# Forum

## The role of the ACCC

*The following speech was presented by Commission Chairman Professor Allan Fels at the National Press Club, Canberra on 29 July 1998. It discusses the Commission's role in promoting competition, fair trading and consumer protection and outlines its recent activities in the areas of health, small business, the waterfront and telecommunications.*

Let me begin with a boast: that Australia, according to an international survey reported in *The Economist* (16 May 1998, p. 121), has the fairest competition policy in the world, and the ACCC plays a pivotal role.

The stated aim of the Trade Practices Act is to enhance the welfare of Australians through the promotion of competition and fair trading and consumer protection (s. 2, Trade Practices Act).

In particular, it focuses on unfair prices, the abuse of market power, and the violation of consumer rights for the whole of Australia.

The role of the Commission is to apply the Act properly, without fear or favour to anyone, no matter how powerful economically or politically, for the benefit of consumers of all kinds everywhere in Australia, including household consumers; small, medium and big business; farmers; local, State and Commonwealth governments; and all people everywhere, in capital cities, country towns and farms. All have an interest in being supplied competitively and efficiently at low prices with good service; and where they sell, to sell to buyers who have to compete for their output.

### Unfair prices

The Commission seeks to break up cartels that cause high prices, high costs, inefficiency and unfairness in all parts of Australia. Examples include the price fixing actions against freight express and concrete companies, and more recently against Pacific Dunlop over foam used widely in Australian furniture; WD & HO Wills for cigarettes in South Australia; Inghams and Steggles in chicken markets in South Australia; McPhees (fined $4m for freight express services in Victoria, although the matter is on appeal); and North West Frozen Foods and others for fixing prices of frozen foods to restaurants, hotels and convenience food outlets throughout Tasmania.

In contrast to the 1980s when, typically, half a dozen cases a year were conducted, the Commission is currently involved in 35 cases in the Federal Court. Around $200 million has been paid in total penalties, refunds and compensation in Commission cases since the mid-1990s. The deterrent effects of penalties and bad publicity on other firms, as well as those caught, have been many times greater.

A case currently before the court concerns Safeways, owned by Woolworths, which is linked to the successful George Weston case. George Weston applied pressure to a small business person selling bread next to Safeways to get it to put up its prices to match those of Safeways, harming both a small business competitor and consumers of bread.

Looking ahead, the Commission is actively investigating a number of significant anti-competitive agreements which are likely to go before the courts.

There has also been an increase in international cartel behaviour, i.e. firms located in different countries agreeing on prices or on who gets which customers. This rise follows the lowering of trade barriers around the world. The private sector often reacts with agreements designed to

offset the pro-competitive effects of trade liberalisation. The US Department of Justice is currently pursuing some 35 international price fixing cases.

Another area of emerging interest is in the health sector. The Commission is currently in Court in Sydney over an alleged price fixing agreement between certain anaesthetists and an alleged associated boycott by some of them of hospitals which did not agree with their pricing demands.

The Commission is also looking at restrictions on entry into medical specialist colleges.

The Federal Trade Commission, the ACCC's US counterpart, spends 25 per cent of its time on health sector matters. Most of the US matters involve naked use of market power to get higher income, rather than higher level questions of ethics, the fiduciary relationship between doctors and patients, or quality of service. If those issues arise in Australia, they can be authorised if there is sufficient benefit to the public, e.g. better quality service.

Price fixing agreements between competitors rarely have social benefits. However, it is now possible to seek authorisation for price fixing agreements where the public would benefit. The Commission is finalising an Australian Medical Association application for authorisation of collective bargaining arrangements between doctors in rural South Australia and the South Australian Health Commission.[1]

## The abuse of market power

The Commission also tries to stop abuses of market power under s. 46. From 1974 until 1996 there were no s. 46 cases by the Commission, but it has launched three recently. One in Adelaide involves a major scrap metal company, Sims, which the Commission alleges sought to force a small scrap metal collector to make an agreement with it not to compete in acquiring scrap metal. The small competitor did not agree. The Commission alleges that Sims then paid extremely high prices to acquire the scrap metal which otherwise would have gone to the small player in order to eliminate it from the market, in breach of s. 46.

The Commission has launched a case against Boral for predatory pricing well below costs aimed at driving a new entrant out of the concrete products market.

