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TERCEIRO LEGAL CONSULTING Pty Ltd

Submission to the Competition Policy Review

from

Terceiro Legal Consulting Pty Ltd

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Introduction

Terceiro Legal Consulting Pty Ltd (TLC) is a small law firm, which specialises in competition and consumer law (trade practices law). TLC has been operating since 2008 and has represented numerous large and small companies and businesses in Australian Competition and Consumer Commission (ACCC) matters.

TLC's principal, Michael Terceiro, has represented clients in relation to ACCC investigations, litigation, authorizations and merger clearances. He is also a regular commentator on ACCC issues through his writing for various CCH publications, as well as in NSW Law Society Journal and the Keeping Good Companies publications.

Michael maintains a blog which aims to engage in more in-depth discussions about ACCC issues: http://competitionandconsumerprotectionlaw.blogspot.com.au.

Prior to establishing TLC, Michael Terceiro worked at the ACCC for 15 years in a variety of positions, including as:

- Director of Enforcement and Compliance in the New South Wales Regional Office
- Director (in charge) of the Sydney Mergers and Asset Sales Branch
- National GST Enforcement Coordinator and
- Director (in charge) of the ACCC's Waterfront Team during the Waterfront Dispute.

During Michael's 15 years at the ACCC, he ran and managed more than 600 separate investigations, including more than 100 merger clearances, and ran 30 court cases

Submissions

Rather than seeking to address each issue raised in the terms of reference or in your Issues Paper, I have chosen to focus on a more limited number of specific areas, which I hope will be of assistance to the Review. I have identified the relevant paragraph from the terms of reference in brackets next to each main heading.

(1) What is the truth about Section 46? (3.3)

The ACCC has been more successful in winning s 46 cases than is generally thought. The popular view is that the ACCC rarely wins such cases. This view has been given considerable credence by comments made by the ACCC, for example the following statements made by former ACCC Chairman Graeme Samuel in 2010:

> *The tests involved in proving allegations of abuse of market power have been inconsistently interpreted in the courts over recent years. As a consequence, it has become unrealistically difficult to overcome the hurdles necessary to prove contraventions of the law – resulting in few successful cases.*

This sentiment has also been echoed by the current Chairman of the ACCC, Rod Sims:

> *Further, over the years only a handful of cases under section 46 have succeeded in court. Indeed, section 46 cases are always hard fought, as major companies are necessarily involved, and they are usually defending what they may see as a key part of their business strategy.*
>
> *The guidance to be derived from case law – at least in successful cases – is relatively modest.*
>
> *So, the ACCC finds itself in the middle, with high public expectations on one side and high legal standards and few successful cases on the other.*

However, in reality the ACCC has won almost 70% of the s 46 cases which it litigated to a conclusion:

Table 1: ACCC and TPC Section 46 cases – 1974 to 2014

	Case	Year	Claims	Result
1.	CSBP & Farmers Limited	1980	ss. 45, 46	Lost
2.	Carlton United Breweries Limited	1990	s.46	Won - consent
3.	CSR Limited	1991	ss.45, 46	Won - consent
4.	Commonwealth Bureau of Meteorology	1997	s.46	Won - consent
5.	Darwin Radio Taxi Cooperative Limited	1997	s.46	Won - consent
6.	Garden City Cabs	1997	s.45, 46	Won - consent
7.	Safeway Limited	2003	ss.45, 46	Won - contested
8.	Rural Press Limited	2003	s.45, 46	Lost s.46 case but won s.45 case
9.	Boral Limited	2003	s.46	Lost - High Court
10.	Qantas Limited	2003	s.46	No result – case settled with each party bearing their own costs
11.	Universal Music and Warner Music (CD's case)	2003	s.45, 46, 47	Lost ss.45 and 46 cases but won s.47 case
12.	FILA Pty Ltd	2004	ss.46, 47	Won - uncontested
13.	Eurong Beach Resort	2005	s.45, 46, 47	Won - consent
14.	Cardiothoracic surgeons	2007	ss.45, 46	No result – s.46 claim dropped as part of the settlement
15.	Baxter Limited	2008	ss.46, 47	Won - contested
16.	Cabcharge Limited	2010	ss.46, 47	Won - consent
17.	Ticketek Pty Ltd	2011	s.46	Won – consent
18.	Cement Australia Pty Ltd	2014	ss.45, 46	Lost s.46 case, won s45 case.
19.	Visa International	2014	ss.46	Ongoing

The above table shows that since the introduction of s 46 in 1974, the ACCC, and its predecessor the TPC, instituted 19 cases alleging a contravention of s 46. Of these 19 cases, the ACCC:

- achieved successful outcomes in 11;
- lost five,
- dropped the market power allegation in one case,

- effectively had a draw in one case and
- is currently preparing the last case against Visa for hearing.

In other words, the ACCC has won 11 of the 16 section 46 cases which have gone to a final decision, a success rate of 68%. Further, the ACCC has resolved 8 of its 11 successful cases by consent, which would suggest that the ACCC is very good at "picking winners".

The real issue in relation to s 46 is not that the ACCC regularly loses such cases (which is not borne out by the numbers), but rather that it simply does not take enough s 46 cases. In the 41 years since s 46 was enacted, the ACCC (and the TPC before it) only commenced 19 cases which alleged a contravention of s 46, or only one s 46 case every two years. The ACCC should be much more active in investigating and litigating s 46 allegations - only by taking such cases will the law in relation to s 46 be clarified.

