Conclusion

Lawful actions by members of the community who provide truthful information that helps to uncover, stop and deter unlawful conduct (or serious professional misconduct) is significantly in the public interest and should be encouraged. Without the encouragement such unlawful conduct or misconduct will often remain uncovered.

The issue of protecting those who do come forward and help in detecting such behaviour is something that deserves further debate and action. Not only would such action strengthen the protection for such whistleblowers but also provide the recognition by society of the public interest these people serve and therefore the protection they deserve. This too may also encourage them to come forward.

TPA review, the ACCC and the media

Following is a summary of a presentation by Commission Chairman, Professor Allan Fels, to the National Press Club, 31 July 2002. Professor Fels' talk concentrated on modernising the Trade Practices Act, accountability of the ACCC and the ACCC's relationship with the media.

The topics being discussed are related. There has recently been a set of virulent, seemingly semi-coordinated attacks on the administration and the media practices of the Commission.

Driving the attacks are a desire by major elements of the big business community to:

- divert public debate and attention away from sensible reforms that the Commission is proposing
- weaken the effectiveness of the Commission as a vigorous though proper enforcer of the Trade Practices Act.

The Commission will neither be intimidated nor diverted from carrying out its proper functions of applying the Trade Practices Act without fear or favour to whomever it applies, no matter how powerful they may be politically or economically.

The big business lobby opposed the introduction of trade practices law in 1965 and 1974, its strengthening (e.g. on mergers and unconscionable conduct) and of trying to weaken the enforcement of the laws by undermining the position of the regulator as far as possible. If big business had its short-sighted way, Australia would be an economy made up of anti-competitive, inefficient monopolies and cartels. It would be riddled with unfair trading practices and unconscionable behaviour with harm ultimately being done to businesses as much as to consumers. There is no worse nor more ill-judged time than the present to try to undermine the work of an effective regulator. The examples of the damage done by ineffective and weak regulation in cases such as Enron and World Com are sufficient to make the point.

Reforming the Trade Practices Act

To make the Act work better the Commission is seeking several changes most of which would bring it into line with international best practice.

Criminal sanctions

The first change being sought by the Commission is the introduction of criminal sanctions under the Trade Practices Act for hard-core collusion by big business. Collusion is extremely harmful both to business customers and consumers. The gains can be large and it is difficult to detect. The incentives for collusion are high in some areas of the modern economy.

Hard-core collusion, that is, secret price fixing agreements, bid rigging and market sharing is ethically objectionable, a form of theft and little different from classes of corporate crime that already attract criminal sentences. The possibility of criminal sentences is therefore appropriate for this kind of behaviour.

In addition, the system does not provide a sufficient deterrent in all cases. The fear of possible jail sentences is a far more effective deterrent than possible fines. We should join the United States, Canada, Japan, Korea, now Britain and some other parts of the world in having criminal sanctions for collusion. The higher fines in the 1990s, although having had a significant effect, are still not sufficient, as shown by the many serious price fixing cases since then.

Moreover, there is an unusual mismatch in this law. Usually laws with possible multi-million dollar fines provide for jail sentences as an option.

The possibility of criminal sanctions should not concern most business leaders in Australia personally. Secret, unlawful collusion of a major kind is not the practice of most Australian businesses. Almost all regard price fixing as abhorrent. But when it occurs its first victims are business and household consumers. These are some of the reasons why the Business Council of Australia supported the adoption of criminal sanctions.

Criminal provisions need to be accompanied by the following safeguards:

- Sanctions would only apply to defined acts of collusion such as price fixing and not to the whole of the Act.
- Proof beyond reasonable doubt would be required.
- The Director of Public Prosecutions, rather than the Commission, would conduct the case.
- The matter would be dealt with by a judge and jury, as the Constitution requires.
- A jury of 12 is required and, according to High Court decisions, its verdict must be unanimous.
- A judge would then decide whether or not a guilty party should be fined or jailed.

The Commission would be likely to invoke the use of the law only when there is strong proof of blatant behaviour seriously damaging the community.

