Passing on the carbon price: misleading and deceptive conduct and the ACCC as the new carbon cop

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The Federal Government recently announced the new responsibility of the Australian Consumer and Competition Commission (**ACCC**) to police carbon pricing claims and prevent businesses from using the carbon price as an excuse to increase prices beyond the Carbon Price Mechanism's (**CPM**) actual cost impact. Businesses who decide to make statements about the applicability of the CPM and/or the extent of its impact should ensure that the claims are accurate.

Policing GST – lessons learnt

In 2000, the Government made amendments to the consumer law (at that time the *Trade Practices Act 1974*), inserting Part VB to specifically prohibit 'price exploitation' in relation to the GST. These prohibitions and the misleading and deceptive conduct provisions allowed the ACCC to successfully police GST price "gouging".

During the three year period surrounding the introduction of the GST, the ACCC investigated several thousand businesses, named and shamed businesses that had over charged customers, initiated a number of major court cases and successfully obtained undertakings to repay customers who had been subjected to GST price exploitation.

The new role of the ACCC

This time around, as there have not been no specific legislative amendments prohibiting price exploitation in relation to the CPM, the ACCC will only be able to pursue carbon pricing claims that are in contravention of the existing prohibitions on misleading and deceptive conduct pursuant to the *Australian Consumer Law* (ACL) and specifically in relation to false or misleading representations with respect to the price of goods or services.[1]

This means that price rises which are in accordance with the scope of particular pass-through or change in law clauses in contracts are likely to fly under the ACCC's carbon policing radar, provided that companies accurately describe the impact of the CPM in those price rises or ensure that there are no representations which exaggerate or misstate the impact of the CPM in those price rises.

In policing whether misleading or deceptive representations have been made in relation to the CPM, the ACCC can draw upon its current general consumer law enforcement powers, including the following:

- seeking civil and criminal penalties for misleading and deceptive representations;
- issuing substantiation notices requiring a business to provide information or produce documents to support any claim it makes about the impact of a carbon price within 21 days;
- issuing infringement notices specifying a penalty of up to $66,000 for listed corporations,

$6,600 for unlisted corporations and $1,320 for individuals if it considers a representation is false or misleading (payment of an infringement notice does not constitute an admission and prevents the ACCC from taking enforcement proceedings); and

- accepting court-enforceable undertakings under s 87B of the *Competition and Consumer Act 2010* (CCA) requiring the business to acknowledge the potential contravention and to take positive steps to avoid similar issues in the future.

Much like during the time of the GST, the ACCC is expected to publish guidelines for industry, explaining how it will be applying the above powers to claims regarding the CPM.

What conduct relating to the CPM is likely to be investigated by the ACCC?

The commercial incentives of attributing price increases to the implementation of the CPM are obvious. However, businesses that make any representations in relation to price increases based on the CPM should ensure that those representations can be substantiated.

Some examples of the types of conduct likely to be investigated by the ACCC as potentially unlawful include:

- overstating the impact of the carbon price/CPM;
- representations that encourage customers to purchase goods or services before the CPM commences, where the CPM will not impact the cost of those goods or services or if the claims overstate the impact of the CPM;
- attributing increased prices to the CPM before it commences (likely to be July 2012);
- implementing price increases attributed to the CPM, when suppliers have chosen not to pass on carbon costs;
- representations referring to a requirement to acquire carbon permits when that particular business is not required to purchase permits under the CPM;
- pricing that does not properly take into account freely allocated carbon permits or other industry assistance; and
- passing on a price increase that a supplier claims is related to the CPM and relying on that information (without considering its accuracy) to make the same claim to customers, rather than attributing the increase to a rise in the business' own costs.

In the absence of a legislative amendment to prohibit price exploitation, identifying misleading or deceptive conduct in relation to any price rises will be difficult for the ACCC in circumstances where no representations have been made or in circumstances where the contract includes a very broad definition of carbon related costs which are entitled to be passed on and there are no misleading representations about these costs.

What this means for you

For those organisations wishing to pass on costs, it is imperative that contracts are properly drafted to achieve this and that if direct reference is made to the impact of the CPM in any statements or representations, it should be factually accurate and be able to be substantiated. In this regard, businesses should consider implementing guidelines on the impact of the CPM, seek to educate employees and obtain legal advice in relation to any publications or representations.

Businesses or consumers on the receiving end of carbon cost pass-through would be taking false comfort if they believed the ACCC's new presence can shield them from other companies' attempts to pass on more than their fair share of carbon price costs.

All businesses should give careful consideration to their existing contracts and their future contracting arrangements which will impact on how carbon costs may be passed-through. The terms of these contracts may also be relevant when considering whether a representation is misleading or deceptive. **Click here** for tips for contracting for carbon cost pass-through.

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[1] Inquiry (April 2009) by the Standing Committee on Economics into the Exposure draft of the legislation to implement the Carbon Pollution Reduction Scheme at sections 13.13-13.15.

[2] Note that transferring obligations is permitted in certain circumstances under the NGER Act and the CPM has similar provisions.

[3] Note that no fuel tax credit eligibility currently exists for gaseous fuels, but fuel grants are available under the energy grants credit scheme. The gaseous fuels will be progressively brought into the fuel tax (and fuel tax credit) regime over a transitional period from 1 December 2011 to 1 July 2015.

[4] Extracted from the Explanatory Memorandum for the fuel tax legislative package

[5] Section 29(1)(i) of the *Australian Consumer Law*.