The ACCC must also make sure that when it does come across a promising s 46 case that it does not sell the case short by settling the case for an inadequate penalty. Parliament's decision to amend s 76 of CCA to introduce vastly increased penalties from 1 January 2007 for anti-competitive conduct should have made it abundantly clear to both the ACCC and the Federal Court that Parliament expects such conduct to be punished much more severely than it has been in the past.

For example, the size of the penalty in the Ticketek case is quite out of step with Parliament's intent – namely, to get serious about punishing anti-competitive conduct. Ticketek settled their section 46 with the ACCC for a total fine of $2.5 million. While Ticketek's annual turnover was not made public during the hearing, as Ticketek claimed that such information was confidential, its annual revenues were disclosed in 2007 when the organisation was still part of Publishing and Broadcasting Limited.

In 2007, Ticketek's annual revenue was reported to be $105 million. Based on this figure, it appears that the total civil pecuniary penalty of $2.5 million does not represent anywhere near 10% of Ticketek's then current annual revenues. Rather the number was likely to represent less than 2.5% of Ticketek's current annual revenue, even assuming it had experienced no revenue growth since 2007.

(2) Do we need an effects test? (3.3)

Another significant issue in terms of section 46 is whether to introduce an effects test. There has been a great deal of criticism of the requirement in section 46 that the ACCC must establish that a firm with a substantial degree of market power had a prohibited purpose. Critics claim that a competition statute should focus on the effects of conduct and not the purpose of the firm in engaging in that conduct. The ACCC is also critical of the purpose test because it claims it is difficult to establish.

It is not correct to state that the ACCC has had difficulty establishing the purpose element in the section 46 cases. In fact, the ACCC has never failed to establish the purpose element in any section 46 case which it has run. Rather the ACCC (in the relatively few section 46 cases it has lost) has failed to establish either the taking advantage element or that the relevant firm possessed a substantial degree of market power.

There are strong arguments to change section 46 to introduce an effects test. Effects tests are clearly the dominant legal test in most other leading jurisdictions, such as the US and European Community, in their monopolisation statutes. In addition, it makes more sense to try to prohibit conduct which has had a demonstrable effect on competition, rather than to punish conduct which, while aimed at lessening competition, may prove to be ultimately unsuccessful in achieving that outcome.

I think the Review Panel should recommend the introduction of an effects test to section 46. I believe section 46 should be amended to add an effects test to the existing purpose test, which will make section 46 consistent with sections 45 and 47 which both have a purpose and/or effect tests.

(3) Do we need divestiture powers? (3.4.2)

One significant issue is whether courts should be given the power to order that a firm, which has been found to have breached competition laws, be required to divest particular assets to reduce their market power.

In the United States, divestiture has long been recognised as one of the remedies which can be ordered in relation to monopolisation cases under antitrust laws. The power of US courts

to order divestiture in monopolization cases does not arise from a specific statutory provision, but rather from the court's equitable jurisdiction.

Whilst this remedy has only been sought on rare occasions in the US, there are two notable examples.

The first divestiture in US antitrust history in relation to a monopolisation case occurred in 1911 when the US Supreme Court ordered the dissolution of the Standard Oil Trust into 34 separate companies after the company had gained almost monopoly power in the US fuel industry.

The other significant divestiture case occurred in 1982 when AT&T consented to being broken up into seven regional service companies or "Baby bells" after becoming a virtual monopoly in the provision of telephony services.

These cases show that a divestiture remedy is both feasible and appropriate in situations where a company has amassed a substantial degree of market power and has used that market power to damage competition.

I think the Review Panel should consider recommending the introduction of a divestiture remedy in relation to proven breaches of section 46 of the CCA.

(4) Does the ACCC need to improve its efficiency? (3.2)

The ACCC's financial management has been under considerable scrutiny over the last twelve months. While the ACCC's initial response to these claims was that it had been given a broad range of additional functions, which had lead it to significantly overspending its budget. After further soul searching the ACCC appears to have accepted that it had to introduce substantive improvements to its operational efficiency.

The total amount by which the ACCC overspent its budget over the last three financial years is quite remarkable. As outlined in its most recent Annual Report for the 2012 – 2013 financial year, the ACCC generated the following losses over the last three years:

2012-2013 $25.9 million

2011-2012 $26 million

2010-2011 $9.3 million

These losses should be seen in the context of the ACCC's total funding, as follows:

2012-2013 $150 million

2011-2012 $151 million

2010-2011 $141 million

Therefore, the amount by which the ACCC overspent its budget over the last three financial years has increased from 6.5% of its total budget in 2010-2011 to approximately 17% of its total budget in the following two financial years.

In other words, over the last two years the ACCC has spent almost 20% more than the amount that it received from the Commonwealth Government to run its operations.

Justifications

The ACCC provided the following explanation to the Economics Legislation Committee as to why it had overspent its budget by such large amounts over the last three years:

> *(The overspend was) largely a function of the fact that we have been asked to do more. The economy is growing, so we get more mergers and we get more activity on all our fronts. We are the competition regulator, the consumer regulator, the safety regulator, we do a lot of compliance work, we deal with mergers, authorizations…*
>
> *One of the problems for us has been that we are about 60 per cent staffing and about 15 per cent legal funding. All the various across-the-board cuts that have occurred through the public sector, particularly in the efficiency dividends, have really eroded our funding base quite a lot. There is very little room to move. When you are 60 per cent staffing and then you have legal expenses and property expenses, there are very few expenses you can actually do something with.*

In other words, the main ACCC justification for the funding shortfall was that it has been given more functions than it had previously. The efficiency dividend required by the former Labor government also had a claimed negative impact on the ACCC's funding position.

