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CARTELS, MEDIA AND TELECOMMUNICATIONS - THE RAPIDLY CHANGING FACE OF AUSTRALIAN COMPETITION REGULATION

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[Australia's Trade Practices Act is a piece of legislation that is constantly evolving to deal with the constantly evolving processes and practices of business – good and bad. Regardless of whether the country's main telecommunications company, Telstra is privatised, or whether we get one or a hundred new TV channels or even abandon our TV sets for computer screens, the Trade Practices Act will continue, as it has done now for 30 years, to evolve with the economy to continue to protect and promote competition for the good of the Australian people.]

I INTRODUCTION

The *Trade Practices Act 1974* (Cth) is a piece of legislation that is constantly evolving to deal with the constantly evolving processes and practices of Australian business – good and bad. In just the last decade we have seen the extension of the Act to previously off-limits or protected areas of the economy, including the professions, public utilities and agricultural marketing boards, as a result of the Hilmer Report

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and a number of court rulings. We have seen merger law altered from a dominance test to the much lower threshold of substantial lessening of competition, the extension of competition law and its principles to intellectual property, and the protection of small business from unconscionable conduct. It's a process that is never ending. This year alone, for example, we will also see:

- legislation introduced that will outlaw two part pricing, so that airlines travel agents and others can no longer quote prices plus tax.
- the establishment of a single, consistent and independent energy regulator within the ACCC – the Australian Energy Regulator
- the introduction of much tougher penalties for cartel conduct, including, for the first time, criminal sanctions for hard core cartels.

I won't have time tonight to go into all of the changes, both recent and forthcoming, that will impact on competition regulation so I will concentrate on three areas which are likely to have the greatest impact in the near future – cartels, telecommunications and media.

II CARTELS

The Australian Competition and Consumer Commission's position on cartels is very clear – cartels are a cancer on the Australian economy. They involve companies that should be competing with each other instead agreeing to fix prices, divide up markets, allocate particular customers or contracts, or restrict supplies to drive up prices.

In doing this they not only break the law but steal millions of dollars from business, from taxpayers and ultimately from you and me as consumers through higher prices and or reduced services. Prior to the introduction of the *Trade Practices Act* in 1974, Australia's relatively small and closed economy was riddled with bid-rigging, cartels, price fixing, anti-competitive practices and deception in marketing and advertising. But the Act was a huge shake-up for many business figures who saw it as the absolute antithesis to the way they thought business should be done in Australia – colluding with competitors on price and markets and being protected from foreign and domestic competition by government regulation. However, simply introducing legislation outlawing something does not automatically wipe out the problem. There are still people prepared to try to break the rules, to collude with competitors and divide up markets so they can stifle competition and inflate profits. Just look at the damage done in Australia from these three cartels before they were detected and busted by the ACCC.

- From the 1970s until the early 1990s, three express freight companies, which controlled 90 per cent of the Australian market worth between \$1 billion and \$2 billion per year, fixed prices and divided up the market to protect themselves from competition. If a customer switched companies, on occasions they even went so

far as to deliberately lose or damage freight to encourage their return to the original carrier.

- From 1989 to 1994 a Queensland pre-mixed concrete cartel divided up between them the sale of \$1.1 billion worth of concrete. Over the course of more than 50 meetings the cartel participants fixed prices and agreed not to compete on specified major projects. They even engaged an accountant to monitor market shares to ensure no-one 'cheated' on the illegal fix.
- The Queensland fire protection cartel, which ran for 10 years until 1997, rigged contracts worth more than half a billion dollars across almost the entire fire alarm and fire sprinkler installation industry in Brisbane. The participants referred to the regular meetings they held to fix tender prices as the 'Coffee Club'.

The problem was that until now, there was a risk that the maximum penalties available to us - \$500,000 for an individual and \$10 million for a corporation - were not a sufficient deterrent. However, I'm pleased to say that in the very near future the risk benefit analysis for Australian businesses contemplating involvement in a cartel is about to get much tougher.

No longer will the assessment be "will the gains from this cartel outweigh the financial penalty if I'm caught?" Soon, it could well be "is my involvement in this cartel worth a lengthy jail term?" Under the new regime, the maximum penalties for the offence will be a term of imprisonment of five years and a fine of \$220,000 for individuals and a fine for corporations that is the greater of \$10 million or three times the value of the benefit from the cartel, or where the value cannot be determined, 10 per cent of annual turnover. But there's always the danger that financial penalties will simply be passed on to shareholders, and those levied on executives will be picked up by shareholders. Imprisonment has no such qualifications – it is a penalty for which no company or shareholder can be forced to pick up the cost. Jim Griffin, who recently retired from the position of Deputy Assistant Attorney General of the US Department of Justice Anti-trust Division, told Commission staff that in his 25 years prosecuting cartels he had listened to many accused say they would gladly pay a higher fine to avoid imprisonment but he had never once heard anyone offer to spend extra days in jail in exchange for a lower penalty recommendation.