In view of this, the present sanctions must be fully retained and indeed strengthened. It is also vital that the relative speed and flexibility with which the current provisions can be applied, compared with criminal sanctions, should be fully preserved.

Section 46

The Commission supports the introduction of an appropriate effects test. The object of s. 46 is to prevent firms with substantial market power from engaging in illegitimate anti-competitive conduct. Such behaviour entrenches the market power of big business, is damaging to competition, consumers and small business, and is a form of unfair trading.

Section 46 gives legitimate protection to new entrants to industries dominated by major businesses. It does not prohibit market power—it only prohibits its abuse.

Section 46 does not prohibit corporations from acquiring a position of monopoly or substantial market power by normal commercial means, for example, by becoming more efficient, innovative or having developed better commercial strategies. If this weakens or damages competitors or competition, it is not prohibited.

Section 46 only prohibits illegitimate, anti-competitive tactics that go beyond normal commercial practice in competitive markets to achieve these outcomes.

Nearly all countries have an effects test and its existence is not controversial. The USA monopolisation law is about the effect of monopolisation. The EU abuse of dominance law concerns the effect of abusive behaviour and covers behaviour by firms that enjoy 'collective dominance', a concept not very different from 'substantial market power'. Australia and New Zealand, which copied our law, differ. Australia adopted the law in response to lobbying by big business in 1977.

Competition law is about protecting the process of competition in the modern economy. It is about the harm to the economy from anti-competitive conduct. It should be concerned with outcomes or effects rather than just the purposes of behaviour.

To the extent that s. 46 excludes an effects test, it appears to be based on a wrong principle.

Under Australian law, if a firm with substantial market power seriously damages the competition process with illegitimate behaviour prohibited in other countries then under the present law it is not unlawful, no matter how great the harm. That is, its purpose has to be proved in court.

Critics claim that the introduction of an effects test will dull competition. It is not so argued in other countries. Yet the whole of s. 46 is written with ample safeguards to protect legitimate competitive conduct. It has been designed to avoid going too far. Cases, in practice, are hard to bring and hard to win.

The High Court's view is clear: that the section is about protecting competition and interests of consumers. This will not be changed by the introduction of an effects test.

Given this, the competitive process would not be disadvantaged but actually helped by the addition of an effects-based test. Without this, small business is being denied a legitimate right. Section 46, in its present form, is the Magna Carta of small business. It needs strengthening and in no way weakening. The Commission's proposal is a moderate one.

Speedier action under s. 46

The Commission is concerned about how long it takes to arrive at an outcome for cases under s. 46 of the Act.

There are many cases at present under s. 46 for which a final result takes five to seven years. Even to get to court can take at least a year. This is fine for lawyers but hardly protects competition. By the time the Commission is able to get to a court a competitor being damaged may well be dead and buried.

The Commission considers it is desirable that subject to appropriate safeguards s. 46 should have a 'cease or desist' provision similar to that recently introduced in New Zealand, and similar to that available in Europe.

The Commission can now obtain interim injunctions. However, these have not worked especially well over the years. They are difficult to get, they need evidence of purpose, and once sought, s. 155 (power to obtain information, documents and evidence) investigations have to cease.

Collective bargaining

The Commission recognises the need to address the treatment of small business collective bargaining under the Act and related small business concerns with the authorisation process.

It proposes a notification process for small business collective bargaining modelled on the existing notification process for exclusive dealing, and improved authorisation procedures.

Mergers

The Commission considers that s. 50 of the Act and the Commission's own informal clearance process for merger assessments are working well and is not persuaded that any significant change is required to either.

It believes there is no compelling evidence to support claims that the current mergers law is stifling Australia's international competitiveness or that it is unsuitable in an era of globalisation. Indeed, a weak or compromised mergers policy could actually undermine Australia's international competitiveness.

Merger statistics show that while the number of mergers examined has been steadily rising, the number of mergers opposed by the Commission is small, averaging between 4 and 5 per cent. Of these, many have been resolved through the use of court enforceable undertakings using s. 87B of the Act. This has resulted in only 2 per cent of mergers being finally opposed by the Commission between 1999–2000 and 2001–02.

