Enforcing Competition Law In An Online Environment: A Regulator’s Perspective

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Overview

The ACCC: Who We Are & What We Do

1. Mergers & Acquisitions

2. Resale Price Maintenance

3. Misleading & Deceptive conduct

4. Scams

5. Franchising

6. SME Engagement & Advocacy

Conclusion
The ACCC: Our Role

• National regulator: oversees laws on consumer protection, equitable competition, product safety, infrastructure access
• Also regulates some specific industries (such as energy, telecommunications), industry codes (franchising, horticulture) and price monitoring (airports, postage, stevedoring)
• An independent statutory agency within the Treasury portfolio
• Court-based enforcement of the law
• Dual educative and enforcement function
• Provides warnings and advice about scams Scamwatch.gov.au
• Enforcement agency…does not set policy
Legal Framework

- *Competition & Consumer Act 2010*
- Includes the Australian Consumer Law
- Laws apply across the country
- Apply to all activities “in trade or commerce” – legal structure is usually irrelevant
- Covers both goods and services
- Activities of government often exempt
- ACCC cannot impose penalties: court-based litigation (but can issue infringement notices)
- Mandatory codes of conduct prescribed under the Act (Franchising Code)
Total Number of Firms: Australian Business Pyramid

Source: Australian Bureau of Statistics (2016), *Counts of Australian Businesses, Including Entries And Exits*, Cat.no.8165.0, Canberra, Table 13 2014-2015
Australian Small Businesses & e-Commerce

- 51% take orders online and 67% receive payments online.

Top 3 reasons SMBs take up e-commerce:
- 79% To provide better customer service
- 60% To promote business more effectively
- 58% To improve delivery

Where do SMBs sell?
- 85% make local sales with 67% saying most of their sales are local
- 47% make interstate sales
- 25% make overseas sales
- 11% are specifically targeting international customers

A Region of SMEs

Viet Nam: 320,000 (97%)
Brunei: 5,000 (98%)
Indonesia: 57,000,000 (99%)
Malaysia: 645,000 (97%)
Philippines: 937,000 (99%)
Singapore: 187,000 (99%)
Thailand: 2,760,000 (97%)
Australia: 2,100,000 (99%)
New Zealand: 460,000
1. Mergers & Acquisitions

- Central issues for merger analysis: product dimension, geographical dimension, counterfactual (“with and without test”)
- Much more difficult online: Is geography still a valid tool? What happens if potentially all customers around the world could be clients? How to compare new business models to old ones (Uber v. taxis)? How to effectively measure market shares?
- EG: 2014 purchase of Wotif by Expedia
- EG: 2016: purchase of Sunday Times newspaper by rival The West Australian (Seven West Media)
2. Resale Price Maintenance

A supplier may recommend resellers charge an appropriate price but they can’t stop you discounting or advertising below that price. RPM is a per se offence in Australia.

In 2015, the Federal Court ordered online retailer Omniblend Australia Pty Ltd to pay a $17,500 penalty.

OmniBlend attempted to stop a competitor from discounting the prices of OmniBlend blenders and refused to supply the blenders to the competitor unless it stopped discounting.

There is nothing wrong with using a supplier’s recommended resale price (RRP) list so long as it is just that—recommended.
3. Misleading & Deceptive Conduct

Two fundamental rules apply:

1. Don’t engage in conduct likely to mislead or deceive
2. Don’t make false or misleading claims or statements

- The **overall impression** created is important
- Don’t rely on fine print exceptions
- Reviews must be honest & accurate
- Same rules apply online and in-store
- Difficult for consumers to verify the truth

**PENALTIES**

- **Misleading or deceptive conduct:** injunction, damages
- **False or misleading misrepresentations:**
  - Up to $1.1 million for corporations and $220,000 for individuals
In May 2016, Kingdom Groups International Pty Ltd paid a penalty of $10,800 after the ACCC issued an infringement notice.

Statements and images on the website represented the Aries Sheepskin boots were manufactured in Australia, when they were made in China.

The website showed the Australian Made logo attached to footwear and said manufactured in ‘Junee, Canberra, Australian Capital Territory’.