To illustrate he spoke of a senior executive who explained that: "So long as you are only talking about money, the company can at the end of the day take care of me – when you talk about taking away my liberty, there is nothing that the company can do for me." The fact is, cartel behaviour is a form of theft and little different from classes of corporate crime that already attract criminal sentences.

However, it is not always perceived this way. In his judgment in the *Transformers* matter,¹ Justice Finkelstein articulated this point well, saying:

¹ ACCC v ABB Transmission and Distribution Limited, (No. 2) [2002] FCA 559.

Generally the corporate agent is a top executive, who has an unblemished reputation, and in all other respects is a pillar of the community. These people often do not see antitrust violations as law breaking. ...[T]here is a great danger of allowing too great an emphasis to be placed on the “respectability” of the offender and insufficient attention being given to the character of the offence. It is easy to forget that these individuals have a clear option whether or not to engage in unlawful activity, and have made the choice to do so.²

The introduction of criminal penalties for cartel type behaviour will put an end to this notion, and send a very clear signal that this is criminal behaviour that is totally unacceptable in our modern, open and competitive economy. Of course, such penalties only apply if you are caught, but anyone who has paid even the smallest attention to the Australian media in recent months will know that is now a very real risk.

- Just last month eight petrol companies in regional Victoria were fined \$22.5 million for their involvement in a long-standing arrangement to fix retail petrol prices. Eight executives were also fined a total of more than \$800,000, with two executives being fined \$200,000 each for their involvement in the conduct.
- George Weston Foods – where a former divisional chief executive telephoned a competitor seeking to fix the wholesale price of flour. Even though the competitor did not agree to the scheme, the intent alone was enough to earn George Weston a \$1.5 million fine. We were alerted to this failed scheme via an anonymous tip-off.
- Metro Bricks, which agreed in phone calls and meetings with its rival Midland Bricks simultaneously to lift the price of bricks by three per cent, and set a floor price for tender pricing for major builders (in Western Australia). Metro bricks was penalised \$1 million.

The first two cases were exposed by whistleblowers, while the brick fix was exposed when Boral, the parent company of Midland, voluntarily came to the ACCC to take advantage of our leniency policy. In so doing, Midland escaped financial penalty while its co-conspirator copped a \$1 million fine. Under the leniency policy, the ACCC offers:

- automatic immunity from ACCC initiated proceedings, where the leniency applicant is the first to disclose the existence of a cartel of which we were previously unaware; or
- automatic immunity from pecuniary penalty, where the leniency applicant is the first to make an application for leniency in rela-

² ACCC v ABB Transmission and Distribution Limited (No. 2), [2002] FCA 559, at [28].

tion to a cartel of which the ACCC was aware, but for which we had insufficient evidence to commence court proceedings.

But the leniency policy comes on conditions – it is only available if those seeking leniency:

- give full and frank disclosure, co-operating fully, expeditiously and continuously with the ACCC,
- cease involvement in the cartel;
- were not the instigators of the cartel, nor have coerced others into participating in it; and, importantly,
- were first through the door.

So, the policy makes cartel lawbreakers and their executives an offer to cease the unlawful conduct and report it to the Commission. In return they receive a clear and certain offer of leniency. Their evidence then exposes others involved who will be investigated and, if the evidence permits, brought before the courts. But only if they were the first to expose the cartel, or the first to come forward once the ACCC began its investigations. While those companies that are penalised may regard this as unfair, Australian courts accept the principle that those who are the first to expose a cartel deserve more lenient treatment. In the December 2003 *Tyco* case,³ Justice Wilcox noted:

It is sufficient to say that, because of the existence of the leniency agreement, there can be no valid argument for parity in outcome as between *Tyco* and *FFE*. If this approach leads to a perception amongst colluders that it may be wise to engage in a race to the ACCC's confessional, that may not be a bad thing.⁴

Last year we witnessed a pretty good example of that race to the confessional from companies in one alleged cartel we had under investigation. As the solicitor acting for one of a number of (too late) leniency applicants wryly observed: “What you’re telling me is that the leniency carrot has already been eaten.” The leniency policy is proving extremely successful in stripping away the secrecy from cartels with the ACCC now having received 14 applications from cartel members keen to blow their whistle on their co-conspirators. This is a pretty powerful deterrent to the formation of cartels, as it makes cartel members aware that no matter how good they are at covering their tracks and keeping their deliberations secret, there is now the ever present threat that one of their co-conspirators will turn them in.