It also litigated against the Bureau of Meteorology, not for any misleading or deceptive conduct, but for monopolisation in trying to keep new competitors out of Australia. These days any government involved in any form of business can expect the law to be applied to it.

The Commission tries through merger law to stop unjustified increases in the concentration of market power. In the Coles/Myer/Foodland case it opposed Coles/Myer's attempt to acquire 75 per cent of the Western Australian wholesale grocery market and thus to:

- increase its buying power in relation to suppliers;
- increase its competitive power versus the small retailers it would have both supplied and competed against in retailing; and
- reduce retail competition.

Merger law is especially important given the absence of a divestiture law in Australia that enables existing firms to be broken up. Mergers have a profound effect in shaping the competitive structure of the economy in years ahead. Essentially a balance must be struck between allowing, with as little difficulty as possible, good mergers that increase efficiency and do not harm competition and opposing undesirable and unhealthy mergers.

A global merger wave is occurring. The US authorities are dealing with three times as many mergers as normal at present. Australia is not exempt. The Asian crisis has probably put somewhat more merger pressure on some Australian firms. Some attempts are being made internationally to improve coordination between countries dealing with mergers occurring in many countries simultaneously.

Merger law is not getting in the way of firms that need to achieve the scale necessary to take part in world markets. The Commission has opposed no mergers where there is significant import competition, and this is the area where the claim that large size is necessary to take part

1 Conditional authorisation was granted on 31 July 1998 — see 'Adjudication' section, this Journal.

in world markets is most relevant. However, even apart from that, the Commission opposes relatively few mergers. The Commission's total rate of opposition to mergers is around 5 per cent a year, and some of them are eventually overcome by undertakings given to the Commission. In the small Australian economy, unlike the USA, our law permits anti-competitive mergers where, as part of the authorisation process, they can be shown to bring a sufficient benefit to the public, e.g. lower prices. Over half of authorisation applications are successful.

The real agenda for future merger policy is in the deregulating areas where there will be a very high rate of merger activity. Much such activity is justified. It is unlikely that the structure of an industry will be right, fixed and immutable at the beginning of a process of deregulation. However, from time to time, mergers can undo the pro-competitive effects of deregulation. For example, if Victoria's electricity industry, which was broken up into many parts, was allowed to remerge tomorrow, if for example the five generator companies could remerge tomorrow or take over the distributors, this could undo many of the pro-competitive effects of Victorian deregulation.

The Commission continues to vigorously enforce the resale price maintenance provisions of the Act. It obtained fines of $3.5 million from Ampol for resale price maintenance and price fixing in a Melbourne suburb. The George Weston/Safeways case involves resale price maintenance aspects. The Commission also acted against Hugo Boss for pressuring a small retailer not to reduce its retail price and promote discounting of men's clothing and for threatening to cut off supplies of Hugo Boss products if it did. The Commission's action was good for small business and good for consumers.

## The violation of consumer rights

The Commission continues to be active in consumer protection. It obtained refunds of over $50 million to consumers of AMP's 80/20 life insurance policies, and of $45 million from Telstra for its misleading wiring repair plain. The Commission is currently concerned about advertising of mobile phones. It is involved in numerous cases involving scams against small business, e.g. telemarketing fraud. It obtained fines against Vale Wines for representing wines as particular varietal wines when they were blended.

Following the Wallis report, ASIC is now the main agency responsible for consumer protection in financial services and the Commission has an agreement to cooperate closely with it, as the Commission does with State fair trading and consumer agencies.

An important new area of consumer protection concerns relates to electronic commerce. This is the fastest growing area of complaints and the Commission is already involved in half a dozen cases with more to come. As consumers buy on the Internet, for example, often from abroad, they need protection of their credit cards and guarantees of appropriate remedies should the products be defective. This whole area has significant international dimensions and there needs to be enhanced cooperation between agencies. The Commission is sponsoring an international conference on this on 9–11 November 1998 in Sydney.

The Commission has also recently become responsible for enforcing product safety standards. It has been very active in this area compared with anything in the past, with recent actions concerning dangerous children's swimming vests and dangerous caustic soda causing permanent injury to a consumer.