The ACCC reiterated this view when responding to comments by the Business Council of Australia (BCA) about the ACCC's staffing levels. In the BCA report entitled "Improving Australia's Regulatory System", it stated that the ACCC's staffing levels had increased from 540 staff in the 2001-2002 financial year to 876 in the 2011-2012 year. The BCA commented that the ACCC's staffing levels had "outstripped the rate of employment growth across the broader economy during the same period."

The ACCC's response to the BCA was swift. The ACCC immediately issued a media release to defend its position:

> *The Business Council of Australia has today issued a report showing that the Australian Competition and Consumer Commission's staffing has increased from 540 in 2001-2 to 876 in 2011–12, or 4.95% per annum (the current number of working full time equivalent staff is actually just over 800). It seeks to make a point about the growth in regulatory spending and staff numbers.*
>
> *The ACCC's growth over this period is associated with completely new functions and responsibilities, most assumed from state regulators and other bodies. Without these additional functions, the ACCC's base line growth since 2001-2 has been 1.8% per annum.*
>
> *…*
>
> *While the underlying staff growth of 1.8% per annum is below real GDP growth, this staffing increase has had to accommodate increased roles in our core areas, such as the regulation of the NBN, the introduction of the Australian Consumer Law, the criminalisation of cartel conduct and carbon price claims, to name a few.*
>
> *Indeed, in the ACCC's core responsibilities, such as in enforcing competition law, the ACCC's staffing has likely not increased at all since 2001-2 despite the greater size and complexity of the Australian* economy.

While vigorous in its defence, the ACCC's news release was entirely disingenuous. The ACCC's response claims that it had acquired a wide range of additional functions since 2001, whilst making no mention of the significant functions which it had lost since the 2001-2002 financial year, most notably its education, monitoring and enforcement role in relation to the introduction of the GST.

The introduction of the GST in 2000 resulted in the ACCC gaining an extensive economy-wide role in providing information to businesses and consumers about the operation of the new tax, as well as a role in conducting extensive price monitoring and enforcement activities. Indeed the ACCC's role in relation to the introduction of the GST was in many respects the largest and most challenging function which the ACCC has ever been required to undertake in its history.

Therefore, it was quite inaccurate for the ACCC to claim, as it did, that the range of new functions which it has gained since 2001-2002 had lead to the steep rise in staff numbers by 62% during that period. Indeed, it is arguable that the loss of the GST function means that the ACCC now has a much less demanding role than it did in 2001.

Staffing levels

ACCC staffing levels have fluctuated over the last few years. In the 2009-2010 financial year, the ACCC had 756 budgeted staff positions but only 732 actual staff numbers. In other words, the ACCC had 24 less staff on its books than the amount for which it was receiving funding.

This situation changed quite dramatically in the next financial year when the number of budgeted positions rose from 756 to 778. Unfortunately, the actual number of staff employed at the ACCC also rose over the course of that year from 732 to 790. In other words, the ACCC hired 18 more staff than to could afford to pay, based on its budgeted numbers.

In the 2011-2012, the ACCC received funding for a record 813 staff members. This level of staff funding was only slightly above its actual staff numbers of 807 staff.

A significant reduction in budgeted staff positions occurred in the 2012-2013 financial year, when the ACCC only received funding for 745 staff, a reduction of 68 staff positions from the

previous year. It also seems that the ACCC was unable to reduce its actual staff numbers significantly in response to this reduction in its staffing budget. Despite receiving funding for 68 less staff members in 2012-2013, the ACCC was only able to reduce its actual staff numbers by nine positions. In other words, the ACCC operated throughout the 2012-2013 financial year with 53 unfunded staff members.

Interestingly, the suggestion that the ACCC had not been properly funded by the former Labor Government seems questionable given the level of staff funding provided to the ACCC in the current financial year. In the 2013-2014 financial year, the ACCC received funding for 802 staff positions which is an increase of 56 positions from the previous year, and four more positions than the ACCC's actual staff numbers in the previous year.

Management structure

One concerning aspect about the ACCC's management structure is that it appears to be remarkably top heavy. In other words, there appear to be a disproportionately large number of senior managers being paid large salaries, including significant performance pay.

For example, up until fairly recently the ACCC currently operated with one Chief Executive Officer and two Deputy Chief Executive Officers. It seemed somewhat strange for an organization with only 800 employees to effectively need three CEO's to manage the organization. Indeed, there would be very few private companies with significantly larger workforces that would need to employ three CEO's.

This situation has been remedied to some extent with the recent departure of the former CEO, Brian Cassidy.

Highly paid staff

Another concern relates to the number of highly paid staff within the ACCC. In the ACCC's most recent annual report, the ACCC listed a total of 54 staff who are classified as highly paid staff. Of these 54 staff, 49 staff were being paid in excess of $180,000 per year. In other words, over 5% of all ACCC staff were being paid more than $180,000 a year.

The annual report also showed that 14 staff were receiving salaries of between $210,000 to $239,000 per year, whilst a further 11 staff were receiving salaries of between $240,000 to $269,000 per year.

It is also apparent that the ACCC's senior executives are much more expensive than the above salary figures would suggest. In the ACCC's annual report, it records the total remuneration paid to the ACCC senior executives in the form of salary, annual leave accrued, performance pay, other allowances, superannuation and long service leave. This table shows that the ACCC's 54 senior executives cost the ACCC a total of $17,768,883 in 2013 which equates to $329,053 per employee.

This level of remuneration for the ACCC's senior executives appears to be quite excessive, particularly given that the ACCC is a public sector organization.

Performance pay

The ACCC annual report also records the total amount of performance it paid to its staff. In 2013, total performance pay of $1,185,026 was paid to 86 staff members. This equates to an average performance pay of approximately $13,800 per staff member.

