



Professional Practice in Engineering Management

University of Sydney Faculty of
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Technologies



Trade Practices Overview

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Overview of workshop

- What we will cover today
 - Importance of complying with the Trade Practices Act
 - Consumer protection / green marketing claims
 - Criminal sanctions for cartel conduct (proposed)
 - New misuse of market power prohibition (below cost pricing)



Trade practices - why you must comply

- Consequences of non-compliance:
 - damages - legal and other costs
 - adverse publicity - criminal fines
 - undertakings - injunctions
 - civil penalties - management diversion
- Maximum penalties:
 - Anticompetitive conduct provisions – currently civil penalties at least \$500,000 (indiv) and for companies, the greater of:
 - \$10 million, and
 - three times the value of the benefit from the cartel, or 10% of annual turnover of the corporate group where the benefit from the cartel cannot be determined
 - Consumer protection - criminal fines \$1.1 m (co) and \$220,000 (indiv)



Why you must comply

- Recent corporate penalties:
 - \$36m ordered against Visy Board Pty Ltd for its involvement in a cartel
- Recent individual penalties:
 - ACCC v FFE: State Manager agreed to a \$10,000 penalty with the ACCC
 - Court rejected the agreed penalty and imposed a penalty of \$50,000
 - ACCC v Visy (waste paper collection): penalties totalling \$25,000 against two senior executives for trying to stop a rival waste paper collection company from taking Visy's customers.
 - ACCC v Visy (cardboard box cartel): \$1.5 million for former CEO, Mr Harry Debney and \$500,000 for former Visy Board General Manager, Mr Rod Carroll.



Section 1: Green Marketing

- ACCC priority
- Key concepts
- Green rules
- Special care
 - sponsorship, approval and affiliation
 - silence
 - disclaimers
 - forecasts and predictions
 - comparisons



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NEWS RELEASE

- “In light of the **growing number of complaints**, the ACCC is taking a closer look at a number of the green claims that are being made at the moment, and all businesses need to ensure they are not misleading their customers with such claims.” ACCC releases its “**Green Marketing Guide**” (8/02/08).
- “The ACCC intends to **ramp-up** its green compliance activities with a combination of business and consumer educative initiatives and targeted enforcement action.” Australian Competition and Consumer Commission Commissioner, Mr John Martin (26/10/07).



Key concepts - misleading conduct

- Do not engage in conduct that is likely to mislead or deceive:
 - most TPA civil litigation whether by the ACCC, competitors or disgruntled customers involves an allegation of misleading conduct
 - very broad, general, prohibition
 - no defence to say it was an honest mistake
 - no need to prove anyone actually misled or deceived
 - no need to show that anyone has actually suffered a loss
- A breach may result in corrective advertising, injunctions and damages



Key concepts - false representations

- Do not make false or misleading representations about the:
 - price;
 - sponsorship, approval, endorsement, or affiliation characteristics; or
 - standard, quality, value, composition, style, model, uses or benefits
 - place of origin;
 - of any goods or services supplied by WSN.
- As discussed before, a breach may result in corrective advertising, injunctions and damages and criminal penalties



Key concepts - misleading to whom?

- **The test is whether:**
 - “*the astute and the gullible, the intelligent and the not-so-intelligent, the well-educated as well as the poorly educated, men and women of various ages pursuing a variety of vocations*” would be misled.
 - What matters is how the ordinary reasonable reader in the target audience will understand the representation viewing the conduct as a whole.
- **You must consider:**
 - the target audience and the likelihood that the target audience could be misled or deceived by the conduct or representation you are making
 - the context in which the target audience will read or hear your advertisement



Key concepts - misleading or mere puff

- Courts acknowledge that:
 - the public expects some puffery / hype / exaggeration in advertising. Eg, a statement that “WSN is a leader in resource recovery” is not likely to be misleading, but a statement that “WSN is the world leader in resource recovery” is likely to be misleading.
- Gillette v Energizer:
 - the Court did not accept that Energizer’s claim of “world’s longest lasting battery in high powered devices” was mere puffery or exaggeration. The claim was not true for all Energizer lithium battery sizes. Energizer was ordered to stop running the advertisement and to pay costs in the litigation.



