The Parliament of the Commonwealth of Australia

Competing Interests: is there balance?

Review of the Australian Competition and Consumer Commission Annual Report 1999-2000

House of Representatives
Standing Committee on Economics, Finance and Public Administration

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Foreword

The Australian Competition and Consumer Commission (ACCC) is at the centre of Australia's competition policy regulation and also has a leading role in consumer protection issues. The importance of these responsibilities makes it essential that it is seen to be accountable for its actions and that its operations and decision making are as transparent as possible.

The ACCC has now been functioning in its present form for six years, and its periodic appearances before the House Economics Committee provide an important avenue through which the public can see whether those requirements are being met, and assess the ACCC's performance.

The ACCC has shown itself to be an effective regulator. Nevertheless, this review highlights a number of areas including:

- concerns with some of the ACCC's tactics, approach and attitudes to business as well as the way in which, on occasions, the ACCC uses the media;
- the need for, or otherwise, of amendments to the *Trade Practices Act 1974* (TPA) to include powers such as a penalty for imprisonment for participants in hard core cartels, an 'effects ' test to strengthen section 46, and 'cease and desist' orders to enhance the ACCC's enforcement capability; and
- questions about whether the ACCC has too many roles and whether competition might be better served by separating some parts into another body.

The committee sees its report as preliminary as further investigation of some of these issues is required and there are a number of other reviews on aspects of the ACCC's operations and its legislation that are not yet finalised or publicly available (such as the Productivity Commission's reviews of the *Prices Surveillance Act 1983*, the national access regime and telecommunications competition regulation).

The committee believes that there is a need for public debate on many of these matters. It hopes that this report opens up that process. There are many in the community who will have a view on the issues raised. The committee hopes that those individuals and organisations will not only read the report but also respond.

The committee appreciates the assistance it received during this inquiry from the ACCC, especially its Chairman, Chief Executive Officer and their staff. It also appreciates the contributions made by several industry associations and by Professor Warren Pengilley.

Finally, I thank the members of the House Economics Committee for their contributions throughout this inquiry and to this report.

David Hawker MP
Chair

Membership of the Committee

Chair	Mr D P M Hawker MP	
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Principal Research Officer	Mr M Tapley (from 20/08/01)
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Terms of reference

Under House of Representatives Standing Order 324 (b), the Standing Committee on Economics, Finance and Public Administration is empowered to inquire into and report on any matter referred to it by either the House or a Minister, including any pre-legislation proposal, bill, motion, petition, vote on expenditure, other financial matter, report or paper.

Annual reports of government departments and authorities tabled in the House stand referred to the relevant committee for any inquiry the committee may wish to make. Reports stand referred to committees in accordance with a schedule tabled by the Speaker to record the areas of responsibility of each committee.

The annual report of the Australian Competition and Consumer Commission for 1999-2000 was tabled in the House of Representatives on 31 October 2000. On 1 March 2001, the committee agreed to carry out a review of that annual report.

List of abbreviations

ACCC	Australian Competition and Consumer Commission
ACCI	Australian Chamber of Commerce and Industry
ALRC	Australian Law Reform Commission
ARA	Australian Retailers Association
ASIC	Australian Securities and Investment Commission
BCA	Business Council of Australia
COAG	Council of Australian Governments
GST	Goods and Services Tax
NTS	New Tax System
NRMA	National Roads and Motorists Association
PS Act	*Prices Surveillance Act 1983*
PSB	Payment Systems Board
PC	Productivity Commission
RACS	Royal Australasian College of Surgeons

RACV	Royal Automobile Club of Victoria
RBA	Reserve Bank of Australia
TPA	*Trade Practices Act 1974*

1

Introduction

Background

1.1 The Australian Competition and Consumer Commission (ACCC) is the Commonwealth's major competition watchdog and consumer protection agency. It was established on 6 November 1995 as a result of the reforms set out in the *Competition Policy Reform Act 1995.* That policy was endorsed in April 1995 by the Commonwealth Government in cooperation with all state and territory governments operating through the Council of Australian Governments (COAG).

1.2 The Reform Act established the ACCC by the merger of the Trade Practices Commission and the Prices Surveillance Authority.

