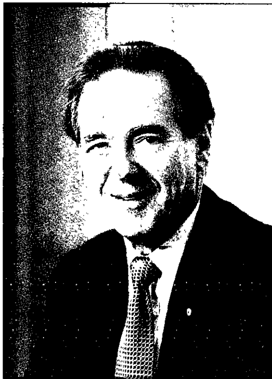
Forum

A new Chairman of the Australian Competition and Consumer Commission: a change in substance or a change in style?



The following is an edited version of a speech by Commission Chairman, Graeme Samuel, to the Melbourne Press Club on 18 July 2003.

Introduction

Just the other evening I was having dinner with my predecessor Allan Fels. I must say that he was looking absolutely refreshed, almost as if he had spent several weeks at a health clinic. And that was only three days after he had retired as Chairman of the ACCC. I asked him how he was feeling. He replied with an unusually light-hearted tone to his voice that no-one could possibly imagine the weight that had been lifted from his shoulders. I quickly responded that I could—it had landed on mine with a sudden thud!

A tidal wave of issues has descended upon me in these first few weeks: the aftermath of the Royal Australasian College of Surgeons determination; AGL; the issue of the power of the major supermarkets; as well as several mergers. Without even mentioning other issues such as regulation of telecommunications, energy issues and the constant stream of enforcement matters relating to both competition and consumer protection issues.

Today I have entitled my address: 'A new chairman of the Australian Competition and Consumer Commission: a change in substance or a change in style?'

In doing so I was prompted by a number of predictions, remarkable for their fearless and certain tone, made mostly by people who have never met me, indicating their views as to what my appointment means for the Commission.

So far, comment about my supposed approach can be grouped into one of four classes.

The first class is that I am a creature of big business and that I lack an understanding of the difficulties encountered by small businesses.

The second would have you believe that I am a dealmaker and thus less interested in seeing the law enforced vigorously.

The third is that I favour a very low profile, will shy away from dealing with the media and as a consequence the Commission's conversation with the Australian public will be muzzled.

The final class of comment is that, as Chairman of the Commission, I will dominate Commission processes, deliberations and decisions and thus diminish the role and importance of my fellow commissioners.

My key message today is that the Commission's responsibilities are defined under the Trade Practices Act and that the Commission will continue to discharge these responsibilities in a manner that is appropriately loud and robust. This must be the case irrespective of who occupies the office of chairman.

In substance, I cannot and will not be any different from my predecessor, Allan Fels. He undertook his functions as Chairman of the Commission in a proper and outstanding fashion. He carried the Commission through the administration of the Trade Practices Act as he was bound to do. He recognised, as business is bound to recognise, that the framework within which the regulator must operate is set by parliament. If the regulator moves outside that framework the courts will bring it to heel. If the regulator is not seen to be properly enforcing the Act, those affected by that failure, consumers, small and big business alike, will act with the assistance of the media and parliament in subjecting the regulator to constant and close scrutiny to ensure that it is fulfilling its responsibilities without fear or favour.

Of course there will be a difference in style between Allan Fels and myself, because he is Allan Fels and I am Graeme Samuel.

I am often asked to describe my own style—I will have to leave it to others to proffer their own descriptions in due course. I would like to think of myself as being open, forthright, and above all completely uncompromising, as to my personal principles and responsibilities attached to public office.

I'm sure that there will be as many critics of my style as there have been of Allan's over the years. But that criticism goes with the job. As Allan often said, if you're not being criticised then you are probably not doing the job effectively.

Sometimes I think that that criticism is an attempt, perhaps somewhat naïve, by elements of business to put pressure on the ACCC and the way it fulfils its responsibilities. Perhaps it's a misconception that this sort of process of using public rhetoric and criticism might influence the way the ACCC carries out its duties.

The important thing is to assess whether the criticism is well-founded and merits a change in style or whether it comes from vested interests that do not understand the role of competition policy or the role of the regulator in pursuing vigorous but lawful competition on the part of big and small business for the benefit of consumers and the Australian economy.

The only sections of business that have anything to fear from the ACCC are those who don't believe in the fundamental principles of lawful, honest competition. And to those I have one message—watch out!

