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COMMITMENT DECISIONS IN ANTITRUST CASES

-- Note by Australia --

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*More documents related to this discussion can be found at
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AUSTRALIA

1. Introduction and legal framework

1. The Competition and Consumer Act 2010 (the **CCA**) is Australia's national competition and consumer law. The Australian Competition and Consumer Commission (the **ACCC**) is the independent Australian Government agency responsible for administering and taking enforcement action under the CCA.

2. Under the Australian model of competition enforcement, the ACCC does not have the power to adopt decisions finding that there has been an infringement of the CCA. Rather, the ACCC investigates potential infringements of the CCA and, where it considers appropriate, must bring them before the Federal Court of Australia for determination. However, the ACCC also has the power, where appropriate, to accept formal written undertakings or use less formal administrative resolutions to address issues.¹

3. The ability for the ACCC to accept formal written undertakings was first introduced in 1993 through an amendment to the Trade Practices Act 1974, now the CCA. Section 87B of the CCA gives the ACCC the power to accept voluntary written undertakings in connection with a matter in relation to which it has a power or function under the CCA.² While the ACCC cannot demand or require such undertakings, since they are voluntary, in practice it is common for the ACCC to raise them as an option in appropriate matters.

4. Undertakings accepted pursuant to section 87B are binding and can be enforced in the Federal Court of Australia. The ACCC considers that section 87B undertakings are an effective and efficient means of achieving compliance with the CCA.

2. Overview of section 87B undertakings

5. The ACCC has a broad power to accept undertakings under section 87B,³ and it is a matter for the ACCC as to whether or not to accept such undertakings.⁴ Undertakings can be accepted prior to or after the commencement of court proceedings.

6. The ACCC will generally only seek to resolve a matter through a section 87B undertaking when it believes that a breach has occurred, or was likely to have occurred, and that a resolution based

¹ Administrative resolutions are not binding or court-enforceable and are usually achieved through an exchange of letters with the parties involved.

² Other than in relation to Part X of the CCA, which concerns international liner cargo shipping. The text of section 87B is set out in the Annex to this paper. Separate provisions deal with undertakings relating to access to essential infrastructure, including telecommunications, and are not covered in this submission. See, for example, section 44ZZA of the CCA, and, in relation specifically to telecommunications, section 152CBA of the CCA and the Telecommunications Act 1997. As regards the latter, the Australian Communications and Media Authority also has the ability to accept undertakings.

³ *Australian Competition and Consumer Commission v Woolworths (SA) Pty Ltd* [2003] FCA 530; (2003) 198 ALR 417.

⁴ In *TPC v Cue Design* (1996) 18 ATPR 41–475, the Federal Court held that the acceptance of a section 87B undertaking was a matter for the ACCC, not the court.

on enforceable undertakings offers an appropriate solution in terms of lasting compliance with the law and redress for injured parties. For example, where the ACCC considers that financial penalties are appropriate it will not accept a section 87B undertaking, but may commence court proceedings. It can then either reach a resolution of the proceedings with or without a complementary section 87B undertaking or run the proceedings as contested proceedings with an ultimate resolution by a court determination.

7. When considering whether to accept a written undertaking, the ACCC will take into account a number of factors. These include:

- the nature of the alleged breach (the seriousness of the conduct at issue and its impact on third parties and the community at large);
- whether the alleged offender's record suggests that an administrative settlement will be sufficient to deter it from future anti-competitive conduct;
- the ability of an undertaking to offer redress to affected parties;
- prospects for rapid resolution of the matter;
- whether there needs to be a clarification of the law by the courts.

8. Of paramount concern in negotiating section 87B undertakings is to find ways to remedy the harm caused by the alleged breach. In addition, the ACCC will often require the company or business concerned to adopt or improve a compliance program to improve its overall compliance with the CCA.⁵

9. Section 87B undertakings must be in writing (this is required by law), be detailed, specific and free from ambiguity. While the content of each undertaking is subject to negotiation between the ACCC and the party concerned, most undertakings accepted by the ACCC are for a period of between three and five years and directly address the conduct that has given rise to the alleged breach and its consequences.