1.3 The ACCC was to be responsible for:

> …enforcement of the competition and consumer protection provisions of the Trade Practices Act and the provisions of the Competition Code. It will also make determinations under the new access regime, and be responsible for prices surveillance, inquiries and monitoring under the Prices Surveillance Act.[1] [Price monitoring was a new function.]

1.4 The ACCC is an independent statutory authority. It administers the *Trade Practices Act 1974* (TPA), State and Territory Application Acts, the *Prices Surveillance Act 1983* and has responsibilities under several related pieces of legislation.[2]

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1 Australia. Parliament. Senate. 29 March 1995. Competition Policy Reform Bill 1995: Second Reading Speech. Senator Crowley. *Parliamentary Debates.* Canberra, AGPS, p 2441.

2 For a list of that legislation see: *ACCC annual report 1999-2000.* 2000. Canberra, ACCC, p 7.

1.5 The Governor-General appoints members of the ACCC for a maximum term of 5 years.[3] Appointments may be terminated by the Governor-General only in limited circumstances such as, physical or mental incapacity, bankruptcy and misbehaviour. The Minister's powers to direct the Commission are restricted by the TPA. For example, the Minister cannot direct the ACCC in relation to the exercise of its powers in relation to access regimes, restrictive trade practices, authorisation of anti-competitive behaviour or telecommunications regulation.

1.6 The ACCC describes its major roles as to seek to:

> …improve competition and efficiency in markets, foster adherence to fair trading practices in well informed markets, promote competitive pricing wherever possible and restrain price rises in markets where competition is less than effective. It is especially concerned to foster a fair and competitive operating environment for small business.[4]

1.7 The ACCC is seen as the friend of consumers and small business.

1.8 In evidence the ACCC stressed that its role is to apply the TPA and some other legislation without fear or favour. It said with only a few exceptions it is not involved in advocacy of changes of law.[5]

1.9 There are numerous other state, territory and Commonwealth bodies involved in competition and consumer protection work. At the Commonwealth level the other major competition body is the National Competition Council.

Ongoing concerns with the ACCC's role

1.10 As result of the implementation of national competition policy the ACCC received new roles and power. COAG sought to aggregate regulatory responsibilities with the ACCC rather than have a number of separate public utility regulatory agencies. Australia's approach is in contrast to traditional international practice.[6]

1.11 Consequently the ACCC is at the centre of competition policy and consumer protection. Over the past six years of its operations many areas previously exempt are now within its scope (see Table 1.1).

3 The instrument of appointment may specify a shorter term. Members are eligible for re-appointment.

4 *ACCC annual report 1999-2000,* op. cit. p 6.

5 Evidence p 2.

6 *ACCC annual report 1996-97.* 1997. Canberra, ACCC, p 1.

Table 1.1 Significant additions to the powers of the competition regulator since 1995 [7]

1995	Prices Surveillance
	Arbitrating disputes over access to facilities of national significance
	Enforcing the TPA's restrictive trade practices provisions in relation to unincorporated entities (including the professions) under the competition code
	Enforcing the TPA in relation to Government business enterprises
1997	Telecommunications Industry: Competition Regulation and Access Regimes
1998	Unconscionable conduct in small business transactions
	Industry codes
1999	Price exploitation in relation to the New Tax System
	Monitoring prices in the transition to the New Tax System
2000	Misrepresentations about the effect of the New Tax System
2001	Representative actions for most of restrictive trade practices provisions (except section 45D and 45E)
	Right to intervene in private proceedings instituted under the TPA

1.12 Questions have been asked about whether these roles have been thrust upon the ACCC or whether some have, or are being, sought by it.[8]

1.13 The ACCC's powers now directly impact on the commercial operations of business in almost every market. It has become a very powerful regulatory body.

1.14 The ACCC has always acknowledged that there will inevitably be resistance to its role and powers and big businesses in particular, especially monopolies, will resist using every available means.[9]

1.15 The ACCC points out that it is subject to administrative and judicial review. The Australian Competition Tribunal is established by Part III of the TPA. The Tribunal may review decisions of the ACCC relating to authorisation, notification and arbitrations relating to essential facilities. Decisions of the Commission are also subject to review by the Federal Court under the *Administrative Decisions (Judicial Review) Act 1977*.