Publicity

Section 28 of the Trade Practices Act explicitly instructs the Commission to publicise the Act and its work. The fact is that the public—and therefore the media—has the right to know all about the Act and the Commission.

The Act these days is the product of all the parliaments of Australia—the Commonwealth, the states and the territories. It is an important, far reaching law whose objects are to promote the welfare of all Australians everywhere in the country. The public, parliaments, the media, businesses large and small, and people in the cities and rural and regional Australia are all entitled to know how the Act affects their rights, their obligations and their welfare. They all need to know how this important law is being implemented and how it is affecting them and the community. And the taxpayer is entitled to a full explanation of what the Commission budget is being spent on.

Making the public aware also builds public confidence in the law and its administration and enables informed debate about and criticism of its shortcomings. It educates the public about competition law and its effects when a cacophony of interest groups argue against it, or at least its application to them.

Public awareness is also a powerful antidote to misinformation about competition law and policy.

Misinformation can be spread because of:

- the complexity of the law
- wilful distortion of the issues by self-interested parties.

Recently, Sony Entertainment claimed the Commission was 'completely misleading and incorrect' to say consumers could make back-up copies of games. In fact, s. 47C of the *Copyright Act 1968* expressly states that infringement of copyright in a computer program does not occur when a reproduction of that work is made for back-up purposes by, or on behalf of, the owner or licensee of that program. We did not mislead, we enlightened consumers as to their rights.

The media has a vital role in getting this important information to the public and the business community and in provoking debate about the law. It plays a key role in a democratic, liberal, market-based polity such as Australia exposing what others want to keep secret. It does this job best if it is diversified and adequately resourced.

Let me now describe the Commission's approach to publicising the Trade Practices Act under Part IV of the Act. Most information provided by the Commission is on matters already resolved in court. For example, most media releases are issued after the courts have brought down their decisions. Usually this is unpopular with the businesses found to have transgressed the law. It is not, however, 'trial by media' to report the outcome of a court case!

The Commission is also criticised for publicising its institution of court proceedings. But our system of justice is public and once the Commission or any law enforcement agency institutes proceedings it is a public matter.

Commission practice is to prepare a media release to provide a simple, accurate, fair and balanced account of what it is alleging and what relief it is seeking. We make it clear the claims by the Commission are allegations. The Commission does not try to make its case or provide evidence before the hearing.

The courts have ruled that not only is it acceptable but also highly desirable that the Commission should issue these media releases explaining the often complex claims simply and properly. It enables the media to properly inform the public of what is happening.

It has sometimes been said that launching proceedings reduces the reputation and standing of firms and that this should result in lower penalties for them. The Federal Court has generally rejected the idea unless it can be demonstrated that adverse publicity resulted from unfair reporting.

Some claim that a conclusion is immediately drawn that 'investigation' or 'allegation' means 'guilty'. This is not the Commission's view. We believe most people are fair minded and fully understand the difference between an investigation, an allegation and a finding of guilt by courts. If given the true facts they will make these distinctions.

The Commission conducts many investigations. It rarely makes the fact of these public and only when there is a good public policy reason. Occasionally, it will confirm it is investigating a matter if it is necessary for the public to feel confident that it is doing its job. Sometimes a minister publicly refers a matter to us for investigation, as recently happened with NAB frequent flyer points and with alleged GST pricing over recovery in pharmaceuticals.

The Commission's general approach, though, is not to publicise the fact that it is investigating a matter. However, it may sometimes confirm it is investigating if this has become known. Sometimes a complainant or someone being investigated will tell the media. Or a third party from whom the Commission has sought information or evidence may tell the media. The Commission may then confirm an investigation so that accurate rather than inaccurate information is being given to the public. Moreover, it is made clear when necessary that no conclusion has been reached as to whether or not the law has been breached.

Business does not like Commission publicity, no matter how justified. They have few valid arguments against it. They are also able to employ their vast public relations machines to respond to Commission publicity and some spend heavily doing that. They are, however, accusing the Commission of 'trial by media' even though there is no basis for this.

The Commission makes no apologies for its high profile. It serves the interest of the public and allows the media to play its role of informing the public. It will continue to put the public interest first.