³ Australian Competition and Consumer Commission v. FFE Building Services Limited, [2003] FCA 1542.

⁴ Australian Competition and Consumer Commission v. FFE Building Services Limited, [2003] FCA 1542, at [29]-[30].

III TELECOMMUNICATIONS - THE ACCC'S ROLE

Judging by media coverage, there is probably no area of competition regulation that is more in the public eye at the moment than telecommunications. I should say at the outset that the ACCC is agnostic when it comes to the privatisation of Telstra. Whether Telstra is completely, partially or not at all in government ownership is entirely a matter for Parliament. Regardless of the ownership structure, the role of the ACCC is to, as far as possible, protect and promote competition in telecommunications. Significant competition in telecommunications only began in 1997 but even in the short time since, few would dispute the benefits that have flowed to consumers, business, and more broadly the Australian economy:

- Average real prices for standard fixed line services fell by around 18% between 1997-98 and 2002-03; and
- The range and quality of products and services offered to customers has improved substantially.

But the initial benefits of competition in telecommunications were largely due to competitors simply reselling access to Telstra's network at a cheaper rate to drive down costs. Only in areas like corporate markets and mobile services have we seen more sustainable competition – and even that is still somewhat patchy in terms of service offerings and geographic reach, particularly for residential consumers. Notably, though, these more competitive markets are those in which Telstra's rivals have competed not just on price, but have installed their own equipment and built their own networks. But the overriding issue in this industry is the fact that Telstra continues to be the sole provider of a ubiquitous local access network connecting virtually every home and business in the country. Consequently, even in the more competitive markets those seeking to compete with Telstra often have a continuing reliance on some form of access to its network.

So to date, the bulk of the ACCC's activities in telecommunications have been directed towards ensuring that competitors are able to get access to Telstra's existing copper telephone wires, where they need it, at reasonable prices and on reasonable terms. And when there is a seriously anti-competitive act, we can respond quickly by issuing a competition notice which says in the clearest possible terms "this conduct is unacceptable". The most obvious example of this is the broadband Competition Notice we issued against Telstra after it announced significant price reductions for its retail broadband services in February last year, without any reductions in its wholesale prices for its competitors. Following initial action by the Commission, Telstra reduced some prices for its wholesale services. However, as these reductions did not go far enough, the Commission issued a Competition Notice in March 2004, stating that Telstra had engaged, and was engaging, in anti-competitive conduct. Following further subsequent reductions in Telstra's wholesale prices – the most recent of which came into effect at the start of this year – the Commission revoked the Competition Notice in February. Whilst the extent of these wholesale price reductions would have varied between carriers, it generally

cut wholesale rates by about a third and has prompted an unprecedented surge in the number of people signing up to broadband services in Australia.

Our most recent *Broadband Snapshot* reports that broadband take-up exceeded 1.5 million at the end of 2004. This is an impressive 120 per cent increase in the take up of broadband services in just 12 months. Importantly, this growth was shared by both Telstra and its wholesale competitors. Information available to the Commission through its *Broadband Snapshot* suggests that there was no significant long-term increase in Telstra's retail market share and would indicate that Telstra did not benefit directly from its conduct.

Some of the mechanisms available to us to promote competition are reasonably effective, some less so. Access regulation does provide better incentives for infrastructure owners to reach commercial agreements with those seeking to use the infrastructure, but it can be a lengthy process, as was demonstrated with the broadband issue we took 12 months to resolve, and subject to game-playing. But the most significant impediment to promoting competition under Australia's existing telecommunications regime is the lack of transparency.

Being unable to determine the way that Telstra's retail and wholesale operations interact makes it difficult for the ACCC to detect if anti-competitive behaviour is occurring, and to obtain the information necessary for carrying out other regulatory functions. The ACCC is therefore strongly supportive of the concept of "operational separation". Under the proposals, Telstra's wholesale and retail arms would remain under the one owner, but there would be a clear internal separation between a 'retail business' supplying services to end-users, and a 'network business' supplying wholesale services to both the Telstra retail business and its competitors. These two sectors would be required to deal with each other on a commercial, arms-length basis and maintain fully separate accounting systems and staff.

