Developing the effectiveness of the process is constrained by resources, timeliness and knowledge.

Resources

The resources available for the agency in the conduct of any consultative process are necessarily finite. The challenge is to make the best use of available resources to improve the communication process between stakeholders and the agency.

An example is improving consultation by using the Internet through *Government Online*[34] which aims to provide a seamless national approach to the provision of online services. Agencies will consult their stakeholders as part of preparing action plans and in designing services.

Timeliness

The consultative process depends on a commitment to ensuring stakeholders have time to prepare effective submissions. But the agency must see that standards are being developed and reviewed as fast as possible. This potential conflict can be addressed by having a firm and continuing commitment to sponsoring independent research on product safety and identifying alternatives within standards development.

Knowledge

Education of stakeholders in the development of mandatory product standards will prove to be a continuing challenge for the agency. Initiatives being pursued include individual consultation with stakeholders on the aims of the agency in a review. Regular meetings with stakeholders to address concerns with current and proposed standards, have improved agency understanding of technical and market issues and provided stakeholders with information on countervailing perspectives.

Having stakeholders help prepare mandatory product standards clearly addresses most concerns about the use of subordinate legislation. The direct participation of the citizen in government improves the legitimacy of laws and the commitment to the political process — the best antidote to cynicism is to endow the cynic with power.

Social responsibility in government marketing

The following is an edited version of a presentation by Brendan Bailey, the Operations Manager of the Commission's Small Business Unit, to the Government Marketing Conference in Canberra on 27 July 2001.

Introduction

Providing information to business and consumers about their rights and obligations under the Trade Practices Act, in effect marketing its role and functions, is an important part of the Commission's work. In doing this it places strong emphasis on ensuring that its publications and announcements are accurate. Information must be useful, comprehensive and readily accessible by all.

Any government business activities may fall within the provisions of the Trade Practices Act, particularly representations about services and products. Even if a government marketing activity is not covered, social responsibility comes into play and marketing should comply with the principles that underpin the legal provisions of the Act.

Government marketing: is it a business for the purposes of the TPA? The JS McMillan case

The Trade Practices Act applies to the Commonwealth in so far as the Crown in right of the Commonwealth carries on a business, either directly or by an authority of the Commonwealth. Likewise, some activities of State government business enterprises fall within the Act. This means that government marketing can attract the attention of the Commission or private litigation.

JS McMillan Pty Ltd & Ors v Commonwealth of Australia (1997) is an example of private litigation.[1] McMillan, as a consortium of print firms, was a tenderer for the purchase of five separate packages comprising the assets and printing operations of the Australian Government Printing Service. There were some core elements in one of the packages on the continued servicing of various departments. To prepare a suitable tender McMillan needed to inspect government

[34] Department of Communications, Information Technology and the Arts, *Government Online*, April 2000.

[1] *JS McMillan Pty Ltd & Ors v Commonwealth of Australia* (1997) ATPR (Digest) 46–175.

material in a data room. Confirmation of the ability to comply with the core elements in the package was fundamental to acceptance of the tender.

McMillan claimed necessary data was not present for inspection and tried to negotiate for more relevant information so it could make a more informed bid. What appeared to be a misunderstanding between it and the tender evaluation committee eventually resulted in McMillan's being ruled out of the tender.

McMillan brought an action against the Commonwealth in the Federal Court alleging misleading or deceptive conduct under s. 52 of the Trade Practices Act and sought an order to be short-listed, or the tender process set aside as void or inoperative.

The Federal Court rejected McMillan's application but in doing so found:

- the conduct of the Commonwealth had been misleading, specifically in relation to the details in the request for tender documentation; and
- the Australian Government Printing Service was a business within the meaning of the Trade Practices Act; but
- because the tender process was administered by the then Department of Administrative Services whose officers had nothing to do with the Australian Government Printing Service — it was seen as a 'once off decision'[2] by the Commonwealth to close the Government Printer and dispose of plant and equipment, and not the Commonwealth carrying on business — Crown immunity applied.

The decision was a technically correct application of the law. Justice Emmett said that the result was unfortunate for McMillan but it was up to the parliament to determine the extent to which the Trade Practices Act bound the Commonwealth. His Honour went further to '... harbour a wish that in the circumstances, the Commonwealth would remedy the effect of the conduct ... However, it is not bound to do so.'[3]

Most of us would agree that the judge had a good understanding of responsibility.

Remedies under the Trade Practices Act

It is important to note here that s. 52 of the Trade Practices Act does not attract a pecuniary penalty — the remedy is an action for civil damages. The penalties that apply to other types of conduct in Part V of the Act, relating to consumer protection, can be up to $220 000 for an unincorporated business and $1.1 million for a company.

The Commission can take action for breaches of the Trade Practices Act. In marketing matters it may seek an injunction to prevent the improper conduct, obtain a refund of money and order corrective advertising. Sometimes, rather than instituting legal proceedings, the Commission chooses to settle a matter administratively. This can be done by accepting formal enforceable undertakings.

Contemplate, if you will, telling a senior departmental executive that they should stand in front of a television camera and apologise for a misleading advertisement. After all, they will have signed-off on the material.

Of particular interest is requiring an offender to implement a compliance program. Effective compliance systems reduce the risk of action by the Commission or a complainant. The compliance focus should not be on sitting on the right side of the legal threshold but changing conduct.