Green Rules – (1) Be accurate

- Claims must be accurate. Eg, a claim that energy is “*green*” or “*renewable*” (without disclosing the percentage of energy obtained from renewable sources) may be misleading.
- **Case Study (17/08/06):**
 - Environmental Marketing Pty Ltd marketed EnviroCare cosmetics through promotional material and a website to have environmental benefits, including being biodegradable. EnviroCare products were marketed as having a “*reduced impact on the environment*”. The ACCC investigation showed that some of the EnviroCare cosmetics contained ingredients not listed on the labelling. Environmental Marketing entered into a court enforceable undertaking with the ACCC.



Green Rules – (2) Substantiate

- Claims must be able to be substantiated. Do you have scientific or test data to support your claim? If the claim cannot be substantiated then it should be removed or modified.
- **Case Study (21/012/07):**
 - EnergyAustralia said on its website and in promotional materials that its “*ClearAir*” and “*GreenFuture*” products would provide “*100% green*” electricity at no extra cost, “*100% renewable energy*” and “*for every kilowatt hour of electricity you buy, the same amount of electricity will be generated from 100% renewable sources*”. These products were not accredited renewable energy products. After investigation by the ACCC, EnergyAustralia agreed to: write to its customers to explain the difference; pay \$100,000 toward an educational brochure; and give consumers the benefit of true 100% Green Power (worth around \$500,000).



Green Rules – (3) Be specific

- Claims must be specific. General statements that a product is “*green*”, “*environmentally friendly*” or “*environmentally safe*” risk being misleading because they do not explain/quantify the basis for the claim. Explain exactly what part or aspect of your claim is environmentally beneficial.
- **Case Study (21/12/07):**
 - Origin’s television ad represented that switching to Origin “*GreenPower*” would be the same as “*not driving your car for two years*”. The ad showed a spider in the exhaust of a disused car. The ACCC said the ad did not clearly explain to consumers the underlying averaging basis for the claimed environmental benefit of switching to Origin 100% GreenPower. Origin agreed it will not air such ads in the future without making explicit the basis upon which the representations are made.



Green Rules – Misleading or not?



The advertisement claims “Grrrrrrreen, Every Saab is green”, Carbon emissions neutral across the entire Saab range, “Switch to carbon neutral motoring” and Saab will plant “17 native trees in the first year following a Saab vehicle purchase as a carbon offset.”



Green Rules – (4) Benefits must be real

- Claims must only be made if there is a real environment benefit as opposed to a benefit that is irrelevant, insignificant or mandated by law. Eg, saying an aerosol is “*CFC free and environmentally friendly*” is misleading as CFCs are prohibited by law.
- **Case Study (15/09/03):**
 - The Court found Sanyo Air-conditions engaged in misleading and deceptive representations about the environmental benefits of the gases used in its air conditioning units, namely “*environmentally friendly HFC R-407C added*” and “*keeping the world green*”. Sanyo consented to Court orders. HFC R-407C is actually a powerful greenhouse gas.



Green Rules – (5) Do not overstate

- Claims must not overstate: (a) the benefit (eg, 50% more waste recycled when originally only 1% of waste was recycled); or (b) the level of scientific acceptance (eg, where the benefit claimed is not universally proven or is in dispute).
- Case Study (31/03/04):
 - ACCC took proceedings against Lloyd Brooks for claims in relation to its “Earthstrength” plastic bags, namely that “46,000 pieces of plastic float in every square mile of ocean, this won’t be one of them” and “this bag won’t contribute to the landfill problem.” The website stated “Earthstrength Bags however, compost just like Kraft bags ... bags biodegrade in 28 days”. The ACCC alleged that Lloyd represented its bags had characteristics and benefits they did not have. The court made orders against Lloyd Brooks.



Green Rules – (6) Be careful about images

- Images (eg, forests or endangered animals) should be used carefully. Do not use an image to suggest environmental benefits that a service does not have.
- **Case Study (5/08/99):**
 - BOC Gases used the image of a “frog”, the words “*green*”, “*green air conditioning*”, “*environmentally preferred*” and the logo “*Ozone Care*” in its technical and promotional materials. BOC Gases agreed to clarify the environmental and performance comparisons, cease using general terms such as “*environmentally preferred*” or general “*green*” claims and to remove the frog image and the Ozone Care logo in future publications.



Green Rules – (7) Be careful about association

- Explain how your product or service is related to any environmental or emblem schemes that are used.
- **Case Study (18/03/08):**
 - The ACCC raised concerns about Woolworths' Select tissue products. Packaging on the Select brand of toilet paper and tissues stated the products were sourced from an environmentally managed company. Woolworths sources its Select tissues from Asia Pulp and Paper (APP). It is alleged that APP clears natural forests in Sumatra for 60-70% of its wood supply. Woolworths agreed to replace the packaging.
 - This case is an example of the care needed when making green claims which may be ambiguous and the negative publicity which can result if the green claim is challenged.