10. Undertakings are a very flexible tool and can be crafted to suit the particular commercial circumstances of the party offering the undertaking. This is a significant practical advantage for parties when faced with the choice of offering an undertaking or risking the imposition of necessarily less tailored court orders.

11. While not prescribed by the CCA, the ACCC usually requires that an undertaking include the following elements:

- an acknowledgment or admission that the conduct at issue constitutes or is likely to constitute a breach of the CCA;
- a positive commitment to cease the conduct and not recommence it;
- specific details of the corrective action that will be taken to remedy any harm caused by the conduct;
- details of redress (e.g. compensation to consumers) where appropriate;
- reporting requirements making it possible to verify that the company has satisfied its undertaking;
- firm future actions aimed at preventing a recurrence or any other breach of the CCA (such as an internal compliance and/or training program).

⁵ In order to achieve greater consistency and utility in compliance program requirements in section 87B undertakings, the ACCC has developed four specific compliance program template undertakings. Digital copies can be accessed on the ACCC's website: <http://www.accc.gov.au/business/business-rights-protections/implementing-a-compliance-program>.

12. The ACCC will generally not accept undertakings that include any statement to the effect that the conduct was inadvertent, or seeking to minimise the consequences of the conduct, or to the effect that the undertakings are not an admission for the purposes of third party actions (although they need not explicitly state that they are such an admission).

13. As regards the latter point, the CCA confers private rights of action on anyone who suffers loss or damage through an infringement of the competition provisions in the CCA.⁶ However, the nature and content of section 87B undertakings makes them of limited value in follow-on actions for damages. In particular, undertakings generally do not contain a detailed analysis of the alleged infringing conduct or findings of fact, and, even if included, admissions of fact have been held by the courts not to amount to *prima facie* evidence of the same facts in later proceedings involving a different set of parties.⁷

14. The ACCC is of the view is that all section 87B undertakings must be a matter of public record and open to public scrutiny. This allows market participants to assist in holding to account parties who are bound by undertakings. In that light, the ACCC makes undertakings as transparent as possible: it has issued procedural guidelines outlining its policy in respect of section 87B undertakings,⁸ and it maintains a public register and record of all section 87B undertakings, which is available on the ACCC's website.⁹ In some rare cases highly commercially sensitive information may be redacted from published undertakings.

3. Types of undertaking

15. In the period 1 July 2002 to 31 March 2016 the ACCC accepted 89 undertakings pursuant to section 87B relating to conduct under the non-merger competition provisions of the CCA.¹⁰

16. Undertakings under section 87B can be both behavioural and structural. Three recent examples of behavioural undertakings accepted by the ACCC pursuant to section 87B are described in brief below.

⁶ Section 82 of the CCA.

⁷ Section 83 of the CCA assists private actions by providing that findings of fact establishing an infringement of the CCA made in proceedings amount to *prima facie* evidence of the same facts in later proceedings, including private actions. However, this has been interpreted not to apply to *admissions* of fact (See, for example, *ACCC v Leahy Petroleum Pty Ltd (No 3)* (2005) ALR 301 at [118]; *ACCC v Dataline.net.au Pty Ltd* (2006) 236 ALR 665 at [107]). While a recent independent review of Australia's competition laws and policy (Competition Policy Review, Final Report, March 2015, pp.71-71, 407-409, <http://competitionpolicyreview.gov.au/>) has recommended amending section 83 so that it extends to admissions of fact made by the person against whom proceedings are brought, it is doubtful whether such a change, if adopted, will have any impact on the use of section 87B undertakings in follow-on claims. In particular, undertakings generally include only limited detail of the alleged infringement(s), and in general infringing parties only acknowledge that the conduct at issue may, or is likely to, constitute a breach of the CCA. See in this regard, a paper presented by Australia to Working Party No. 3 on Co-operation and Enforcement on 15 June 2015, *Relationship between public and private antitrust enforcement*, [http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WP3/WD\(2015\)17&docLanguage=En](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WP3/WD(2015)17&docLanguage=En).