Claims or representations using words, images or logos must be clear, accurate and truthful.
Comparator Websites Are Often Prone To Misleading & Deceptive Conduct

- May not cover all the industry (or even most of it)
- May receive remuneration for recommending some sites
- Ratings may be based on very small samples
- Ratings may be open to all (including competitor businesses), not just actual users

In 2014, Compare The Market Pty paid an infringement notice penalty of $10,200 in relation to advertising claims. Compare The Market said they “Compare more health funds than anywhere else” when there were two other websites that compared more funds.
Online Reviewing Systems Can Be Skewed Or Gamed...

90% of businesses agree “negative reviews or social media drive us to take complaints more seriously”. Manipulated reviews effect competition.

The ACCC alleges Meriton took steps to prevent guests it suspected would give a negative review from receiving TripAdvisor’s ‘Review Express’ email
Sharing Economy

The sharing economy provides consumers with increased choice and offers individuals new ways of generating income.

The ACCC has published guidance for

• platform operators
• consumers, and
• Private traders

These roles are interrelated and it is important that each understand their legal obligations under the Australian Consumer Law.
4. Online Scams

June 14, 2016
Alert Number I-061416-PSA

Questions regarding this PSA should be directed to your local FBI Field Office.

Local Field Offices: www.fbi.gov/contact-us/field

UNCLASSIFIED

Public Service Announcement
FEDERAL BUREAU OF INVESTIGATION

BUSINESS E-MAIL COMPROMISE: THE 3.1 BILLION DOLLAR SCAM
This Public Service Announcement (PSA) is an update to the Business E-mail Compromise (BEC) information provided in Public Service Announcements (PSA) 1-012215-PSA and 1-082715a-PSA. This PSA includes new Internet Crime Complaint Center (IC3) complaint information and updated statistical data.

DEFINITION
BEC is defined as a sophisticated scam targeting businesses working with foreign suppliers and/or businesses that regularly perform wire transfer payments. The scam is carried out by compromising legitimate business e-mail accounts through social engineering or computer intrusion techniques to conduct unauthorized transfers of funds.
Business Email Compromise Scams

How it works

1. Scammer gets access to company’s email system via virus or phishing attack
2. Scammer sends email from ‘the boss’ advising a financial officer of an urgent $ transfer
3. Scammer pressures the officer to quickly wire $ to strike a major deal
4. Money sent is lost for good

Protect your business

1. Install and update security software
2. Advise payments staff to be suspicious of requests for secrecy to transfer money
3. Put in place sound financial security procedures including a two-step verification process for wire transfer payments

Scammer pressures the officer to quickly wire $ to strike a major deal

Money sent is lost for good
Current Scam: Domain Name Renewals

Looks like a renewal invoice, but it is a solicitation for registering a new (very similar) domain name. (eg .com or net.au rather than com.au).

- Limit the number of people authorised to make orders or pay invoices
- Have clearly defined procedures for the verification, payment and management of accounts and invoices
- Check if an Australian .au domain name provider is legitimate and accredited by visiting the auDA website www.auda.org.au
5. Franchising & E-Commerce

Number of franchise systems and franchisees is still low across the Asia-Pacific region.

Significant potential exists for future growth of franchising in most countries.

Major growth tool for entrepreneurial SMEs with proven products/services
Countries with Specific Franchise Laws
January 2016

Blue = Disclosure Law
Green = Relationship Law
Red = Disclosure & Relationship Laws
Black = Other

The Americas
Antigua and Barbuda
Argentina
Barbados
Brazil
Canada
   Alberta
   British Columbia
   Manitoba
   New Brunswick
   Ontario
   Prince Edward Island
Mexico
United States
   Federal
   Several States
   Several States
   Several States

Within EU
Belgium
Estonia
France
Latvia
Lithuania
Italy
Romania
Spain
Sweden

Western Asia
Azerbaijan

Central Asia
Mongolia
Kazakhstan
Kyrgyzstan
Turkmenistan

Asia
China
Japan
Macau
South Korea
Taiwan
Vietnam

Non-EU
Albania
Belarus
Georgia
Moldova
Russia
Ukraine

South Pacific
Australia
Indonesia
Malaysia

Africa
South Africa
Angola
Tunisia

Does Not Include:
- Codes of conduct which do not provide for governmental or private enforcement, even if promulgated under governmental authority.
- Bodies of law (e.g. commercial agency, distributorship, competition, intellectual property, etc.) which may also cover franchising.
- Registration requirements that exist in many countries under various laws (e.g., franchise, foreign exchange, intellectual property, competition, etc.).
What Is The Future Of Franchising?