1.16 Some of these criticisms come from well-resourced companies who choose to take these matters to the media rather than avail themselves of the legal

7 The ACCC did lose some jurisdiction in 1998 when the Australian Securities and Investment Commission (ASIC) was given responsibility for misleading and deceptive conduct in relation to financial services. ASIC also obtained responsibility for policing the unconscionable conduct provisions in relation to financial services (except those involving small business under s51AC). ASIC has the capacity to refer responsibility back to the ACCC - it has done so in relation to health insurance and the new tax system.

8 Australian Chamber of Commerce and Industry. Prices surveillance and the ACCC. *Media Release* MR 40/01, 12 June 2001, 2p; and Submissions p S40 (W Pengilley)

9 Evidence pp 47 and 56.

measures that are available to them to challenge the view taken by the ACCC. Having said that, the volume of complaints is growing and many are coming from the small business sector.

1.17 In its last report on the ACCC the committee pointed to a recurring pattern of criticism pervading many of the ACCC's activities. As outlined in the following chapters the pattern is continuing. What appears to be changing is the volume of criticism, its documentation, its evaluative nature and the sources are becoming more authoritative. [10]

1.18 All of these views are being put on the table despite the fact that there are still organisations that have reported they are unwilling to express their concern publicly because they perceive they could prejudice future dealings with the ACCC. [11]

1.19 Organisations that are generally supportive of the ACCC are increasingly prepared to publicly point to a specific problem area. For example, the Council of Small Business Organisations of Australia is generally supportive of the ACCC but critical of the its approach to the treatment of small business under the New Tax System arrangements.[12]

1.20 Some criticism also has its origin in the legislation that the ACCC administers rather than its application by the ACCC. For example, business complaining that the ACCC guidelines on mergers prevents them from achieving sufficient scale to compete internationally,[13] would perhaps be better placed making the case to government for a return to a test based on market dominance, rather than the present test of substantially lessening competition.

1.21 Nevertheless, after six years of operation and the growing volume of criticism, it is now not so easy for the ACCC to dismiss such criticism as

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10 For example see concerns raised in: House of Representatives Standing Committee on Financial Institutions and Public Administration. June 1997. *Review of the Australian Competition and Consumer Commission 1995-96 annual report.* Canberra, AGPS, xi 25p; House of Representatives Standing Committee on Financial Institutions and Public Administration. March 1998. *Review of the Australian Competition and Consumer Commission 1996-97 annual report*. Canberra, AGPS, xiii 51p; Gledhill, J. June/July 2001. Rating the regulators. *Global Competition Review*, pp 10-33; Hewson, J. Lets watch the watchdog. *Australian Financial Review*, 15 June 2001; Productivity Commission. March 2001. *Review of the Prices Surveillance Act 1983: Draft report*. http://www.pc.gov.au/inquiry/psa/draftreport/psa.pdf XXIII and 88p; Pengilley, W. April 2001. Competition regulation in Australia: A discussion of a spider web and its weaving. *Competition and Consumer Law Journal*, vol 8, no 3, pp 255-310.

11 Southgate, L. Watchdog overawes retailers. *The Australian*, 15 March 2001; and Submissions p S37 (W Pengilley)

12 Southgate, L. Watchdog overawes retailers. *The Australian*, 15 March 2001.

13 Gray, J and Kitney, D. Why business loathes Fels. *Australian Financial Review*, 16 February 2001.

the critics reflecting only the views of 'big business' or views based on one particular experience.

1.22 The ACCC is a well-funded and resourced enforcement agency (see Table 1.2). Few government agencies have received the boosts in funding that the ACCC has received over the past six years, even allowing for its additional roles.

Table 1.2 ACCC resourcing 1996-97 to 2000-01

Date	Budget allocation		Approved staffing level
	$m	*% change*	
1996-97	33.899		305
1997-98	37.422	10	337.5
1998-99	39.007	4	336
1999-2000	57.453	47	372
2000-01*	75.627	32	-
2001-02*	83.4	10	-

Source *ACCC annual reports 1996-97 to 1999-2000 and *Agency resourcing 2001-02: Budget paper no.4. 2001. Canberra, CanPrint, p 166. (for 2000-01 and 2001-02 figures)*

1.23 The ACCC has to be transparent and accountable in its operations. Some consider the ACCC has become so powerful that it increasingly seems accountable to no one.