Green Rules – Misleading or not?



The press kit states
“The secret to guilt-free high performance” - Lexus GS450h, the new high-performance hybrid luxury car, will revolutionise the automotive landscape.”



Special care - if your green claim involves

- **Silence**

- the Court considers the overall impression – what is said, what is not said, what is implied and any ambiguities.

- **Disclaimers**

- a disclaimer cannot correct a false misleading main statement.

- **Comparisons:**

- Inaccurate comparisons are inherently likely to be misleading and competitors pay close attention to these types of claims



Special care - if your green claim involves

- Forecasts and predictions
 - Claims about a future benefit (eg, forecasts or predictions) are deemed to be misleading unless there are reasonable grounds for the claim.
 - An area of concern identified by the ACCC in its issues paper on “The TPA and carbon offset claims” is that “many claims as to future carbon neutrality are potentially misleading where there are insufficient disclaimers as to the expected timeframes of the offset process.”



Green - Do's and Don'ts

- ✘ DON'T use broad brush environmental statements for all aspects of your products
- ✘ DON'T make claims about the future unless you have a reasonable basis for the claim
- ✘ DON'T use the words “green”, “environmental” or “sustainable” unless the claim can be substantiated
- ✘ DON'T make a “green” claim at all if it is too hard to mention all variables or qualifications to make the claim true
- ✘ DON'T claim that something has “green” or “environmental” benefits if the benefits do not derive from the product or service
- ✘ DON'T make a green offset claim unless you are sure it will be valid for the life of the promotion (or the period clearly stated)
- ✓ DO use “environmentally friendly” where a customer is given a benefit of real value
- ✓ DO set out any necessary qualifications so that the green claim is true (eg, “the landfill is sustainable for 80 years if waste is diverted using an AWT facility”)



General Fair Trading - Do's and Don'ts

- ✓ DO ensure that the information given to customers is accurate and up to date
- ✓ DO put yourself in the shoes of the customer and think about what information is important to them
- ✓ DO be careful about statements about competitor's products or services
- ✗ You CANNOT "correct" a misleading main statement with fine print
- ✓ You CAN qualify a potentially ambiguous but not misleading main statement with a disclaimer
- ✓ DO bring all important conditions or qualifications to the audience's attention
- ✓ DO put any disclaimers up-front close to the representation being qualified



Section 2: Proposed criminal sanctions for cartel conduct

- New offences
 - Why introduce criminal offences for cartel conduct?
 - Current status of the law
 - What is “serious” cartel conduct; how it relates to existing prohibitions
 - The likely elements of the criminal offence
- New criminal penalties
- Upgraded investigatory powers for the ACCC
- Implications



Criminal sanctions - policy

- Why introduce criminal sanctions for cartel conduct?
 - growing disapproval of cartel conduct over last 50 years
 - in nearly all sectors of the economy the choice between cooperation and competition is no longer open
 - cartels have been described as
 - a “cancer” on the economy and a “silent extortion on consumers”
 - “morally repugnant”
 - no longer just a question of inefficiency: akin to fraud
 - cartels cause significant damage to the economy and criminal sanctions are seen to be the most effective deterrent (cost benefit analysis)
 - US experience is that individuals are happy to negotiate higher fines to avoid prison but do not offer to spend more time in jail in return for a lower fine



Criminal sanctions – overseas experience

- The introduction of criminal sanctions would also bring Australia into line with a growing number of overseas jurisdictions including:
 - United States, which has had criminal sanctions since 1890: current max penalty is 10 years or fine of US\$100 m
 - the average jail sentence is now more than 18 months (there has been a sentence of 10 years handed down)
 - Chairman of Sotheby's fined US\$7.5 m and 1 year in prison
 - United Kingdom introduced criminal sanctions in June 2003: 5 years or unlimited fine
 - Japan, Canada, Ireland, France and Norway also have criminal sanctions