Therefore, an alternative to legislative amendment of the Trade Practices Act, by intervention of parliament, is to have voluntary or 'administrative' compliance by those government marketing activities that enjoy Crown immunity.

Some relevant principles and conduct

To ensure that consumers and small businesses are treated fairly you should do the following.

- Know your target audience. Many people who need information from government are among the most vulnerable and may have difficulty getting it and understanding it.
- Understand 'puffery' and how in a commercial transaction it is tolerated. It is obviously an exaggeration to say 'this product or service is out of this world'. The Trade Practices Act does not expressly recognise puffery as a defence, but where does that leave us in the

[2] ibid: per Emmett J at p. 54,404.

[3] ibid: per Emmett J at p. 54,405.

government marketing context with a statement like 'We are from the government and we are here to help'? Should that ever be said or written?

- Make statements that are correct and current. Promotional material or activity must not mislead or deceive, or be likely to mislead or deceive. The words must be honest and truthful including what can be implied.
- Not assume special knowledge, or that the information is adequate. Consider the JS McMillan case, for example.
- Consider whether you can substantiate your claims.
- Know that omissions from the material are as crucial as what is actually stated, that is, a misleading impression can be created by not disclosing necessary information (as in the JS McMillan case).
- Not bury important information in fine print. This could become a major issue as the population ages and eyesight weakens.
- Apply best practice by not including disclaimers or qualifications in advertisements. If they are necessary make them bold, precise, unambiguous, as early as possible and easily understood.
- If making comparative claims, compare like with like.
- Avoid reckless future projections.

The Trade Practices Act contains other marketing related provisions including:

- prohibitions on misleading statements about the standard, quality and performance of goods or services, or the origin of goods;
- false representations in relation to land; and
- misleading conduct in relation to employment.

There are other prohibitions with limited relevance to government marketing such as bait advertising such as 'we have sold out of those items on special', referral selling and pyramid selling.

A practical perspective

Complying with established standards and protocols can present practical difficulties.

I have recently worked with a team preparing and marketing a video on unconscionable conduct in business transactions. The title is *Fair Game or Fair Go: Unconscionable conduct in business*. It was released in time for the Commission's Competing Fairly Forum on unconscionable conduct — a satellite broadcast to 62 locations throughout Australia.

A great deal of time was spent on deciding whether to use the term 'unconscionable conduct'. Public relations staff advised that 'unconscionable' is an unusual word. In the context of the Act the term means engaging in conduct in a way that exploits another party without regard to conscience. In the practical legal sense it means that a contract that satisfies the correct legal form can be set aside when it was obtained by conduct that is unconscionable.

A simple example is taken from the touchstone High Court decision in the 1982 Amadio case.[4] An elderly migrant couple had been persuaded by their son to provide a mortgage guarantee on his business debt to a bank. The bank did not ensure that the elderly migrant parents understood the nature of what was an important financial transaction. The bank was found to have engaged in unconscionable conduct.

In June this year the same legal principles arose in *ACCC v National Australia Bank and another*.[5] The Commission's action resulted in consent orders declaring that the bank had acted unconscionably in its dealings with a Tasmanian woman, Mrs Kathryn Ashton.

In July 1998 parliament introduced a specific statutory remedy into the Act, s. 51AC, for unconscionable conduct in business transactions. This has been recognised by the Federal Court in the Simply No-Knead (Franchising)[6] case as having a much broader application than the legal remedy used in Amadio's case. In the Simply No-Knead case a franchisor was in an escalating

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[4] *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447.

[5] *ACCC v National Australia Bank Limited and Carlton Patrick Dixon* — Case No. T22 of 2000 in the Federal Court of Australia (Tasmanian District Registry).

[6] *ACCC v Simply No-Knead (Franchising) Pty Ltd* [2000] FCA 1365.

dispute with some franchisees. Justice Sundberg described some of the conduct by the franchisor as not only unreasonable but also 'bullying tactics'.[7] The court found that there had been unconscionable conduct.

It is hard to explain such complex legal issues and conduct. Other descriptive terms tend to surface. These include 'unfair', 'harsh and oppressive', 'unreasonable' and 'lacking in good faith'. In the end, it was decided that it was better to stay with 'unconscionable' because of its special meaning. To say 'unfair' when you mean 'unconscionable' is to make an important distinction in the context of s. 51AC. Even the courts will sometimes use descriptions like 'unfair' as a form of generalisation. It is a difficult concept to explain. Lots of things in life are unfair — but not all of them are unconscionable.

The Commission focused on technical accuracy. The challenge was to de-mystify the term by using professionally acted scenarios that drew out the relevant issues. This was a valuable lesson in how to market information in a way that is accurate and comprehensible.

Summary

In summary:

- I have attempted to show that even the guardian must weigh up issues of social responsibility in government marketing;
- the Trade Practices Act and related materials provide useful guidance on relevant principles and appropriate conduct;
- Emmett J's call in the *JS McMillan* case for consideration of legislative changes is noted but it should be possible to achieve enhanced standards of conduct by voluntary means; and
- at the end of the day, I am sure we all draw comfort from the fact that in the matter of government marketing, the Chairman and Commissioners of the ACCC are watching.

[7] ibid: per Sundberg J at para 47.