⁸ Section 87B of the Competition and Consumer Act: Guidelines on the use of enforceable undertakings by the Australian Competition and Consumer Commission, April 2014, <http://www.accc.gov.au/publications/section-87b-of-the-competition-consumer-act>. The current version dates from April 2014, but was first introduced in 1999.

⁹ <http://registers.accc.gov.au/content/index.phtml/itemId/815599>.

¹⁰ The ACCC also accepts section 87B undertakings in merger cases and in relation to consumer protection matters. In the period from 1 July 2004 to 31 March 2016, the ACCC accepted 73 undertakings in merger cases and 382 undertakings in consumer protection matters.

3.1 *Informed Sources Pty Ltd*¹¹

17. Informed Sources Pty Ltd provides a petrol price data service which lists, site-by-site, the price for each grade of petrol. Subscribers to the service provide pricing data to Informed Sources at frequent, regular intervals and in return receive from it collated data from other subscribers, and various reports containing petrol pricing information across particular regions in Australia.

18. In August 2014, the ACCC instituted court proceedings against Informed Sources and five petrol retailers which subscribed to Informed Sources' retail petrol price information service. The ACCC alleged that the information sharing arrangements allowed those retailers to communicate with each other about their prices, and that the arrangements had the effect or likely effect of substantially lessening competition, contrary to section 45 of the CCA.¹²

19. Prior to commencement of the hearing, the parties offered binding section 87B undertakings, which were accepted by the ACCC. The undertakings require that Informed Sources will not, for a period of five years, supply a petrol price information exchange service unless it also makes available to Australian consumers, and to third party information service providers, consumer organisations, motorist organisations, research organisations and regulatory agencies carrying on business or operating in Australia, on reasonable commercial terms, at the same time, the price information it provides to petrol retailers.

20. The retailers have undertaken, for a period of five years, not to enter into or give effect to any price information exchange service unless the petrol price information each receives is made available to consumers and third party organisations at the same time.

21. The undertakings will take effect in mid-2016, and the ACCC expects that greater price transparency will drive increased price competition over time.

3.2 *Cabcharge Australia Limited*¹³

22. Cabcharge is a leading supplier of products to the Australian taxi industry. These products include Cabcharge payment products (the Cabcharge card), processing services for non-cash taxi fare payments, taxi meters, and dispatch and network services.

23. In 2010, Cabcharge was found to have breached the misuse of market power provision of the CCA (section 46) by refusing to deal with certain firms and engaging in predatory pricing. As part of the resolution of the matter, the Australian Federal Court required Cabcharge to establish a written set of criteria against which it would assess requests for another business to accept or process Cabcharge cards by electronic means or with an electronic system for the payment, by non-cash means, of fares and charges incurred by taxi passengers (the **Request Processing Policy**).

24. Subsequent to the court resolution, the ACCC investigated allegations that Cabcharge had refused to deal with a third party processor making requests pursuant to the Request Processing Policy, and that it had constructively refused to deal with third parties by establishing and implementing the Request Processing Policy in terms that would discourage or deter requests.

25. During the course of the investigation (in June 2015), Cabcharge provided an undertaking to the ACCC addressing those allegations. The undertaking establishes a process which allows rival

¹¹ <http://registers.accc.gov.au/content/index.phtml/itemId/1191652>.

¹² Section 45 of the CCA concerns contracts, arrangements or understandings that restrict dealings or affect competition; the text of section 45 is available at: http://www.austlii.edu.au/cgi-bin/sinodisp/au/legis/cth/consol_act/caca2010265/s45.html?stem=0&synonyms=0&query=sect%2045.

¹³ <http://registers.accc.gov.au/content/index.phtml/itemId/1187316>.

payment processors to process Cabcharge cards on their own in-taxi payment terminals. This will increase choice and the opportunity for innovation and price competition among service providers.

3.3 Restrictive provisions in supermarket leases¹⁴

26. Following an industry-wide investigation in 2008, the ACCC identified a practice whereby supermarket operators would include terms in their leases which may have prevented shopping centre managers from leasing space to competing supermarkets.

27. The ACCC was concerned that such restrictive terms may have prevented and/or hindered other supermarket operators from entering and competing in markets for the acquisition of supermarket space and/or in retail grocery markets, and result in fewer options for consumers.