1.24 As well, the ACCC has demonstrated the ability to gain the media high ground and public opinion in a way that creates considerable additional influence for the stands it decides to take. Some suggest the ACCC's media influence can on occasions inhibit proper business decision making and create unnecessary fear particularly amongst small business. The recent Federal Court decision on the Electricity Supply Association of Australia vs ACCC highlights these concerns:

> "The stances so taken may constitute good public theatre," Justice Finn said. "The stance taken by the ACCC, in at least some of the instances in which threats were made against [the association] and the suppliers, could quite reasonably be interpreted as simply an attempt to stifle debate."[14]

14 Campbell, R. Federal Court censures watchdog. *Canberra Times*, 13 September 2001; and see *Electricity Supply Assoc of Australia Ltd v Australian Competition and Consumer Commission* (2001) FCA 1296 per Finn J, file:/ / /C | /WINDOWS/TEMP/Electricity Supply Assoc of Australia Ltd v Australian Competition and Consumer Commission 2001 FCA 1296 (12 September 2001).htm, paras 141-142; Hopworth, A. ACCC chairman under fire from judge. *Australian Financial Review*, 17 September 2001; and ACCC. Federal Court dismisses ESAA claims against ACCC. *Media Release* MR 225/01, 14 September 2001, 1p.

Continuing the watch on the watchdog: The review

1.25 In 1997 and 1998 the House Economics Committee reviewed the operations of the ACCC. The current review builds on the committee's earlier reports. Both of those reports focused on merger issues.

1.26 The basis for those reviews and the current one is House of Representatives' standing order 324(b) whereby annual reports within a committee's area of portfolio responsibility stand referred for any inquiry the committee may wish to make.

1.27 The annual report of the ACCC for 1999-2000 was tabled in the House of Representatives on 31 October 2000. On 1 March 2001, the committee agreed to carry out a review of that annual report.

1.28 The committee's review of the annual report is a public process. However, it is not as comprehensive as an inquiry into a specific reference, since the review is not formally advertised, and submissions generally are sought only from those organisations directly involved in the review process.

1.29 The current review is wider than the committee's earlier work. As well as examining merger issues it looks at other anti-competitive behaviour and prices oversight matters. It attempts to get more of an overview on how the ACCC is performing.

1.30 The current review is part of the committee's wider program of reviews of annual reports of major regulators. That work started with the committee's review of the Reserve Bank of Australia (RBA) and the hearings with the RBA have become a major avenue of accountability and transparency for the RBA.

1.31 Evidence by the ACCC was given at public hearings held in Canberra on 30 March and 25 June 2001. Details of those hearings as well as a list of private briefings with industry groups are provided at Appendix C. The hearings were also telecast live on the Parliament House Monitoring System in Canberra and covered by an audio webcast on the Parliament's internet site. On the 23 August 2001 the committee also took evidence from Professor Pengilley at a private briefing. The committee was pleased that Professor Pengilley agreed to make the transcript of the briefing publicly available.

1.32 The list of submissions the committee received is at Appendix A and the exhibits received are listed at Appendix B.[15]

Structure of the report

1.33 This report is structured to reflect the major concerns with the performance of the ACCC. Chapter 2 focuses on the Commission's administration of anti-competitive conduct particularly mergers, cartels and measures to protect small business; Chapter 3 examines the ACCC's current prices oversight work and highlights the Productivity Commission's proposals for change to the Prices Surveillance Act and the ACCC's reactions to those proposals; and Chapter 4 looks at the ACCC's enforcement activities and draws together the committee's conclusions on the ACCC's performance.