While this is less than the amount of performance paid to staff in 2011-2012 financial year, which was approximately $1.3 million, one has to question whether a public sector organisation should be paying almost $1 million performance pay to its employees each year, particularly when it is generating a $17 million loss.

Consultancies

Another area which has experienced significant growth over the last three years are consultancy agreements. The ACCC disclosed in its annual report that in the 2012-2013 financial year it entered into 62 new external consultancy contracts worth a total of $4.4 million. This is in addition to 17 ongoing consultancy contracts which accounted for a further $4 million.

Therefore, in the 2012-2013 financial year, the ACCC spent a total of $8.8 million, or approximately 6% of its total budget, on external consultancies.

The amount spent by the ACCC on consultancies in the 2012-2013 financial year was 22% higher than the amount it spent on external consultancies in the previous financial year (ie $7.2 million) and 30% more than it spent in the 2010-2011 financial year (ie $6.9 million).

One has to question why the ACCC has to enter into so many external consultancies and why it is paying so much for these consultancies. Another important question is why have external consultancies increased by 30% in dollar terms over the last three years.

This trend is even more concerning in the light of the fact that the ACCC has access to a large and highly paid, and one would assume highly skilled, Senior Executive Service. The question is why the ACCC cannot apparently meet its needs for specialist technical advice from amongst the ranks of its existing Senior Executive Service.

How can the ACCC improve its bottom line?

During the ACCC's evidence at the Economics Legislation Committee hearing last year, the ACCC claimed to have implemented a range of strategies to reduce its costs, including by:

- offering voluntary redundancies;
- reducing travel costs;
- cutting back on newspaper subscriptions; and
- reviewing its accommodation needs.

However, with the exception of the voluntary redundancies, these measures only offered piecemeal solutions to the ACCC's financial crisis.

As suggested above, a significant cost is the ACCC's senior executives. Not only does the ACCC's senior executives appear to be disproportionately large, comprising 54 staff members, but this select group of employees is very costly, costing the ACCC approximately $329,000 per employee per year.

The ACCC must conduct an urgent and in-depth review into the size and cost of its senior executives to determine whether it needs such a large Senior Executive Service and whether some of these employees are being paid too much.

The ACCC should also conduct an urgent review of its performance pay scheme. Such a review is particularly important when one analyses the ACCC's performance in relation to major litigation over the last three years. Whilst there have been a number of notable successes, including the airline cartel cases and the Apple iPad case, there have been a number of quite spectacular and high profile court losses.

One has to question whether the ACCC's performance in major litigation can justify the organisation continuing to pay such generous performance pay.

It would also be sensible for the ACCC to review its practices in terms of entering into external consultancies. The ACCC is relying too heavily on external consultants to provide the types of advice which the ACCC should be able to obtain from its own Senior Executive Service.

Other sources of inefficiency

As a practitioner who has regular interactions with the ACCC, as well as a former ACCC employee for 15 years, it is quite easy to identify areas where the ACCC is not operating efficiently.

For example, one area of inefficiency relates to the way in which the ACCC runs its litigation. The ACCC has a tendency to overstaff its litigation in relation to small and medium sized cases. While it is invariably the case that larger corporate respondents will retain large legal teams consisting of lawyers from the top tier legal firms to fight the ACCC, the same is not true of small and medium business respondents. It is relation to these smaller respondents that the ACCC ends up incurring too much legal expense.

The ACCC will often retain two or even three senior lawyers from a top tier legal firm or the Australian Government Solicitor to work on even relatively small cases. For example, in a recent case, the ACCC had a legal team consisting of three senior lawyers from a top tier legal firm and a senior barrister. This was despite the fact that the respondents were only being represented by a small firm solicitor and a junior barrister.

The ACCC also appears to have developed a practice of overspending on barristers when running smaller cases. Often the ACCC will retain a senior barrister, or even a senior and a

junior barrister when running relatively small and simple cases against unsophisticated opposition.

When I worked at the ACCC, we would often used one junior barrister in smaller cases to save money, as well as to skill-up these junior barristers. For example, we decided to use a junior barrister in the high profile Ian Turpie impotency trial (namely Robert Bromwich, now the Commonwealth Director of Public Prosecutions). On another occasion, we decided to use a junior barrister to run a five-day trial in the Original Mama's case. Both barristers rose to the challenge and did exceptionally well in each case.

The ACCC also have a habit to throwing enormous amounts of legal resources at large scale litigation in a haphazard way. This was particularly evident in a case in which I was acting for a client who had agreed to give evidence for the ACCC as part of their case. It was apparent from my interactions with the ACCC in that case that whilst it had assembled a very large legal team of experienced lawyers and barristers to run the case, there was a total lack of organization and planning. Indeed, it seemed to me sometimes that the ACCC's legal team lacked any clear case theory. Needless to say, the ACCC lost the case.

Companies in liquidation

Another area of concern relates to the ACCC's tendency to continue pursuing litigation against companies which have gone into liquidation. I fail to see how a judgment or penalty against a company which no longer exists is a sensible use of the ACCC's limited resources.

The ACCC will still have to spend a significant amount of money to secure a penalty and costs order against the company in liquidation. The only difference with these cases is that the ACCC knows beforehand that it will not recover any of the penalties or costs which may be ordered by the court.

For example each of the following cases, involved a company which had gone into liquidation:

- Elite Publishing
- E-Direct
- Energy Watch

- Yellow Page Marketing BV/Yellow Publishing Limited
- Global One Mobile Entertainment Ltd / 6G Pty Ltd
- Marksun Australia Pty Ltd
- SMS Global

As far as I am aware, the ACCC never saw a cent of the penalties and costs awarded in these cases.