What Allan has demonstrated is the critical importance of publicly making consumers and business aware of their rights and responsibilities under the Trade Practices Act. You may rest assured, or, depending on your perspective, be somewhat discomfited, to know that I will be following Allan's example in continuing to do just that.

Big business, small business, consumers and the law

In coming to this role I bring extensive experience in law, investment banking and business; and in the way businesses think and operate. These practical experiences give me a good insight into the way businesses focus on competitive pressures and the way they may engage in anti-competitive behaviour. After all, it is universally acknowledged that poachers make the best gamekeepers.

My work over the past six years as President of the National Competition Council involved reforming Australian businesses, government businesses, big and small business, with the objective of producing benefits for consumers. It was a valuable precursor for my new role as Chairman of the ACCC.

The purpose of competition policy is to promote competition in the interests of consumers, not to preserve competitors or to protect certain sectors of business from the rigours of competition.

Businesses that are able and motivated to take advantage of the competitive environment through innovation, improved efficiencies, keen pricing, quality service standards and other forms of vigorous competition will thrive. The corollary is that businesses that are unable or unwilling to respond to the challenge of competition will languish and may ultimately fail.

This is not to say that small business has no protection under competition policy. Competition policy is about encouraging vigorous, competitive behaviour which benefits consumers and the public at large. Small businesses that are subjected to unfair or unconscionable business behaviour that disadvantages consumers are entitled to protection from that behaviour under our competition policy laws.

And the facilitation of collective bargaining by small business, the subject of recommendations in the Dawson Committee report, is significant in helping to correct any mismatch in the relative bargaining strengths of big and small business operators.

It may be the case that to promote and nurture competition in a market, it is necessary to intervene to protect competitors or a class of competitors in that market from substantial damage or indeed elimination as a result of a course of behaviour by another competitor.

The difficult task for governments and competition policy regulators is to strike the balance—to distinguish between vigorous but lawful conduct that is likely to lead to significant benefits for consumers and unlawful anti-competitive behaviour, likely to disadvantage consumers. This is a task that needs to be undertaken independently, rigorously, transparently and objectively to ensure that the primary focus is on the interests of consumers, that is to say the community at large, and not on insulating certain sectors of business from the normal competitive disciplines.

The voice of the consumer will be constantly heard urging that the focus remains on consumer benefits.

Consumers represented by consumer groups, want to ensure that governments and regulators promote dynamic competition, even if this implies that it be aggressive and potentially damaging to some competitors within a market. This is the way for consumers to get the advantages of choice, quality and price to which they are entitled and to ensure that our economy is best able to adapt itself to maximise productivity and growth.

Any suggestion that the Commission will, under my chairmanship, favour big business to the detriment of small business therefore totally misses the point. It is not the role of competition policy to favour one sector over another.

The Commission cannot and will not favour particular groups or players in the marketplace. It is not a champion for particular groups, and will not champion the interests of big business, small business or any other sector of the economy.

We shouldn't be using competition policy to tilt playing fields in favour of big or small business, one way or another, if that's going to have an anti-consumer impact. That's not in the public interest.

Enforcing the law, compliance and public comment

The very reach of the Act, both in terms of competition law and consumer protection, means that it touches on everything we do.

The Commission has obligations under the Trade Practices Act to investigate allegations of unlawful behaviour, regardless of whether it's big business, small business or particular interest groups.

If a large business treats small business unfairly, in an unconscionable manner, then the Act will be brought to bear on that business. If a business treats consumers unfairly and in a misleading and deceptive manner, the full force of the Act will be brought down on that business. If a business colludes with another business and, as a result, the consumer suffers, then again the full force of the Act must and will be brought down on the offending businesses.

A strong enforcement team works within the Commission. This role will continue as energetically as ever. We have a staff of 450 people who will continue to work hard in pursuing those who choose to breach the Trade Practices Act.

As a public agency the resources of the Commission are constrained. It's important therefore that we utilise these resources to achieve wide-reaching results in the areas of enforcement and compliance.