Criminal sanctions – history in Australia

- In the lead up to the Dawson Review (2001-2002) the ACCC ran a campaign calling for criminal sanctions for serious cartel conduct
- The Dawson Report (2003) found that there was general agreement that serious cartel conduct may be “sufficiently reprehensible” to be punishable by a prison sentence
- This view was based largely on the deterrent value of criminal sanctions and overseas experience
- Government agreed in 2003 to introduce criminal sanctions subject to finding acceptable definition of serious cartel conduct and having workable immunity policy
- In 2005, the Government announced proposed solutions but no further progress
- 2007 – federal election, 2008 – draft legislation released
- Some issues with the draft legislation, but very likely criminal sanctions will become law this year



Criminal sanctions - new offences

- The Draft Bill creates two criminal offences:
 - A person commits an offence if:
 - the person makes a contract, arrangement or understanding (agreement) with the intention of dishonestly obtaining a benefit; and
 - the agreement contains a cartel provision.
 - A person commits an offence if:
 - an agreement contains a cartel provision; and
 - the person gives effect to the cartel provision with the intention of dishonestly obtaining a benefit.



Criminal sanctions – cartel provisions

- What is a cartel provision?
 - has to be an agreement between competitors
 - price fixing: purpose or effect of fixing, controlling or maintaining the price for, or a discount, allowance, rebate or credit in relation to goods or services supplied in competition
 - market sharing/customer allocation: allocating between the parties customers, suppliers or territories
 - bid rigging: agreeing whether one or more party will bid, the price at which a party will bid or the circumstances in which a party will bid
 - output restrictions: agreeing to restrict the production or capacity of a party



Criminal sanctions - new offences

- Also new civil cartel offences for making or giving effect to an agreement that contains a cartel provision.
- The difference between civil and criminal sanctions is that for a criminal sanction the conduct has to involve an “intention to dishonestly obtain a benefit”.
- Issues with “dishonesty”
 - is it enough to differentiate a criminal offence from a civil offence?
 - currently, if a person contravenes the civil cartel provisions, but it appears to the Court that the person has acted honestly and reasonably, the Court may relieve the person either wholly or in part from liability to any penalty or damages – ie dishonesty is already a factor in civil liability.
 - criminal liability will lie so long as there is a dishonest intention to gain from the conduct.
No gain need in fact be made for criminal liability to arise
ie, even if it was impossible for the members to profit from the cartel.



Criminal sanctions – new penalties

- The maximum criminal penalties proposed are:
 - for individuals penalties for serious cartel conduct:
 - 5 years in jail and/or fines of up for \$220,000
 - for corporations the maximum penalty would be:
 - the greater of:
 - \$10 million, and
 - three times the value of the benefit from the cartel, or 10% of annual turnover of the corporate group where the benefit from the cartel cannot be determined
- The maximum civil penalties proposed are:
 - for individuals \$500,000
 - for corporations as above



Criminal sanctions – ACCC's investigatory powers

- Civil investigation
 - ACCC can use s 155 powers to compel the production of documents, information and compel attendance at interviews – no privilege against self incrimination but results not admissible in evidence against individual in criminal proceedings
 - Legal professional privilege applies
- Criminal investigation
 - search warrant under Crimes Act but note that there are restrictions on using information obtained under a warrant in civil proceedings but privilege against self incrimination applies for natural persons
 - Legal professional privilege applies
 - Other powers likely, eg telephone interception powers and other surveillance powers



Criminal Sanctions – Implications

- Criminal sanctions raise the stakes significantly for cartel conduct
- Criminal sanctions are likely to result in greater use of “dawn raids” by the ACCC with search warrants
- Race for the confessional - the risk of jail terms creates a significant incentive for cartel members to break ranks and self-report their involvement in a cartel
- To preserve the benefits of an effective leniency program, new criminal cartel immunity program will be introduced for the DPP based on existing ACCC program:
 - To qualify for criminal immunity, the applicant must
 - be first in the door
 - not have been a clear individual leader in the cartel
 - not have coerced anyone to join the cartel
 - fully cooperate with the ACCC and give evidence if necessary
 - Very little guaranteed benefit for the second in the door



Section 3: Misuse of market power

Misuse of market power (update)
Pricing below cost (predatory pricing)

The Australian Financial Review
www.afr.com • Tuesday 4 March 2008

11+

Wanted: pricing predator for test case

Matthew Drummond

Controversial new predatory pricing laws had not caused the sky to fall in, the Australian Competition and Consumer Commission said yesterday.

But businesses looking for guidance as to what the new laws actually mean will be waiting a while, and may have to look further than the ACCC.

Chairman Graeme Samuel said the commission was looking for a potential case of predatory pricing so it could test the new laws in the courts, but nothing suitable had appeared.