IV FACILITIES-BASED COMPETITION

The other key to increasing competition and reducing regulation in telecommunications is for competitors to invest in their own infrastructure. An example of this is mobile phones. I won't say these markets are perfectly competitive but there are 4 players with networks out there – Telstra, Optus, Vodafone and Hutchison - which creates the environment for much more effective and sustainable competition, and much less regulation. It's this degree of infrastructure competition that the ACCC would like to see between fixed-line networks and I strongly believe emerging technologies are increasingly the answer for those looking for alternatives to Telstra's network. Wireless local loops are one new model being pursued. Another critical development is the increasing availability of much higher capacity ADSL2+ broadband which will have the capacity to deliver DVD quality live broadcasts over the internet. Another new technology is fibre, all the way to customers' premises. I notice the National Party has recently been calling for a feasibility study into the costs involved in rolling out a national fibre network. There can be no harm in seeing the outcomes of such a study. But it is worth remembering where the action is at the moment - BigPond has just announced annual growth of 140% in the

number of retail customers getting ADSL broadband on the existing copper network.

The ACCC's broadband report to December 2004 showed the total DSL market growing at 160% over the previous twelve months. By contrast, broadband over HFC cable grew at a relatively modest 61%. And this is all costing a fraction of the "tens of billions of dollars" Telstra's Bill Scales last month told a Senate Committee it would cost to roll out a fibre network to more than 90% of homes. While declines in the number of line rentals have been touted by some as a sure sign of the switch from fixed to mobile telephony, it is quite possible that it is more reflective of a switch from dial-up internet access to broadband, and a corresponding reduction in the number of homes with a second line.

And this is where telecommunications regulation meets possible media deregulation. Although convergence between telecommunications and media is often talked about, some may not find this an obvious leap. Media regulation is about who may control the newspapers; free to air and subscription TV channels and radio stations used to convey news and entertainment – the content – to individuals and households. As we get greater competition in the ways in which content can be delivered to our homes, the more important issue will become the control of the production and distribution of the content itself. As Rupert Murdoch said in his speech to the American Society of Newspaper Editors in April 2005:

What is happening is, in short, a revolution in the way young people are accessing news. They don't want to rely on the morning paper for their up-to-date information. They don't want to rely on a God-like figure from above to tell them what's important. And to carry the religion analogy a bit further, they certainly don't want news presented as gospel. Instead, they want their news on demand, when it works for them. They want control over their media, instead of being controlled by it.⁵

V MEDIA DEREGULATION

Whatever changes are made to the laws controlling media ownership or broadcasting spectrum, such as, for example whether or not more than three commercial free to air TV channels are to be permitted, is entirely a matter for the Australian Parliament. But in my view, speculation about possible consequences from the scrapping or easing of the current cross-media ownership rules is missing the point. Relative to most industries, the Australian media is highly regulated. Protection of the free-to-air television networks is the cornerstone of this regulation, on the grounds that it ensures diversity in the services available to Australians at large. There is an outright prohibition on new entry into free-to-air television markets. Existing free-to-air broadcasters also have first rights of refusal over the most popular sporting content, with competition from pay-TV precluded by anti-siphoning legislation. Other potential competitors have spectrum available, but are

⁵ Available at: <http://www.newscorp.com/news/news_247.html> (last accessed: 17 September 2005).

defined as data-casters and subject to extensive limitations on the types of content they can offer. On the flip-side, there is a prohibition on free-to-air broadcasters using currently available technology and spectrum capacity to start multi-channelling; that is, offering additional channels and choices to consumers, either on a subscription or free-to-air basis. This lessens the competitive pressures faced by pay-TV providers. But these protective regulations are dependent not only on continuing government support, but on the maintenance of the existing top down structure of the Australian media, and it's now clear the environment is ripe for change.

Over the next 10-15 years it's likely most home will have super-fast internet access over powerlines, wireless networks, satellites or optic fibre, through which we will receive phone calls, video calls, information, IPTV, music, movies, games, TV on demand and home videos. Personal Digital Recorders and TV downloads will make it effortless for us to pick and choose the programs we want to watch, and when we watch them. Media research has found that some 80% of the programs we watch are pre-recorded, so in the future high-capacity devices will be required for consumers to store their preferred viewing. Our 3G/4G/5G mobile phones receive maps, transport information, music, email, all available at the touch of a finger. Online advertising will continue its strong growth. Classifieds will be searchable anywhere, any time, on the mobile phone, TV, computer. Maybe they will still be printed in the newspapers, maybe not.

This revolution seems inevitable. So it is pretty clear that the internet will be a key driver of the next wave of competition to the current media players, and the markets we have traditionally defined as 'media' will change. And the possibility is there for not one, but hundreds of new competitors to today's broadcasters. What does all this mean for the free-to-air and subscription broadcasters of today? What does it mean for newspapers and radio? And what does it mean for current regulation of the media?