The approach of the Commission reflects this thinking. Enforcement strategies are either curative or preventative, and range in intensity from contested hearings in the courts, through hearings by consent, formal s. 87B undertakings, administrative settlement, and informal resolution to education programs.

It has been suggested that I favour secret deals and a soft approach to enforcement.

My message to those who would make such a calculation is that they do so at their own considerable risk. We cannot deal with serious misconduct under the Trade Practices Act by way of deals done in back rooms. We are a public agency, and as such, are accountable to the public.

But perhaps more importantly, public exposure of serious misconduct on the part of a business and the determination of the Commission in dealing with such misconduct is a crucial element of our fundamental objective to bring about compliance with the requirements of the Act. It must be clearly understood that if matters of misconduct are to be dealt with by way of settlement with the Commission, there is a non-negotiable element to settlement, which means it will be done in full view of public scrutiny and public exposure of the misconduct concerned.

No deals will be done behind closed doors.

Serious misconduct needs to be dealt with in a manner that achieves an appropriate change in behaviour and imposes penalties that send a message to corporate Australia that such conduct will not be tolerated.

Let me also make it clear that the ACCC will not be deterred from enforcing the Act simply because a big corporate player threatens to engage the Commission in drawn-out and expensive litigation proceedings. The ACCC has a role to enforce the Act. It will undertake that role against big and small businesses that breach the Act, particularly where those breaches affect consumers and it will do so irrespective of any intimidatory threats from business, designed to deter the Commission from properly fulfilling its responsibilities.

Publicity, the media and the Commission

One of the important roles of the Commission is to inform the public of the activities of the Commission itself.

This was the clear intent of parliament, which in s. 28 of the Act provided that the Commission make available to persons in trade, consumers and

the public, information about the operation of the Act and matters concerning the rights and interests of consumers.

In providing such information the Commission accounts for its actions to the Australian public. As is proper, the community has a right to be informed of, and to assess and judge the work and decisions of the Commission.

The Commission therefore welcomed the Dawson committee's acknowledgment of the important and legitimate role of the media in ensuring improved compliance with the Trade Practices Act. The committee said it was appropriate and cost-effective for the Commission to use the media to educate both consumers and business about their rights and obligations.

There is a clear public benefit generated by the broadcasting of Commission activities and initiatives. The Commission will continue to use the media, to use the public forum to keep consumers informed of their rights and businesses informed of their responsibilities under the Act.

My own personal view is that we need to encourage media and commentators to focus on the institution rather than the individual at the helm. To that end I am encouraging my fellow commissioners to represent the Commission's view on issues directly the focus of their responsibilities. This does not mean that the Chairman will be, to quote one media headline, 'avoiding the limelight'. I regret to inform those of you who were discomfited by Allan Fels' constant media presence, that you will have to get used to my perhaps lower-pitched and more gravelly tone of voice. For I recognise that the media is constantly interested in the views of the Chairman as the face of the Commission and that it is incumbent upon me to express the views of the Commission on the vast range of issues that fall for its deliberation.

I will continue to use the media as a forum for informing the public of their rights and responsibilities under the Act.

I believe the media can be used to bring about behavioural change on the part of business, by ensuring that they understand what their responsibilities are as well as to reinforce their obligation to behave in a proper, lawful manner in pursuing vigorous competition.

Of course, publicity attending an adverse judgment of say, price fixing or unconscionable conduct, can lower a firm's standing and reduce sales. This is of concern to the companies involved and, sometimes, a matter of complaint, which I acknowledge.

A good reputation is highly prized by businesses. Those planning unlawful anti-competitive behaviour put at risk a valuable asset. That said, there is an important balance to be struck.

The Commission should not be cavalier in its treatment of individuals or corporations about whom we allege wrongdoing—not in public, and not in private.

I am very comfortable with the Dawson recommendations on the establishment by the Commission of a code of media conduct.

The Commission will continue to maintain a public discourse on a number of levels.

We will make comment to the media and issue press releases. Commissioners and staff will give speeches like this one. We will issue discussion papers and technical papers. We will maintain over 20 public registers and a number of 'voluntary' public registers. We will continue to operate an internet site to provide the Australian community with detailed and comprehensive information about the operation of the Act.