"As soon as we believe we have a strong case we will not hesitate to take it before the courts in the interest of making these laws work, but as yet our investigations have not led us to such a strong case," he told a conference in Brisbane.

The new laws are aimed at stopping companies with substantial market share from anti-competitive, below-cost pricing.

They have created uncertainty about the legality of aggressive discounting. Federal Labor, which criticised the changes when they were rushed through parliament last



Watching . . . chairman Graeme Samuel says the ACCC has yet to find a predatory pricing test case.

Photo: JOSH ROBERTSON

September, is monitoring their impact. But Mr Samuel said the impact so far appeared to be minimal.

"It is worth noting at this stage that, several months in, the sky is yet to fall in on discounting in Australia," he said.

"Predictions from Woolworths and others that an army of lawyers would be needed to work out whether bread could be discounted at the end of the day does not seem to have caused an immediate shut-down of specials at large retail and grocery chains.

"Indeed, the fear of being hauled before the courts for predatory pricing didn't seem to put a stop to the annual post-Christmas sales that shoppers enjoy every year."

Mr Samuel also said it should not be assumed the ACCC would bring the first test case, as businesses

affected by predatory pricing were able to bring their own suits.

But the chairman of the National Association of Retail Grocers of Australia, which represents independent retailers, said a test case was beyond the means of small businesses and it was incumbent on the regulator to move first.

John Cummings cited a recent case of misuse of market power in which Woolworths was found to have bullied bakers into not discounting their bread to rival supermarkets. The case took eight years and everyone involved, except Woolworths, was now out of business, Mr Cummings said.

"Why would a small business start proceedings when there's no guarantee they will still be in business by the time the judgement comes down?"

Separately, the ACCC accepted a court-enforceable undertaking from ASX-listed music retailer JB Hi-Fi, settling an investigation into whether it broke the law by encouraging a Ballarat music retailer to close before it opened its own store. It is the second time JB Hi-Fi has been investigated by the ACCC in just over two years.



Misuse of market power – existing prohibition in s 46

- It is illegal for a company with:
 - a substantial degree of power in any market
 - to take advantage of that power
 - for a prohibited anti-competitive purpose
- Prohibited anti-competitive purposes:
 - to eliminate or substantially damage a competitor in any market
 - to prevent someone entering any market
 - to deter or prevent competitive conduct in any market
- Examples:
 - refusals to deal, eg refusal to supply by a monopolist
 - predatory pricing – low prices designed to drive out competitors (but only contravention if take advantage of substantial power)



Misuse of market power – new prohibition in s 46

- Recent amendment to the TPA – the Birdsville Amendment
 - motivated by a concern that s 46 was not effective in protecting small business from predatory conduct by large business
- It is now illegal for a company with:
 - a substantial share of the market
 - to supply goods or services for a sustained period
 - at a price that is less than the relevant cost
 - for a prohibited anti-competitive purpose
- Prohibited anti-competitive purposes remain the same:
 - to eliminate or substantially damage a competitor in any market
 - to prevent someone entering any market
 - to deter or prevent competitive conduct in any market



Misuse of market power - supply below relevant cost

- What is a “substantial share” of a market?
 - not insubstantial / not insignificant
 - court will have regard to number and size of competitors
 - could be as low as a 20% market share
- Other uncertain concepts:
 - What is “relevant cost”?
 - Parliament thinks it should be determined on a case-by-case basis
 - useful guide is the average variable cost (eg exclude overheads and other fixed costs)
 - What is a “sustained period”?
 - It will also be determined on a case-by-case basis.
Possibly as short as 4 – 6 weeks



Supply at below relevant cost

- Low risk behaviour:
 - following a competitor's price reduction to maintain volume or share
 - pricing that covers all reasonable measures of cost
- Make sure pricing decisions are not for a prohibited purpose:
 - eliminate, prevent or deter competitors
- Seek advice if a drop in prices might be alleged to be motivated by:
 - responding to a market entrant
 - targeting and damaging a particular existing competitor's business
 - preventing a competitor from being able to behave competitively (eg, product bundling with 'loss leaders')



Hard bargains

- While WSN is subject to fierce competition, if you are driving a hard bargain keep in mind that you must not:
 - misuse any market power that WSN may have; or
 - supply WSN products or services below cost for a prohibited purpose.
- Hard competition is fine, but taking advantage of market power or supplying WSN services below the relevant cost in order to win a tender or a customer is risky and you should get advice in any such situation.