28. To address the ACCC's concerns, a number of supermarket chains provided section 87B undertakings to the ACCC. They essentially undertook to phase out all restrictive provisions in supermarket leases, not to include restrictive provisions in any new supermarket leases, and, in the case of existing leases, not to enforce restrictive provisions after a certain time period.

29. The undertakings have led to an increase in the number of shopping centres with more than one supermarket, thus creating more competition and leading to lower prices for consumers than in shopping centres with only one supermarket.

4. Variation of undertakings

30. Parties may withdraw or vary section 87B undertakings with the consent of the ACCC. This allows negotiations for changes if undertakings are subsequently found to be too difficult to comply with, impractical or where circumstances change.

31. The ACCC will consider any reasonable requests as long as they do not alter the spirit of the original undertaking. Any variations are made public.

5. Monitoring compliance with undertakings

32. Following acceptance of an undertaking, the ACCC requires that its implementation and effectiveness be monitored. The ACCC has given consideration to the most effective way to do this, bearing in mind the resources required. This has led the ACCC to put a focus on auditing, and it usually requires a commitment from the party giving the undertaking to carry out an independent audit of compliance with the undertaking at regular intervals (usually annually) for the period of the undertaking. This will come back to the original case team, which is responsible for monitoring compliance.

33. The ACCC also, as a standard practice, seeks the inclusion in undertakings of provisions to ensure that the ACCC can access all relevant information to ensure compliance. In practice, the ACCC finds that many consumers and market participants also actively monitor compliance and quickly report suspected breaches of undertakings to the ACCC.

6. Breaches of undertakings

34. Where the ACCC has reason to believe that a business has not complied with an undertaking, it has the power to apply to the court to seek enforcement of that undertaking, although it will usually try to resolve the matter by consultation first. The ACCC is not required to prove that the

¹⁴ See, for example, <http://registers.accc.gov.au/content/index.phtml/itemId/893471>; <http://registers.accc.gov.au/content/index.phtml/itemId/893470>; <http://registers.accc.gov.au/content/index.phtml/itemId/986140>.

failure to comply was intentional, and lack of intent is not a defence.¹⁵ The ACCC makes public its applications to the court for breach of an undertaking.

35. Section 87B provides that the court, if satisfied that a term of an undertaking has been breached, may make all or any of the following orders:

- an order directing compliance with the undertaking;
- an order for the infringing party to pay an amount up to the amount of any financial benefit that can be reasonably attributed to the breach;
- any order the court considers appropriate to compensate any other party who has suffered loss or damage as a result of the breach;
- any other order that the court considers appropriate.

36. In general, in cases where a company breaches a section 87B undertaking through continuing to engage in the alleged infringing conduct at issue, the ACCC is more likely to commence new infringement proceedings than to bring proceedings for breach of the undertaking. This is because the remedies available to it in infringement are more extensive. As regards other breaches of an undertaking, such as failure to comply with a deadline or to implement a compliance program, the ACCC is often able to resolve these issues on an informal basis.

37. A recent example of an action taken by the ACCC for breach of a section 87B undertaking concerned the proper construction of the terms of undertakings given by major Australian supermarket chains Coles and Woolworths in December 2013, following concerns about fuel discounts given by fuel outlets owned by or linked to the supermarkets that were tied to purchases in those supermarkets.¹⁶ The ACCC was concerned about the possible longer-term effects of such fuel discounts on the structure of retail fuel markets.

38. The supermarkets undertook not to make or allow fuel discounts where those discounts were:

- not funded wholly by the fuel business of the supermarket group (that is, not cross-subsidised by the supermarket); or
- greater in value than 4 cents per litre and contingent on past or future purchases of other goods or services at a store or business separate from the retail fuel outlet.

39. In February 2014, the ACCC brought proceedings in the Federal Court of Australia against Coles and Woolworths for breach of their section 87B undertakings. Woolworths had offered a saving of 4 cents off fuel where the customer spent a qualifying amount at a supermarket, and an additional 4 cents discount where the customer had spent a further \$5 or more on in-store items at the petrol outlet. Coles Express petrol stations offered savings of 10 cents per litre if \$20 were spent in the store located at the petrol outlet, and that discount could be combined with a 4 cents per litre discount from making a qualifying purchase at a Coles supermarket, resulting in a total discount of 14 cents per litre.

