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Deterrence and enforcement of the competition law

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Jurisdiction and available enforcement options

- Competition Acts usually provides the agency with a range of enforcement remedies, including court-based outcomes and court enforceable undertakings. CAs also resolve many matters administratively, informally and through settlements.
- Consumer Law and Unfair trade practices are sometimes included as part of the Compliance and enforcement program as in Australia, Japan, Korea and UK, nwhere the model is a ‘one law, multiple regulators’ model, with various consumer regulators enforcing the uniform law.

Prioritisation of enforcement matters and the exercise of the CAs discretion

CAs first set out the main goals e.g:

- maintain and promote competition and remedy market failure,
- protect the interests of consumers and support fair trading in markets.

Prioritisation of enforcement matters and the exercise of the CAs discretion

With these goals in mind outline the actions needed to:

- stop unlawful conduct
- deter future offending conduct
- where possible, obtain remedies that will undo the harm caused by the contravening conduct (for example, by corrective advertising or securing redress for consumers and businesses adversely affected)
- encourage the effective use of compliance systems
- where warranted, take action in the courts to obtain orders which punish the wrongdoer by the imposition of penalties or fines and deter others from breaching the law,

Priority setting and objectives

- CAs cannot pursue all the complaints they receive about the conduct of traders or businesses and they are unlikely to become involved in resolving individual consumer or small business disputes.

- The CA's role is to focus on those circumstances that harm the competitive process or result in widespread consumer detriment. Therefore most CA exercise their discretion to direct resources to the investigation and resolution of matters that provide the greatest overall benefit for competition and consumers

Criteria for priority setting

- Experience show that CA have given priority to matters that demonstrate one or more of the following factors:
- conduct of significant public interest or concern
- conduct resulting in a substantial consumer (including small business) detriment
- conduct demonstrating a blatant disregard for the law
- conduct involving issues of national or international significance
- conduct detrimentally affecting disadvantaged or vulnerable consumer groups

Criteria and priority setting../..

- conduct in concentrated markets which impacts on small business consumers or suppliers
- conduct involving a significant new or emerging market issue
- conduct that is industry-wide or is likely to become widespread if the agency does not intervene
- where CA action is likely to have a worthwhile educative or deterrent effect, and/or
- where the person, business or industry has a history of previous contraventions of competition, consumer protection or fair trading laws

Periodic review of priorities

The CAs usually review their priorities regularly. There are some forms of conduct that are so detrimental to consumer welfare and the competitive process that they will always be assessed as a priority. These include cartel conduct and anti-competitive agreements, and the misuse of market power.

Priority setting and discretion

When the CA decides not to pursue enforcement action in relation to complaints it receives, it may nevertheless:

- provide information to the parties to help them deal with the matter and gain a better understanding of the Competition law even where a possible contravention is unlikely
- postpone or cease investigations where insufficient information is available to it, with a view to later investigation should further information become available
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Priority setting and discretion..

- draw the possible contravention to relevant parties' attention and provide information to encourage rectification and future compliance where the possible contravention appears accidental, of limited detriment to consumers and of limited gain to the business concerned
- place the relevant parties on notice about their concerns and the possibility of future investigation and action should the conduct continue or re-emerge
- deal with the matter informally where a business has promptly and effectively corrected a possible contravention and has implemented measures to prevent recurrence

Priority setting and discretion..

- While CAs rely on complaints to identify issues and inform their compliance and enforcement activities, the are not a complaint handling body that seeks to resolve every approach. If fact available information indicates that agencies are unlikely to pursue matters that:
- are one-off, isolated events, unless the conduct involves a blatant and deliberate breach of the law
- are more appropriately resolved directly between the parties under an industry code (for example, by way of mediation)
- involve issues more effectively dealt with at the local level by state (for example, by way of individual dispute resolution of a complaint)
- are primarily contractual or private right disputes

Principles and approaches underlying these policies

The CAs usually exercise their enforcement powers independently in the public interest with integrity and professionalism and without fear, favour or bias. The guiding principles include:

– Transparency—this has two aspects:

* Decision-making takes place within rigorous corporate governance processes and is able to be reviewed by a range of agencies, including the Appellate bodies and the courts

* CAs do not do private deals—every enforcement matter that is dealt with through litigation or formal resolution is made public.

Principles and approaches underlying these policies

- Confidentiality—in general, investigations are conducted confidentially and the CA does not comment on matters it may or may not be investigating.

- Timeliness—the investigative process and the resolution of enforcement matters are conducted as efficiently as possible to avoid costly delays and business uncertainty.
- Consistency—CAs do not make ad hoc decisions; they set their focus clearly to give business certainty about their actions.

- Fairness—CAs seek to strike the right balance between voluntary compliance and enforcement while responding to many competing interests.

compliance and enforcement strategies

- To achieve compliance objectives CAs employ a variety of flexible and integrated strategies:
- enforcement of the law, including resolution of possible contraventions both administratively and by litigation.
- encouraging compliance with the law by educating and informing consumers and businesses about their rights and responsibilities under the Competition law and other relevant legislation,
- working with other agencies to implement these strategies.

Additional enforcement strategies include immunity policy for cartels and cooperation policy-

Compliance and enforcement outcomes

- ***Education, advice and persuasion***
- ***Voluntary industry self-regulation codes and schemes***
- ***Infringement notices***
- ***Enforceable undertakings*** whereby companies or individuals generally agree to:
- remedy the harm caused by the conduct
- accept responsibility for their actions
- establish or review and improve their trade practices compliance programs and culture.
- **Court cases**

Compliance and enforcement outcomes

Court cases

Legal action is taken where, having regard to all the circumstances, CAs consider litigation is the most appropriate way to achieve its enforcement and compliance objectives. Most CAs are likely to resort to litigation in circumstances where the conduct is particularly egregious, where there is reason to be concerned about future behaviour or where the party involved is unwilling to provide a satisfactory resolution

Working with other agencies

CAs are not always the agency best placed to deal with particular competition issues. For example sector regulators such as the financial authorities may also provide a more appropriate resolution.

Questions?