Case selection

While the ACCC's case selection practices have improved significantly over the last few years, there are still some notable anomalies.

For example, earlier this year the ACCC accepted an undertaking from Toyota Australia relation to representations that the upholstery in certain vehicle interiors was 'leather', when in fact the upholstery was only partially leather.

I find it hard to understand why the ACCC pursued this matter, given that it seeks to prioritise matters based on the level of consumer detriment. If the ACCC believed that Toyota's conduct had created a significant degree of consumer detriment, one would have expected to see the ACCC demanding consumer remedies as part of the settlement.

However, the only remedies sought by the ACCC in relation to this matter were that Toyota:

- publish corrective notices;
- implement a supplementary trade practices compliance program;
- provide training for Toyota Australia sales and marketing staff and dealers; and
- implement a procedure for the review of product information materials.

In other words, there were absolutely no consumer remedies sought by the ACCC in this case.

Another odd use of resources relates to the Samsung Electronics case. In this matter, Samsung provided an undertaking to the ACCC concerning alleged misrepresentations about the energy savings of its Bubble Wash washing machines compared to conventional washing

machines. Despite the ACCC's view that the company had misled its customers about these products, it did not require Samsung to offer any of its customers a refund of their purchase price. Rather, the only consumer remedy obtained by the ACCC was that Samsung was required to extend its manufacturer's warranty for the affected customers by three years.

I also represented a small Australian business in an ACCC investigation in relation to country of origin representations. The ACCC focused its investigation on the representations being made by my client in relation to products which it was exporting to places such as China, Korea and Europe. Apart from the very real question of whether the ACCC even had jurisdiction in relation to this conduct, I could not see how the pursuit of this investigation was a justifiable use of the ACCC's resources. After all, no Australian consumers were being affected by my client's conduct. The ACCC ultimately decided to close its investigation after a few months when it realized that my client was not breaching the Australian Consumer Law in relation to products it was selling to non-Australian consumers in overseas markets.

(5) What are the real problems with the new cartel laws? (3.4)

Anyone who has looked at the new criminal cartel laws will agree that they are very complicated. I believe that this complexity has caused the ACCC many problems with the investigation and enforcement of these provisions.

Quite apart from the complexity of the legislation, I believe that the ACCC is having major difficulties in investigating cartel offences.

The first problem is the level of investigatory training which ACCC investigators receive. In my view, ACCC investigators still do not receive a sufficient level of proper investigatory training.

It is absolutely essential for ACCC investigators to get better investigatory training in order to properly investigate criminal cartels, particularly in such crucial areas as conducting formal interviews and executing search warrants. The investigatory skills required to obtain evidence to prove a criminal cartel are much more sophisticated than those required to prove a civil contravention.

In a criminal cartel investigation, ACCC investigators will have to have the skills to:

- properly execute search warrants;
- caution potential defendants prior to interviewing them;
- conduct formal interviews with potential defendants rather than using section 155 powers;
- maintain a proper chain of evidence; and
- properly analyse recordings of telephone intercepts.

ACCC officers lack experience conducting formal interviews (aka as Records of Interview (ROI)). Historically, the ACCC has not used its investigators to conduct section 155 oral examinations. Rather it is standard ACCC practice to retain external counsel to conduct such examinations. This is a great deal different to the practice in other Commonwealth Government investigatory bodies such as ASIC and the ATO. As a result of this practice, many ACCC investigators have not developed the skills required to conduct formal interviews.

Furthermore, it is standard practice of the Commonwealth Director of Public Prosecutions to require the relevant investigatory agency to offer each prospective defendant an opportunity to participate in a ROI prior to any charges being laid. Accordingly, in relation to criminal charges against individual respondents, the ACCC will not be able to avoid conducting ROI's.

Another concern is that the ACCC does not appear to have a great deal of experience in the execution of search warrants which are an essential tool in investigating criminal cartels. Indeed, one could be forgiven for being unaware that the ACCC has had the power since 2006 to use search warrants in relation to alleged breaches of the CCA. That is because in the period from 2006 to 2014, the ACCC has only executing ten search warrants.

Two issues which appear to have been overlooked when introducing US style criminal cartels laws to Australia has been the role of the Federal Bureau of Investigation (FBI) and the grand jury in conducting criminal cartel investigations in the US.

Federal Bureau of Investigation (FBI)

In Australia, criminal cartel investigations are conducted primarily by the ACCC. The Australian Federal Police (AFP) have a limited role in assisting the ACCC in the execution of search warrants and the logistics of setting up telephone intercepts and installing listening devices. However, apart from this limited assistance it is entirely the responsibility of the ACCC to investigate criminal cartels.

On the other hand, in the US antitrust investigations are conducted jointly between the US Department of Justice (DOJ) and the FBI. In reality, the FBI conducts the entire investigation. The FBI is involved in all stages of the investigation – for example they will be involved in interviewing potential defendants, interviewing leniency applicants, obtaining information from third parties, chasing up investigatory leads, managing the chain of evidence, obtaining and analysing relevant documents and giving expert evidence in court or before the grand jury. The FBI will also execute the search warrants.

The main concern about the Australian approach is that, as stated above, many ACCC investigators do not have the high-level investigatory skills needed to investigate a cartel, particularly where there is no immunity applicant. Clearly while ACCC investigators are good at what they do in terms of civil proceedings, the level of investigatory training they currently receive does not compare favourably with the level of training that FBI agents receive.

