will closely examine subsequent pricing responses at the time of the GST introduction and afterwards. The Commission would expect to see the effects of demand anticipation on margins to be neutral over the transition period.

Supplier justification

The Commission expects that suppliers will be able to justify in specific terms any change in product net margins.

Justification should be by reference to the terms of the statutory test and the guidelines, including consistency with competitive market operation.

Monitoring

In carrying out its task of monitoring prices in the transition period the Commission will take into account any publicly available econometric modelling and any other modelling that the Commission itself undertakes or commissions. Price changes that vary significantly from an industry's expected average price movements will be an indicator for closer scrutiny by the Commission.

Displaying prices

Where prices are displayed they should be GST inclusive. This is in line with the intent of the Government. It is also consistent with the Trade Practices Act (ss 52, 53(e) and 53C). In addition, suppliers are encouraged to provide information to consumers to explain the basis for any price changes. This may include display of the pre-GST prices as well as the GST inclusive price, where appropriate.

Compliance commitments

The Commission will seek voluntary commitments of compliance with the guidelines from individual businesses with annual turnovers above $100 million.

The draft guidelines are available from Commission offices or at its website.

Restrictive trade practices and health professionals

This article by Elizabeth Kelleher of the ACCC's Brisbane office identifies some of the types of conduct that may be subject to enforcement action by the Commission in relation to the application of Part IV of the Trade Practices Act to health professionals.

Part IV of the Act was extended to unincorporated businesses, including the medical profession, by the *Competition Policy Reform Act 1995* and State and Territory application law from 21 July 1996. Part IV therefore applies to those professionals that operate through independent businesses as opposed to employed professionals.

Health sector compliance with the provisions of the Act is a Commission priority. The important social and economic role of the health sector in our society makes it vital that consumers enjoy the full protection of the Act. Application of Part IV will help ensure that competitive forces stimulate the development of products and services and allow consumers to determine the range, quality and price of services available.

The specific provisions of the Act dictate what enforcement action can be taken by the Commission. This article highlights the types of conduct that are likely to breach the provisions of Part IV of the Act and provides several examples of instances where the Commission has taken action.[1] Professionals need to be aware that monetary penalties apply to breaches of the Act.

Primary boycotts: ss 45, 4D

Agreements reached between persons in competition with each other that exclude or

limit dealings with a particular supplier or customer are prohibited under the provisions of the Act. These agreements are sometimes referred to as primary boycotts. Below is an example involving members of the Pharmacy Guild of Australia, which illustrates the risks involved in entering into such agreements.

The Pharmacy Guild of Australia held two meetings in Adelaide on 21 and 22 February 1994, attended by approximately 85 members. There was discussion as to the action that might be taken by individual members in response to certain pharmaceutical companies that were considered to be unfairly discriminating in terms of price against members of the guild. A suggestion was made that members of the guild defer placing their winter orders with any pharmaceutical manufacturer (other than Wellcome or Alphapharm) for about two months.

The Commission considered this arrangement to be in breach of s. 45(2) of the Act. As a consequence of an investigation by the Commission the guild undertook not to give effect to any agreement that might have arisen from those meetings and to develop and implement a trade practices education and compliance program.[2]

Price fixing: s. 45A

Traditionally many health professionals have relied upon their associations to set fees for services. However, professionals run the risk of breaching the Act if they agree with other professionals to set a standard fee. A recent matter involving the Australian Society of Anaesthetists (ASA) and individual anaesthetists illustrates this risk.

It was alleged that four NSW anaesthetists, through their medical practice companies, had reached an agreement to charge $25 per hour for on-call services. It was further alleged that the ASA was a party to one or more of the agreements.

On 17 December 1998 Justice Hill accepted undertakings from the four anaesthetists and the ASA not to engage in the alleged conduct.[3] The ASA gave an additional undertaking to develop and implement, at its own expense, a program of compliance with the Act.[4]

The best approach for a health professional is to individually determine the fees to be charged for his or her services. Furthermore, individual or government negotiation with hospitals/health funds over the fee for service is the only way that will guarantee no breach of the Act. An alternative avenue open to members of the health sector is to seek authorisation, which is discussed in greater detail below.

Exclusive dealing: s. 47

In the recent case of *ACCC v Health Partners Incorporated*[5] the Court found that the respondents, Health Partners Incorporated (HPI) had engaged in exclusive dealing conduct in breach of s. 47(7) of the Act. Section 47 prohibits the supply of goods and services on condition that the purchaser acquires goods or services from a particular third party. It also prohibits a refusal to supply because the purchaser will not agree to that condition.

In this case HPI, a health insurer, had sought to terminate a contract with an Adelaide suburban chemist shop that had made a decision, based on commercial reasons, to leave the Chem Mart pharmacy chain.

Health professionals should be aware of the protection offered by s. 47 of the Act. This case highlights the fact that professionals may not be compelled to acquire the services of a third party in order to acquire services from a second party.

Certain hospitals will only accredit doctors who are members of a particular society. Such criteria may involve a *per se* breach of the Act as it forces professionals to acquire membership from a third party, such as a specialist society, before they are eligible for accreditation from the hospital, the second party.[6]

Authorisation

Maintaining the standards of quality health care is important to both the Commission and the community at large. Neither the Act nor the Commission is concerned with the 'blind pursuit' of competition. Under the provisions in Part VII of the Act there are mechanisms in place that allow certain anti-competitive

conduct to be authorised in the event that it results in a public benefit outweighing the anti-competitive detriment. Where there are perceived public benefits from engaging in conduct that may breach the Act, professionals should consider lodging an application for authorisation before engaging in such conduct.

Conclusion

Cooperation between members of the health profession is important in maintaining standards and ensuring quality care. There is concern that the application of the Act may work to stop such cooperation. However, the Act does not generally seek to stop cooperation in relation to standards of care or the pooling of non-price related information.

There is also concern that the imposition of competitive conduct rules on the health sector will result in the quality of health care becoming secondary to price considerations. However, as noted by Professor Fels:

> ... in the medical services market, consumers are likely to want a quality service first and a good price second. As a consequence, increased competition in the health sector will manifest itself in competition over the quality of the service being provided.[7]

The above cases highlight the legal risks to which health professionals are exposed under the Act. The Commission will use its powers as a law enforcement body to stop contraventions of the Act and as an effective means of informing newly exposed sectors, such as health professionals, of their rights and obligations under the Act.

NOTES

1. For further information refer to the Commission's booklet *A guide to the Trade Practices Act for the health sector*, November 1995.
2. Undertakings to the Trade Practices Commission given under s. 87B by The Pharmacy Guild of Australia and Barry R. Schultz and Humphrey George, 10 March 1995.
3. In the Federal Court of Australia New South Wales District Registry, Case No. NG844 of 1997.
4. For further case information see 'NSW anaesthetists and The Australian Society of Anaesthetists', *ACCC Journal* 19, February 1999, p. 40.
5. (1998) ATPR 41-604.
6. Prof. A. Fels, 'Competition health: two years on', speech presented on 31 July 1998, available from the Commission's website.
7. Prof. A. Fels, 'The Trade Practices Act and the health sector', *Australian Health Law Bulletin* 6, 1998, 57 at 61.