
  - directly emailed hundreds of industry associations and stakeholders.

### **Product Safety Recalls Australia website**

- The new Product Safety Recalls Australia website, <http://www.recalls.gov.au>, also allows consumers and businesses to sign up for electronic recall alerts about the types of products of most interest to them, such as children's products.
- Other steps the ACCC is taking to improve recall effectiveness includes encouraging suppliers to place tracking labels on their products to enable the product to be easily traced as it moves through the supply chain and into the hands of consumers.
- Suppliers will also be encouraged to use online warranty cards and registration systems and make greater use of loyalty card data to identify consumers who bought products which were later recalled.
- The report also flags that the ACCC will not accept that a recall is finalised until the cause of the problem is identified and measures are put in place to ensure that it does not recur.
- Many of the measures to improve the effectiveness of the recall system will be reflected in new recall guidelines for suppliers.