A FBI agent receives 20 weeks of intensive basic training at the FBI Academy before becoming an agent. This training focuses on four core skills area, two of which are interviewing and interrogation. FBI agents must then complete further training on a regular basis. By contrast, the ACCC investigatory is likely to get one week of basic investigatory training. All the rest of their expertise has to be gained from on the job training.

Grand jury

Another major difference in terms of US antitrust enforcement is the role of the grand jury. The function of the grand jury is to investigate possible criminal violations and return indictments against culpable corporations and individuals.

The grand jury has been described as in *Blair v. United States*, 250 U.S. 273 (1919):

> *...a grand inquest, a body with powers of investigation and inquisition, the scope of whose inquiries is not to be limited narrowly by questions of propriety or forecasts of the probable result of the investigation, or by doubts whether any particular individual will be found properly subject to an accusation of crime.*

As is apparent from the above, the grand jury has very broad powers of investigation. The grand jury has extensive powers to compel witnesses to attend the grand jury to give evidence, to issue subpoenas and to pursue other investigatory leads. The prosecutor presents a range of proposed investigatory steps to the grand jury. The grand jury then decides whether these investigatory steps should be taken. The grand jury can also decide to pursue other investigatory steps.

The grand jury is not limited to considering admissible testimony. Witnesses have no rights to object to the scope or propriety of the grand jury proceedings. Witnesses are not permitted to have Counsel present with them in the grand jury room (although the Antitrust Division will allow the witness to leave the room to consult with their Counsel).

The grand jury's deliberations are conducted in secrecy. A person is not permitted to make public comment about the existence or nature of a grand jury investigation.

It has been held in the US that the US Courts generally "cannot unduly interfere with the essential activities of the grand jury nor encroach on the grand jury's or the prosecutor's prerogatives" - *United States v. United States District Court*, 238 F.2d 713 (4th Cir.), cert. denied, 352 U.S. 981 (1957).

The existence and operation of the grand jury system in US antitrust matters makes a significant difference to the way the DOJ and FBI are able conduct criminal cartel investigations. The DOJ, through the grand jury, has access to very broad investigatory powers which are largely unfettered. The grand jury does not need to have a strong basis for pursuing a particular investigatory lead. The fact that much of the grand jury work can be done in complete secrecy also permits the DOJ to maintain the covert status of its investigation for a long period of time.

While there is very little that can be done in terms of introducing a grand jury type process in Australia, the area where the ACCC can do something is in relation to staff training. The ACCC has to start providing its staff with proper investigatory training, particularly in relation to the conduct of criminal cartel investigations.

(6) How does the ACCC treat small business? (3.4.2)

In the following, I will provide a series of short case studies showing a number of real-life small business interactions with the ACCC over the last few years. I think these case studies speak for themselves in demonstrating the types of problems small businesses experience when dealing with the ACCC.

Case Study 1

I was retained by a micro-business to provide him with Compliance Training pursuant to a court order following ACCC legal action. From having worked at the ACCC, I understood that the ACCC almost always requires a person or company which has engaged in the illegal conduct to undertake three years of compliance training about the relevant provisions of the TPA/CCA.

I was quite surprised to discover that this particular micro business had been required to undertake six years of Compliance Training – twice as much as is usually required. When I queried my client about why he had been required to undertake six years of compliance training, he was entirely unaware that six years was twice the usual requirement.

I wrote to the ACCC on a number of occasions to ask whether this client could be relieved from attending further compliance training in relation to the Franchise Code on the basis that he had already attended compliance training each year for three years and he was no longer involved in franchising in any way. The ACCC refused, stating that my client had to take legal action against the ACCC to have the relevant orders changed. The ACCC were unable to provide me with any reason why they had required six years of compliance training to be undertaken by a micro-business who had never been the subject of ACCC action in the past.

The client did ultimately take his own legal action against the ACCC to have the orders amended. The court ordered that he be relieved from having to complete the final two years

of compliance training. Interestingly, the ACCC consented to the orders being sought by my client.

Case Study 2

The ACCC investigated one of my clients for the country of origin claims he was making on goods he was exporting to China. I drew the ACCC's attention to the relevant provisions of the Explanatory Memorandum when the country of origin amendments were introduced into the TPA in 1998 which stated:

> *Item 2 ensures that this extra-territorial element of the Act is not applied to the new Division, as to do so may subject Australian manufacturers to both the Trade Practices Act 1974 requirements and the labelling requirements of the country in which they are selling their goods. By explicitly excluding any extra-territorial reach, the new provision is limited to goods sold or made available for retail sale in Australia (at 17).*

I submitted to the ACCC that it was clear from the above extract that Parliament intended that Australian exporters should not be subject to Australian country of origin laws but only to the laws which apply in the country where they are exporting their products and where those products will be sold.

I explained to the ACCC that the problem with the relevant provisions of the ACL arose from the way in which the Parliamentary drafters sought to give effect to the clear Parliamentary intention. I argued that the actual amendment to the CCA/ACL which was supposed to exempt Australian exporters from Australian country of origin laws appeared to have been drafted incorrectly. Rather than exempting Australian exporters from these laws, the amendment actually "removed" the defences contained in Part 5-3 of the ACL for Australian exporters. Accordingly, Australian exporters were now in the remarkable situation, based on the ACCC's interpretation, of having no statutory defences to an ACCC country of origin case.

Even thought I had pointed out to the ACCC the clear contradiction between the intent of Parliament, as expressed in the relevant Explanatory Memorandum, and the terms of section 5(1)(c) of the CCA to the ACCC, the ACCC was unmoved. They claimed that that because the words of section 5(1)(c) are clear there is no need to look at the intent of Parliament as expressed in the Explanatory Memorandum.