The Commission believes that the penalties under the consumer protection part of the Act should be increased from their present levels of $200 000 maximum for corporations and $40 000 for individuals. They contrast with penalties of $10 million for corporations and $500 000 for individuals under the competition provisions of the Act.

## Small business

The Commission already takes many actions that are of direct benefit to small business. It is often assumed that consumers are the main beneficiaries of the Commission's actions. In fact, very often it is small business customers who most directly lose from cartels and anti-competitive mergers and misuse of market power.

Under the 'New Deal, Fair Deal' reforms, the law regarding unconscionable conduct between big and small business has been strengthened. Small business now gets the same protection as consumers. The Commission is engaged in two significant unconscionable conduct cases, both pre-dating the new legislation, one involving the Shell Oil Company, the other involving Farrington Fayre, a retail shopping centre in Leeming, Western Australia. The Commission is looking for further suitable cases to test the law through litigation.

Many small business issues cannot be satisfactorily resolved by litigation. What is required is special action in those 'hot spot' areas of the economy where there are constant disputes between small and big business. Examples include shopping centre tenants and shopping centre owners; franchisors and franchisees; oil companies and service stations; independent film exhibitors and film distributors. Typically these areas involve chronic problems about disclosure and dispute resolution. Disclosure practices need to be improved, i.e. small business needs to understand what it is in for when it starts up as a tenant or franchisee. Likewise if a dispute arises during the life of a tenancy, it is better to adopt low-cost, effective dispute resolution mechanisms than force people into expensive litigation. The Commission believes that the best way of dealing with the hot spot areas is to adopt codes of conduct applicable to the whole industry, which forces that industry to adopt good practices on disclosure, dispute resolution and other standard problems. There is a successful voluntary oil code to build on.

The Parliament has accepted that this is a good way of dealing with many small business problems. The Government can now mandate codes for particular industries and also make the provisions of those codes enforceable under the Trade Practices Act. Similarly an industry can voluntarily adopt a code but have it made enforceable under the Act. Already the Franchising Code has been mandated; likewise the Oil Code is expected to be mandated.

## Applying the law

The Commission is committed to vigorous enforcement of the law. The goals of the Commission in taking enforcement action are to:

- stop unlawful conduct;
- seek compensation for those damaged by unlawful behaviour;
- secure compliance with the law;
- seek deterrence and, if appropriate, punishment.

Although the Commission is committed to the vigorous enforcement of the Trade Practices Act, it is equally committed to following lawful processes. It is always careful to stay within the law in its own behaviour. There are important safeguards for business in the Act. Essentially the Commission must prove its case in court, usually against well-heeled, highly defended litigants.

No one likes having the law applied to them. The usual fear and loathing apply to the regulator. When the Commission applies the law to someone a frequent response is:

- the behaviour did not occur;
- if it occurred, it was not unlawful;
- if it was unlawful, it was justified in the circumstances;
- the business is being unfairly picked upon;
- others in the industry or in other industries are breaking the law more than this business and should be the target of the Commission rather than this business;
- the Commission should exercise its discretion not to apply the law;
- if the law must be applied, there should be absolute minimal resolution, e.g. by means of a warning or exchange of letters between the Commission and the offending party.

The Commission's view is ultimately that the Trade Practices Act is an important one and it should be upheld. There should be no special favours to any groups. In short, the law should be applied without fear or favour in the way Parliament clearly intended.

## Current issues

Let me turn to two major topics the Commission is dealing with currently, the waterfront and

telecommunications, and briefly comment on the so-called retreat of national competition policy.

*The waterfront*

Parliament passed strong laws regarding secondary boycotts in 1997 and especially strong ones concerning boycotts affecting the movement of goods and services into and out of Australia, of special relevance to the waterfront. The provisions are quite different to those which applied from 1977 to 1993, as well as from 1993 to 1996.

Let me emphasise, the Commission has not taken sides in the dispute. It has been investigating behaviour on both sides of the waterfront. Its duty is to seek compliance with the law. Following private and then public warnings, boycott action affecting Australian exports and small business that the Commission considered unlawful continued. It had no choice but to go to Court. To turn a blind eye to substantial, very public breaches of the law would have been to override the clear intent of Parliament and would damage the Commission's general credibility.