The Commission has, of course, long-standing expertise in both the theory and administrative practice of competition law, which we will continue to articulate in public. Reasonably, the expertise we have should be shared with the Australian public.

Equally, however, we are not a policy agency nor do we make the law.

Just as it would be inappropriate for a high-ranking military officer, or a commissioner of police to argue publicly for a change to a particular policy of government, then so must the Commission be constrained when urging changes to competition policy. This means that, while we will be diligent in explaining the facts of policy matters or the consequences of existing policy to government and parliament, we will not necessarily be making our case in public.

In my former role with the National Competition Council we were dealing with governments to bring about changes in policy and in legislation. We dealt privately with governments because I don't believe it's appropriate for regulators or agencies of governments to be lecturing them through the media or to be pushing cases for policy change through the media.

Now I will pursue a similar philosophy, a similar policy, at the ACCC. We will work with governments and with parliament through appropriate parliamentary committees to establish and modify

where appropriate the legislative framework in which we operate. But ultimately that framework has to be set by parliament. It is our role as regulator to provide independent, rigorous advice to government and to parliament as to the settings of that legislative framework—its effectiveness and its failings.

Ultimately, we must leave it to parliament to determine whether those settings are adequate or whether and how they should be modified. And in that context, it is up to parliament to consider the advice that we have provided. It is not appropriate for the regulator to be taking a public position that demands that parliament act in a particular way or is critical of parliament if it fails to act in the way recommended by the regulator.

The role of the Chairman—to ensure proper process at the Commission

A few comments on how I see the role of chairman of the Commission.

It has been suggested that I will impose my view on the Commission and override the views of other commissioners to the detriment of competition law as it is enforced in this country.

Nothing could be further from the truth.

Of course decisions are made not by the Chairman alone, but in consultation with the four very competent and objective people who form the Commission. Any notion that the Chairman operates in a singular and sole way contradicts all notions of good governance. It's inconceivable to me that I would ignore, or be able to ignore, the expertise and knowledge of my fellow commissioners or that of Commission staff. I may be the face of the Commission, but it's the Commission overall with all its expertise in economics, in law, in small business and consumer affairs that make the relevant decisions.

This corporate governance policy not only applies to decisions of the Commission, but also to the workings of its various committees. Just as I am bemused by references in the media to decisions of the ACCC having been made by the Chairman alone, so equally I am bemused by the suggestion that individual commissioners are able and can make decisions on their own in relation to areas that are seen as being their direct responsibilities.

Labels have commonly become attached to individual commissioners such as the 'Merger Czar' or the 'Enforcement Commissioner'. Let me make it clear that while individual commissioners lead coordination and overall management of certain areas of the Commission's activities, all decisions involve several if not all of the commissioners at any time.

For example, in the mergers area, a number of commissioners are involved in the decision-making process by sitting on the weekly Mergers Panel, as they do with enforcement issues, both areas in which I am taking an active role.

I have a high regard for the institution of the ACCC and to the commissioners that play an integral role in the construct of the Commission. All the Commission make the decisions and so set the direction of the ACCC. It is these decisions of the Commission which ultimately shape the application of the Act.

Conclusion

I am often asked how I will measure my success or failure. Will it be judged by the attitude of big or small business groups or consumer groups toward my performance? Will it be reflected by my ranking in the somewhat questionable media assessments of the power brokers in Australian political and community life? Will it be judged by newspaper editorials providing their own critical assessment of my performance?

Let me make it clear that in my view I should not and indeed cannot seek to satisfy all or indeed a majority of the many vested interest groups that are concerned with the policies and attitudes of the ACCC. If I were to react to those sorts of pressures, I would be the first to rank myself as a failure. I am absolutely certain that most objective observers would agree with that assessment.

Success or failure will depend upon the Australian community at large being satisfied that the ACCC has continued the role set under the leadership of Allan Fels of fearlessly promoting honest, vigorous competitive behaviour by business, big and small, in the interests of the consumer. If the Commission is judged to have undertaken that task successfully, then I will regard my own role as Chairman of the Commission as having been performed satisfactorily. Nothing less will suffice.