As a result, the ACCC conducted a detailed investigation into my small business client in relation to country of origin claims which he was making about export products which he was selling to customers in China. While the ACCC ultimately closed its investigation without taking any enforcement action, the investigation caused my client considerable expense and inconvenience.

Case Study 3

I assisted a small business client in an unconscionable conduct case against a very large multinational corporation. Prior to my involvement, the client's then lawyer had written to the ACCC to seek their assistance in his matter. Given my client was a very small business and the company alleged to have engaged in the unconscionable conduct was a large multinational company with annual revenues of $35 billion, it seemed sensible to try to get the ACCC to help.

In their response letter to the small business, the ACCC said they could not assist him because:

- many of the relevant issues appear to be issues of contract between the client and the large multinational corporation. The ACCC claimed that these issues fell outside the TPA and that accordingly, the ACCC did not have jurisdiction to intervene; and
- there was insufficient evidence to suggest that the alleged conduct by the large multinational corporation constituted unconscionable conduct within the meaning of sections 51AA or 51AB of the TPA.

In reality, the alleged conduct was a straightforward section 52 case – hardly an issue which fell outside the TPA.

Unfortunately, the client's then lawyer had made a slight error in their letter to the ACCC. He had referring to sections 51AA and 51AB instead of section 51AC. Section 51AC would have been the appropriate provision as the conduct involved commercial unconscionability rather than consumer unconscionability. Strangely, the ACCC did not even consider the relevance of section 51AC when assessing this small business complaint, even though it was clearly applicable on the facts.

My client ended up pursuing their own private legal action against the large multinational company in the NSW Supreme Court. The client was successful in their case under section 52 of the TPA and was awarded over $1.1 million in damages.

Case Study 4

I was retained by a client to assist them in complying with a number of court orders. The client had been taken to court by the ACCC because he was not complying with the Franchising Code of Conduct.

After speaking to the client, it became apparent that he had previously retained a lawyer to draft his agreements on the specific condition that the lawyer draft agreements which were not franchise agreements. The client had wanted to offer prospective customers licence agreements so that he would not have to comply with the Franchising Code of Conduct. Unfortunately, the lawyer had not drafted the agreements properly and they were in fact clearly franchise agreements.

I asked the client whether the ACCC had been aware of these facts prior to the ACCC commencing legal action against him. He said that he had explained to the ACCC that he had asked a lawyer to draft up licence agreements and that he had relied on his lawyer's advice in this regard. Unfortunately, these highly relevant facts made no difference to the ACCC's decision to take legal action against this small business.

I subsequently assisted this client in taking legal action against his former lawyer for negligence for failing to draft the licence agreement properly in the first place. The respondent solicitor called in LawCover almost immediately and LawCover settled the negligence claim soon afterwards.

Case Study 5

I was retained by a small business in the aftermath of it having been the subject of two ACCC search warrants. I was advised that during the course of the search, ACCC staff had removed two hard disks from the premises and returned them within 72 hours as required by section 154GA.

Unfortunately, the ACCC did not appear to comply with the requirements of section 154GA(2) of the TPA/CCA which require the ACCC to:

- advise the recipient of the search warrant when they were proposing to examine or process the information on the hard disks; and
- allow that person to attend when the hard disks were being examined or processed by the ACCC, either in person or through a legal representative.

When I queried the ACCC about this apparent failure to comply with the section 154GA(2) of the TPA/CCA, they responded that they had not moved the hard disks pursuant to section 154GA but rather had seized them pursuant to section 154H.

There is important technical distinction between these two provisions. Section 154GA permits the ACCC to move anything found at the premises to another place for examination or processing to determine whether it may be seized. This section may be used by the ACCC to remove hard disks if it is unsure whether they contain evidential material.

Section 154H on the other hand states that if the executing officer believes on reasonable grounds that data accessed by operating electronic equipment at the premises might constitute evidential material, they may do only one of three things:

- seize the equipment and any disk, tape or other device
- operate equipment at the premises to put the data into documentary form and remove the documents or
- operate the equipment to transfer the data to a disk, tape or other storage device.

The ACCC's conduct in this case raises concerns about the utility of s 154GA. It seems that the ACCC can avoid the safeguards in s 154GA by simply claiming, in every case, that it has decided to seize electronic equipment under s 154H. It is quite clear from s 154H that seizure of such things as hard disks is an exceptional step. Under s 154H, the ACCC can keep the hard disks in its exclusive control for up to 120 days. This contrasts with s 154GA where the ACCC has supervised access to hard disks for 72 hours.

In addition to this particular issue, I identified a number of errors which I believe the ACCC made in executing these two search warrants.

Case Study 6

A client received a letter from the ACCC on 15 December 2010 asking it for detailed information about its operations. The due date for a response was 5 January 2011.

While I believed that it was appropriate for the client to ask the ACCC for an extension of time to provide a response, the client preferred to get the response submitted to the ACCC by the due date. Accordingly, we worked over the Christmas and New Year to finalise the letter. The ACCC's investigation related to a quite complex area of law – namely, exclusion clauses in relation to recreational services.

On 25 May 2011, or 140 days after the client had submitted their response, the client received a response from the ACCC. The ACCC advised my client that it had considered my client's response and required further information. After taking 140 days to consider the client's response, the ACCC required a response from the client in nine days. The client again wanted to comply by the due date, so we did.

Case Study 7

I acted for a client who had been the subject of legal action by the ACCC. I looked into the case as part of my task of preparing compliance training. While the client had decided to settle the ACCC's litigation by consent, prior to settlement the ACCC had filed a draft witness list.