Oil company walk-in

After the Commission recently conducted a walk-in at an oil company, misinformation was promulgated by some in the business community.

The facts are that a whistleblower contacted the Commission last year with information of concern. The Commission advertised for the whistleblower to come forward without disclosing which industry was concerned. The whistleblower provided some information including documents. The whistleblower contacted the Commission again by letter. This letter was copied to *The Daily Telegraph*, which wanted to publish and told us so. The Commission asked *The Daily Telegraph* not to publish until further notice from the Commission. The Commission conducted its walk-in, then later that morning, told *The Daily Telegraph* that it had withdrawn its request for non-publication. *The Daily Telegraph* asked for and was given, some basic and factual information about the walk-in. It

also asked for a photo. The walk-in had already occurred.

Contrary to claims by many business people such as the Australian Chamber of Commerce and Industry, no photographers or cameras were present at the walk-in. However, *The Daily Telegraph* was advised that staff would be returning during the afternoon from the Caltex head office to the nearby Commission office. They took a photograph of them bringing back boxes containing Commission material. At no time was *The Daily Telegraph* told nor was it implied or suggested that the boxes contained Caltex material. The boxes removed from various sites later in the day and on other days contained Caltex material but those particular boxes did not.

The Commission cannot investigate under the Trade Practices Act unless it has reason to believe there may have been a breach of the law. The Commission formed the view that this precondition for the walk-in had been satisfied. More than that, it took the matter to independent counsel, an experienced QC who gave us his independent opinion that the walk-in was justified.

We expected a challenge from the oil companies. There have been many challenges to the use of our powers. We have won nearly all of them. But we were still surprised that the oil companies chose not to challenge us but instead later to conduct a public relations campaign about the boxes.

Caltex claims that its reputation has been harmed. The fact is that the public is well able to distinguish between investigations, allegations and court verdicts and knows that an investigation does not mean that someone has broken the law.

If oil companies have a bad reputation with the public, this is not the Commission's fault. It is the oil companies'. There have been strenuous efforts in recent weeks, mainly by Caltex to blame the Commission for their reputation with the public.

Should there be oversight of the Commission?

Some have suggested that the Commission needs oversight, a view partially stemming from the erroneous belief that the Chairman in some fashion makes the decisions and that these need oversight.

Before 1974 there was a single Commissioner in charge of competition law enforcement. Partly in recognition of the problems this can cause it was decided to establish a Commission. There are currently five Commissioners including myself. All are independent, meet frequently, debate and vote on issues. The Act makes clear that issues are to be decided by majority vote of the Commissioners.

It is true that there is a board of review of the Commissioner of Taxation but the Taxation Commissioner is not part of a Commission but a single decision-maker. Moreover, the board is purely advisory. In addition the Taxation Commissioner's decisions differ from those of the Commission. Those decisions are binding although they can be appealed to a court.

The Commission on the other hand cannot affect anyone's rights against their wishes. It must go to court to get the verdict. Unlike the Tax Commissioner, the Commission must go to court, prove its case and get orders from the court before someone's legal rights are affected against their will. We are currently involved in more than 80 cases, many vigorously contested.

Obvious problems with an ACCC Review Board include:

- What would it do—overrule Commission decisions?
- Resolve disputes with firms rather than have them go to court?
- Would it consider complaints or objections to our decisions by customers or consumers—e.g. say a consumer opposed a bank or retail or oil company merger, could they take it to the board?
- Who would be the members—business people with potentially conflicting interests? Small as well as big business? Farmers? Consumers?
- Would it be just another set of expert independent people like the Commissioners (presumably people who do not have active interests as consultants for business)—would this not create another layer of bureaucracy?

Isn't this just an attempt to nobble the Commission which is already highly accountable to the courts? What is wrong with the ACCC Consultative Committee which meets regularly and is well attended by business people, although I note that neither the President or Executive Director of the Business Council of Australia have attended for the past five years.

There are similar difficulties with other ideas such as having the Australian Competition and Consumer Commission Inspector-General, a name that Gilbert and Sullivan would have delighted in.