Unlike traditional media, the emerging online players are not subject to substantive limitations on content, ownership, geography or anything else. They can pick and choose the audiences they target, the content they buy, and the way they provide it, in much the same way that other businesses face a myriad of commercial choices. Therefore, a crucial factor for the success of any ventures using these new technologies will be content rights, and control of premium sporting content, such as AFL, rugby, rugby league, cricket and tennis, could be pivotal. As such, it is essential that no single network owner acquires exclusive rights to all that content and effectively locks out the potential competition. There is a risk that the exclusive acquisition of such rights for new and emerging markets like DSL broadband and 3G mobiles will allow the rights-holders to shut out competition across a range of services delivered over these new networks. Ultimately, this could deprive consumers of choice and quality not only for broadcasting, but also voice, internet and innovative services such as video calls and determine the success or failure of a new competitor. I like to put it this way: if you can't control the arteries, what you do is get hold of the blood.

The *Trade Practices Act* has always recognised the potential for exclusive contracts to be anti-competitive. Section 45 of the Act prohibits companies from entering any arrangements that result in a substantial lessening of competition. Section 47 of the Act is even more explicit: exclusive dealing that causes a substantial lessening of competition is illegal. It is perhaps too early to judge how rights will be divided up, or whether the bundle of content that is compelling on your TV is the same as the bundle that is compelling on a mobile phone. But the ACCC will continue to closely scrutinise the acquisition of exclusive rights to content to ensure that no carrier is able to use them to create a major barrier to entry into infrastructure markets. And we will continue to engage with the key industry players to hear their views on these trends in the market-place. So the relationship between content and new networks is one area in which the ACCC may have an involvement in media markets. But as the regulator charged with protecting and promoting competition, in telecommunications specifically but more importantly in the economy as a whole, the ACCC has another substantial role.

VI MEDIA MERGERS AND SECTION 50

I refer, of course, to section 50 of the *Trade Practices Act*, which prevents mergers or changes in ownership between two or more entities which result in a substantial lessening of competition. It is the very strong view of the ACCC that regardless of whatever changes are made to media ownership laws, Section 50 should continue to preserve competition in the media by preventing undue concentration or accumulation of market power which would result in higher prices or lower quality service for consumers. The traditional view on media markets was that print was print and electronic was electronic and if print acquired electronic then it didn't involve a greater concentration. However, we're now doing a lot of research on how you define media markets and the more research we do the more it confirms my initial assessment that convergence is making those traditional definitions of media markets largely irrelevant. In the future a media market might be defined by the content, such as, for example, classified advertising, or even just employment advertising, rather than the medium used to convey the content. A substantial lessening of competition in any one market could raise implications under Section 50 and be possible grounds for us to intervene.

Now, some have suggested this would amount to a de facto cross media ownership rule. This is entirely false. It is no different from the way competition law applies to every other industry, and there is no reason why it should not apply to the media. While we may focus on a market such as classified advertising this could be classified advertising provided through the print media, internet, mobile phone, TV, etc. The content delineation of a market may be narrower but there could be many more mediums used to convey that content than has been the case in the past.

The way in which media markets are defined will inevitably change. The impact of convergence and technological developments on media market dynamics and market definitions may be much sooner than many might expect – indeed it could be happening already. As I've made clear today, it is not the job of the ACCC to decide whether it is better for people to access their news and entertainment through the

TV, or broadband or fibre or wireless or even through the mobile phone. But it is our job to ensure that existing players not be allowed to use their market power to close down new forms of competition, and that, as far as possible, it be left to consumers to decide what form this revolution takes and what services and content they wish to access.

VII CONCLUSION

When the *Trade Practices Act* was enacted in 1974, colour television hadn't even been introduced, the PMG still ran our phone system, government legislation ensured the only choice of flight you had was whether the livery was red or blue and many companies thought that ringing your rival to fix prices was a perfectly acceptable way of doing business. The economy is unrecognisable from that era of high protection, regulated exchanges and interest rates and high tariff walls, yet the *Trade Practices Act* not only survives, but continues to be an extremely powerful weapon against misleading, deceptive and anti-competitive conduct. As I said at the outset, this is because the *Trade Practices Act* is a piece of legislation that is constantly evolving to deal with the constantly evolving processes and practices of business – good and bad. That's why I am confident that regardless of whether Telstra is privatised, or whether we get one or a hundred new TV channels or even abandon our TV sets for computer screens, the *Trade Practices Act* will continue, as it has done now for 30 years, to evolve with the economy to continue to protect and promote competition for the good of the Australian people.