The ACCC was proposing to call six non-ACCC witnesses. I was surprised to see that five of the proposed witnesses were employed by current competitors of my client. Furthermore, of these five witnesses, two had been former employees of my client who had been dismissed by the client for performance issues. One of these two witnesses had been the subject of an AVO taken out by the Managing Director of my client for allegedly making death threats against him and his family.

This was not a cartel case where the five competitor witnesses were giving evidence pursuant to an immunity agreement. Rather this was a run of the mill misleading and deceptive conduct case.

Summary of the problems

In my view, the above 7 case examples give some flavour of the types of problems which small businesses experience when dealing with the ACCC – namely that the ACCC often:

- takes harsh and aggressive enforcement action against small businesses;
- takes excessively long times to respond to letters from small businesses while at the same time demanding responses from these same small businesses in very short time frames;
- is too accepting and trusting of the evidence from complainants who are competitors or even former employees of the small businesses under investigation;
- does not give appropriate weight to valid excuses or explanations from small businesses about their conduct; and
- in some cases, pressures small businesses into settlements which are unfair and disproportionate.

In addition, I have found that the ACCC often acts in the following ways when dealing with small businesses in investigations:

- simply ignoring inconvenient questions - I am aware of many instances where I have written to the ACCC on behalf of a small business and asked them a valid but difficult question. In most cases has the ACCC has chosen to simply ignore the difficult question and not provide a response
- providing disingenuous answers to difficult questions – where the ACCC does in fact try to respond to a difficult question, it often provides a disingenuous responses
- being highly defensive when responding to criticism – the ACCC does not welcome criticism despite its statements to the contrary
- being dismissive of worthwhile complaints – the ACCC often dismisses worthwhile complaints because it rushes its assessments and has poor complaints assessment processes.

What are the causes of the problems?

A major cause of the problems which are besetting ACCC enforcement is the absence of any proper investigatory training for staff, as has already been discussed above in the context of criminal cartel enforcement.

When I started at the ACCC, I attended a one-week orientation / investigation training course. That was the extent of my investigatory training. I acquired the rest of my investigatory skills through on the job training. Fortunately, I was able to work with some excellent investigators from whom I gained invaluable skills and experience.

It is my understanding that not much has changed at the ACCC in relation to investigation training – ie staff still receive minimal and rudimentary investigatory training.

How can the ACCC fix the problems?

The ACCC should review its case selection processes. The processes which are currently applied are too ad-hoc. They rely significantly on the personal preferences and workloads of individual officers and regional directors. Regional Directors should be meeting regularly to discuss their case loads to make sure they are focusing on the correct areas as identified in the ACCC priority statement.

The ACCC needs to introduce regular internal reviews to make sure that the cases it is pursuing are appropriate and being conducted properly.

The ACCC lacks transparency in responding to complaints from business about the ACCC's own shortcomings. Currently, businesses can complaint to a senior manager or the CEO about alleged inappropriate conduct. However, the complaint will invariably be referred back to the primary case officer for a response. The response is usually highly defensive and unfortunately, in some cases, quite evasive.

The tendency of the ACCC to sweep complaints about its own conduct under the carpet is quite ironic given that the ACCC is a strong advocate of the importance of businesses implementing comprehensive and responsive complaints handling systems. One would have hoped that the ACCC would practice what it preaches, and implement a proper system for receiving, assessing and responding to complaints from businesses about its own performance.

There should be a senior person, somewhat akin to an Internal Ombudsman, within the ACCC to whom businesses can complain directly if they believe that some aspect of the investigation or litigation against them is not being carried out appropriately.

The ACCC must ensure that it does not take advantage of businesses who do not understand the law because they are without legal representation or lack adequate representation. I have been retained by many small businesses after they have entered into an s87B undertaking with the ACCC. Most had absolutely no understanding of what they had just agreed to. It is not adequate for the ACCC to say that such businesses should have obtained their own legal advice. Rather I believe it is incumbent on the ACCC to explain fully to these businesses what they are signing and what they are agreeing to do.

The ACCC enforcement area has to start using a great deal more common sense in the way it approaches its work. Unfortunately, I have found that ACCC enforcement staff often show a lack of commonsense in the way they approach investigations and litigation. Often ACCC enforcement staff have either pursued relatively unimportant enforcement matters much too vigorously and aggressively or alternatively have been much too dismissive and offhand in their approach to potentially significant matters.

Other aspects of the ACCC's operations and processes lack transparency. For example, it is all but impossible for complainants to find out whether their complaint is actually being investigated by the ACCC, as it is now appears to be the ACCC's standard practice not to provide any substantive written responses to any complaints.

Furthermore, the ACCC shows a general reluctance to provide even the companies it has under investigation with basic information about the course of its investigation or how it has interpreted the relevant law.

I believe that the Review Panel should reconsider two of the recommendations made by the Dawson Committee in relation to ACCC accountability, namely:

- to establish a Joint Parliamentary Committee to oversee the ACCC's administration of the TPA (CCA) (Recommendation 11.1); and

- to appoint an Associate Commissioner to the ACCC to receive and respond to individual complaints about the administration of the Act and to report each year in the ACCC's annual report (Recommendation 11.3).

I think both of these steps would have positive impacts on the ACCC's administration of the Act. A specific Joint Parliamentary Committee to oversee the ACCC's administration of the Act would introduce some proper accountability, particularly in relation to the ACCC's financial management.

The appointment of an Associate Commissioner to receive and respond to individual complaints about the administration of the Act and to report each year in the ACCC's annual report, would give businesses with concerns about their treatment at the hands of the ACCC some place to turn.

If you have any questions about this submission, please contact me on (02) 8086 2005.

Yours sincerely

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