The traditional franchising relationship

Franchisor is a wholesaler/distributor, not retailer

Defined geographic territories

Franchisees have exclusive rights to sell to customers in their region

Customers can only buy from one franchisee
But What If This Occurs?

**Online franchising relationship**

Franchisors can sell directly to customers at minimal cost

Customers can choose who they buy from

Exclusive rights to a franchise territory have limited value
6. Advocacy, Outreach & Engagement

- Allows faster, wider, cheaper communication with SMEs
- Common tools: websites, apps, social media
- Most SMEs now use online services (Google) as first source of advice for competition law
- Most SMEs also prefer to receive information electronically (URLs, PDFs, etc)
- Online education tools very popular in Australia
- Problems: no face-to-face contact; not everyone is online; websites often difficult to navigate; not all regions have easy internet access in ASEAN
- 2016 Australian Consumer Survey: Key Business Findings
What Do SMEs Typically Want To Know About Trading Online?

- Is my competitor making false claims?
- How should I display my prices?
- What are my refund obligations?
- Who’s responsible for product safety?
- How do I avoid getting scammed? Is this request for payment real?
- How should I handle online reviews?
Sources of information and advice

Information

- State regulator: 77%
- General Internet search (google it): 75%
- ACCC: 55%
- Solicitor or lawyer: 53%
- The relevant ombudsman: 48%
- Other business owners or industry peers: 45%
- ACCI: 30%
- COSBOA: 26%
- National Retail Association (NRA): 19%
- Relevant industry association: 11%
- Real Estate Institute: 3%
- ASIC: 3%
- CPA: 3%
- Master Builders Association/ MBA: 2%
- Housing Industry Association/HIA: 2%
- Other: 16%

Advice

- State regulator: 66%
- Solicitor or lawyer: 52%
- General Internet search (google it): 44%
- Other business owners or industry peers: 37%
- ACCC: 35%
- The relevant ombudsman: 22%
- ACCI: 20%
- COSBOA: 19%
- National Retail Association (NRA): 12%
- Relevant industry association: 11%
- Real Estate Institute: 2%
- Other: 20%
- Don’t know: 2%

Base: Total sample 2011 n=1,210; 2016 n=1,210

Q9. If you needed information for your business about the Australian Consumer Law, where would you seek it?

Q10. If you needed advice about your rights and obligations under the Australian Consumer Law for a particular scenario with a consumer, where would you seek it?
Preferred format for receiving information

- Electronic brochures or booklets sent via email: 57%
- Hardcopy brochures or booklets sent via post: 27% (Significantly lower amongst large business: 13%)
- Visit a specific website to access or request information: 4%
- Advertisements or announcements in industry publications/newsletters: 3%
- Advertisements or announcements in mainstream media: 2%
- Via an accountant: 2%
- Attend seminars or forums: 2%
- Other: 3%

Base: Total sample 2016 n=1,210
Q38. What is your preferred method of receiving information for your business about new laws such as the Australian Consumer Law (ACL)?
Conclusion

- E-commerce creates multiple challenges for competition regulators
- Are agencies converging or diverging in their responses? Hard to tell...
- Common approach is to modify existing regulatory arrangements, not adopt a new model
- But note national variations in regulator cultures/history, national business practices, online access
- Still very much a work in progress, especially in ASEAN
ACCC Contacts

Small business helpline 1300 302 021


Keep up to date and sign up to the Small Business Info Network
Sign up at www.accc.gov.au/sbin

Free Online Training Programs
www.ccaeducationprograms.org

Small Business in Focus