The parties have now finalised or virtually finalised a private agreement between themselves to resolve their private dispute. They have made it a condition of their final agreement that the Commission withdraws its public interest litigation and that those involved in other litigation do so also.

The MUA approached the Commission some five or six weeks ago to ask about a settlement. The Commission indicated its interest in a settlement and outlined the relevant parameters and set these out confidentially in a letter to the MUA, copied to Patricks. Some selective details of this promptly appeared in the Press. Essentially, we've not heard from the parties since then. There have been a few inconclusive discussions at lawyer level. There have been around 30 public statements to the media by the MUA about the matter. The parties have repeatedly told us that they will come back to us with a proposal and that there has been no need to settle the matter with them up till now. I mention this because there's a widespread impression being created that the Commission is in some way blocking a settlement at this time. This is simply not so. The parties have to come back to the Commission and they have said they will. The ball is in the court of the parties to the dispute.

One matter of concern to the Commission is that, in the course of a private dispute, economic damage has been done to small business and exporters. The Commission has details. The damage in the Commission's view was done by unlawful boycotts in breach of the Trade Practices Act. Something needs to be done about this. As well, the Commission requires some commitments regarding future behaviour. The Commission did not seek any penalties under the Trade Practices Act for the boycott behaviour, but everyone else in Australia who breaches the Trade Practices Act in any substantial way has to give some kind of undertakings about not repeating unlawful behaviour in future.

Some people are suggesting that there are only two alternatives: that the Commission backs off totally, or that the settlement collapses as a result of the self-imposed condition of the parties to that settlement. These are false alternatives. What is required is that some steps be taken by the parties to meet the Commission's concerns. Once this is done it will be possible to move forward.[2]

## Regulation

The Commission is playing a significant regulatory role in relation to communications, energy and transport. Essentially, Part IV of the Act alone is not sufficient for dealing with the market power of recently deregulated, often vertically integrated monopolists with inherited high market shares and control of key network facilities such as telephone networks, gas pipelines, electricity grids, rail lines and airports. The Commission is, for example, overseeing the development of national energy markets, e.g. by ensuring the rules of the electricity market are not anti-competitive.

*Telecommunications*

The Commission has been active, increasingly so lately, in applying its new powers to the telecommunications industry. The Commission believes it has done more in 12 months than

2 This matter was settled on 3 September 1998 — see 'Enforcement' section, this Journal.

any other country within a comparable period. Our competitive environment is improving considerably and ranks well by international standards. Nevertheless some of the biggest changes are still to come in the local call market.

The Commission acted decisively against anti-competitive conduct. It has issued competition notices and stands ready to do so again if necessary. Following the Commission's action in relation to the Internet, wholesale prices have fallen and it expects a flow-through to the retail network market.

But guaranteeing access to telecommunications network infrastructure on reasonable terms is the most important competition issue.

- The Commission has reduced interconnect prices and is currently assessing them further. Long distance call charges have plummeted.
- Data services are becoming more important in economic terms than voice services. Significant Commission access decisions on data services, including declaration for transmission and data, are creating the environment for competition to bring prices down in those services that are so vital for business, especially the financial sector, as well as for government and education.
- The effect of both these decisions has been to give greater access to competitors to Telstra's network and increase competition.
- Number portability arrangements are a key element in competition and are necessary to facilitate customer choice of competitors in the local call market. The Commission directed the Australian Communications Authority to arrive at rules which deliver local number portability as soon as possible and it set time limits for this. (The Minister had a particular role in ensuring that this occurred in relation to Optus.) The Commission has decided that each carrier is responsible for its own costs in providing number portability. For example, if Optus needs number portability for a customer moving from Telstra to Optus then Telstra pays. This is about to become an important benefit for other competitors also.
- A facilities access code has allowed sharing of facilities to reduce the need to build more mobile towers and to dig up more streets to duplicate ducts.
- The Commission has launched an inquiry into the local loop which will address the question of competition in the local call market, and through this mechanism local call prices will be addressed.

Within the past 12 months the Commission has examined, or has started examining, all the significant aspects of the telecommunications market, and prices have started to fall in a number of areas. This has also been due to greater competition and the entry of new participants. This has been helped in no small part by the activities of the regulator and the decisions it has taken to encourage this competition. It is early days yet. However, the Commission expects this pressure to continue as it continues examining other aspects of the telecommunications sector.