40. The ACCC considered that the 4 + 4 cents fuel discount offer by Woolworths was conditional on Woolworths supermarket purchases and therefore breached its undertaking because the discount was only available to a customer who had made a qualifying supermarket purchase. Similarly, the ACCC considered that Coles' bundled discount of 14 (10 + 4) cents per litre breached

¹⁵ [ACCC v Signature Security Group Pty Ltd \[2003\] FCA 3](#); (2003) ATPR 41-908. Lack of intent may, however, be taken into account by the court in determining what orders it may make.

¹⁶ [ACCC v Coles Group Ltd \[2014\] FCA 363](#); [ACCC v Woolworths Ltd \[2014\] FCA 364](#).

Coles' undertaking because it was only available to a customer who had made a qualifying supermarket purchase and because it exceeded 4 cents per litre.

41. The Court held that only Woolworths' offer breached the undertaking, because it was an "essential condition" that to qualify for the extra 4 cents per litre discount a purchase had to be made at a Woolworths supermarket. In the case of Coles, although the full discount was only available to a customer who had made a supermarket purchase, only 4 cents of the total bundled discount was contingent on a qualifying supermarket purchase (which did not exceed the maximum set out in Coles' section 87B undertaking), and the 10 cents per litre discount was available irrespective of having made a qualifying supermarket purchase.

42. These cases highlight the importance of ensuring precise drafting of undertakings. In that regard, the ACCC's internal legal service is often consulted by case teams when section 87B undertakings are offered. In the Coles/Woolworths case, similar discounts that the ACCC considered to be inconsistent with the undertaking were viewed differently by the court on a strict reading of the terms of the undertaking.

7. Conclusion

43. After more than 20 years of using section 87B undertakings to resolve competition cases, the ACCC's experience is that binding undertakings are an effective and efficient means of achieving compliance with the competition provisions in the CCA.

44. This is perhaps particularly true in the Australian context, where the ACCC has to bring alleged infringements of the CCA before the courts for determination. Court proceedings are lengthy, costly, and by their nature uncertain; the ability to accept undertakings enhances compliance through a quick and flexible procedure, which, in most cases, avoids the costs of litigation for each side. In addition, since section 87B undertakings are enforceable in court, they are an effective enforcement tool.

45. The use of section 87B undertakings to resolve competition cases has generally been well-accepted by the public and the legal and business communities. They seek to provide the victims of alleged breaches of the CCA and the general public with corrective remedies in a timely and efficient manner while avoiding the costs associated with court proceedings.

46. In utilising its section 87B powers, the ACCC seeks to balance the competing public interest in obtaining a less costly and more flexible solution with the need for transparency.

ANNEX

**TEXT OF SECTION 87B OF
THE AUSTRALIAN COMPETITION AND CONSUMER ACT 2010****Section 87B Enforcement of undertakings**

- (1) The Commission may accept a written undertaking given by a person for the purposes of this section in connection with a matter in relation to which the Commission has a power or function under this Act (other than Part X).
- (1A) The Commission may accept a written undertaking given by a person for the purposes of this section in connection with a clearance or an authorisation under Division 3 of Part VII.
- (2) The person may withdraw or vary the undertaking at any time, but only with the consent of the Commission.
- (3) If the Commission considers that the person who gave the undertaking has breached any of its terms, the Commission may apply to the Court for an order under subsection (4).
- (4) If the Court is satisfied that the person has breached a term of the undertaking, the Court may make all or any of the following orders:
 - (a) an order directing the person to comply with that term of the undertaking;
 - (b) an order directing the person to pay to the Commonwealth an amount up to the amount of any financial benefit that the person has obtained directly or indirectly and that is reasonably attributable to the breach;
 - (c) any order that the Court considers appropriate directing the person to compensate any other person who has suffered loss or damage as a result of the breach;
 - (d) any other order that the Court considers appropriate.