On the other hand, I would have to say that the attempt at self regulation, while very useful in relation to certain kinds of issues, has only been partly successful, and the Commission as regulator has, as a result, become rather more active in this market. I expect the next 12 months to be a crucial time in this industry.

## National competition policy

As mentioned, a recent international survey in *The Economist* reported that Australia has the fairest competition policy in the world. Indonesia is at the other end of the list.

The fact is that farmers and rural people want their inputs to be supplied efficiently and competitively. They welcome the actions by the Commission in breaking up cartels that supply them. For example, the Commission recently broke up a cartel setting car rental prices in the Australian outback in the Northern Territory and secured fines of $1.2 million.

*BHP and Queensland Wire Industries*, an important case in trade practices history, involved BHP refusing to supply fence posts to a small Queensland business that was competing with it in retailing wire fences to farms and that could not do so without supplying posts at the same time. The Court held that BHP had misused its market power for a proscribed purpose, namely to prevent a competitor from entering the market. This decision under the Trade Practices Act was good for small business,

good for farmers and sent a strong message to corporate Australia.

The Commission recently succeeded in litigation against Channels 7, 9 and Golden West Network in breaking up exclusive dealing arrangements which were effectively preventing people in rural Western Australia and the Northern Territory from receiving TV programs that would have been transmitted by new second commercial licences.

The Commission took action some time ago in relation to resale price maintenance and price fixing by ICI in relation to fertilisers. The Reef Distributing case involved misleading conduct in relation to the supply of fertiliser to many farmers. When I visit country areas I do not find people arguing for a weaker Trade Practices Act. If anything, they usually want it stronger.

In many respects the problem I find in country areas is not competition, but the lack of it. It is the lack of competition that causes high prices. Petrol is an example. For years, country people have been very unhappy about high fuel prices, which have been caused not by high transport costs but by lack of competition. Now, following the undertakings in the Ampol-Caltex case, Woolworths and some others are entering country towns, and petrol prices are falling by several cents a litre or more. This is competition at work in country towns, but small service station owners face the threat of closure in some cases. This shows the complications of competition policy — simplistic views of its role are rarely adequate.

Turning to banks, there is a major concern about rural bank closures. Suppose the Treasurer relaxed his prohibition on key bank mergers, and suppose the Commission ignored the merger law, suppose we had no competition policy. Do you think there would be more or less bank branches? I would suggest that if the four pillars policy is seen as part of competition policy it is arguably helping to keep branches in country areas. In other words, competition policy, in some respects, may be helping to overcome certain problems in country areas.

One area of contention concerns the future of statutory marketing bodies. This is more a matter for legislative review.

The Commission has been eminently reasonable in granting authorisations to chicken processors, wine and grape growers, egg farmers, and has accepted tobacco grower arrangements after early difficulties.

The opposite of competition is monopoly.

A recent study by Professors Creedy and Dixon of the University of Melbourne published in *Economica*,[3] a leading international journal, demonstrates empirically that most monopolies in Australia have adverse effects on income distribution.

Monopoly is no more a friend of the poor than is competition a friend of the privileged.

### Conclusion

To conclude, the Commission has a role to defend consumers, small business, rural Australia, and others from unfair prices, the abuse of market power, and the violation of consumer rights.

It has a strong, valuable Act — its role is to enforce it properly, now and in the years ahead.

## The AMA and chiropractic: a trade practices viewpoint

### The Trade Practices Act and the AMA

The State and Territory Competition Policy Reform Acts of 1995 applied the competitive conduct rules to Australian professions, including the medical profession, for the first time. The competitive conduct rules are basically the prohibitions on restrictive trading practices contained in Part IV of the Trade Practices Act. As the medical profession was effectively sheltered from the operation of the Trade Practices Act until the Reform Acts of 1995, the profession was able to engage in a number of activities that would have been prohibited in other commercial operations. The Reform Acts placed professions and professional associations such as the Australian Medical Association (AMA) in a position where they had to re-evaluate past practices to ensure they complied with the law. The purpose of this

3 Creedy, John and Dixon, Robert, 1998, 'The relative burden of monopoly on households with different incomes', Economica, 65, pp. 285–93. This study partly funded by the ACCC.