15 The hearing transcripts and submissions have been incorporated into a volume that is available for inspection at the National Library of Australia, the Commonwealth Parliamentary Library and the committee's secretariat. They are also available on the committee's internet site: http://www.aph.gov.au/house/committee/efpa/

2

ACCC's role in preventing anti-competitive behaviour

Background

2.1 Anti-competitive practices are covered by Part IV of the Trade Practices Act (TPA). They include a wide range of restrictive trade practices, which include: most price agreements, agreements containing exclusionary provisions (primary boycotts), secondary boycotts (other than consumer boycotts) which lessen competition or result in substantial loss or damage, misuse of market power to damage another business, retail price maintenance and mergers and acquisitions which substantially lessen competition.[1]

2.2 The ACCC's role is to use these provisions to enhance the welfare of Australians by promoting competition and fair trading. It is also required by government to provide safeguards for consumers.[2]

Mergers

ACCC approach to mergers

2.3 The Committee has noted in the past that the ACCC's approach to mergers is a sensitive issue. It, in essence, opposes mergers which it determines would have an anti-competitive effect on the Australian

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1 Australian Competition and Consumer Commission. Nov 1999. *The ACCC role and functions.* Canberra, ACCC, pp 10-11.

2 ACCC. Nov 1999, op. cit. p 8.

economy. It does, however, have the authority to authorise such mergers if the parties can demonstrate that there is sufficient public benefit to outweigh the anti-competitive aspects of the proposal.[3]

2.4 Under the terms of the TPA, assessment of potential public benefit requires:

> … a significant increase in the real value of exports and significant import substitution. … The Commission must also take into account all relevant matters relating to the international competitiveness of Australian industry. They include where a proposed merger would have an adverse impact on the ability of smaller companies to expand or develop export markets.[4]

2.5 The ACCC uses a series of benchmarks to determine which merger applications are likely to give rise to concerns over the level of competition in the industry concerned:

- the market involved must be substantial;
- the combined market share of the four (or fewer) largest firms is at least 75 per cent and the merged firm will supply at least 15 per cent of the relevant market; or
- the merged firm will supply at least 40 per cent of the relevant market.[5]

2.6 If these benchmarks are exceeded, the ACCC then assesses the likelihood of imports imposing an effective competitive discipline or, failing that, the likelihood of effective competition from new entrants to the market. If neither of these is likely, it examines a range of factors relating to the structure and conduct of the market, to determine whether the proposed change would substantially reduce competition. Factors which might be considered include: availability of substitute products, whether the merger would remove a vigorous competitor, whether the market conditions are conducive to coordinated conduct, the nature and extent of vertical integration and the dynamic characteristics of the market such as growth, innovation and product differentiation.[6]

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3 ACCC a*nnual report 1999-2000*. 2000. Canberra, ACCC, p 38.

4 Fels, A. Chairman, ACCC. Mergers and market power. *Speech to Australia-Israel Chamber of Commerce Boardroom Lunch, 15 March 2001, Sydney*. http://accc.gov.au/speeches/2001/fels_Israel_15_3_01.htm p 2.

5 Miller, RV. 2001. *Miller's annotated Trade Practices Act 2001*. 22nd Edition. Sydney, LBC Information Services, p 318.

6 Miller, RV. 2001, op. cit. p 318.

Criticism of ACCC approach

2.7 The sensitivity surrounding the mergers policy arises from accusations levelled at the ACCC, notably by the Business Council of Australia (BCA), that it has obstructed mergers and takeovers unnecessarily. The ACCC's response to these claims has been that proposals are only opposed if there is likely to be an anti-competitive effect in the market. It has commented that none of the companies protesting about ACCC's policies have had mergers or takeovers rejected.[7] The BCA, however, said in a television interview:

> … in many cases, the evidence isn't public. I think in many cases it's the possible mergers, or possible acquisitions that didn't take place, didn't reach the light of day, because it was determined that the process was one, too long and then secondly, too uncertain.[8]

2.8 The ACCC said that it opposed only about five per cent of mergers and that many of those cases were resolved by the parties entering into agreements to address the anti-competitive aspects of their proposals. Those agreements, under section 87B of the TPA, are enforceable in court.[9] The BCA felt that it is just as important to take account of proposals which did not proceed but acknowledged also that other powerful factors are involved, e.g. taxation issues.[10]

2.9 The committee noted that while the ACCC could claim that it only intervened in a small proportion of merger cases – it had an interest in almost all of them. This lends weight to the BCA's claim that many proposals are simply abandoned, rather than face the long and uncertain process of seeking the ACCC's blessing.

2.10 In its analysis of merger proposals, the ACCC said it examines competitive conditions in four separate categories: local, regional, national and international. In each of these sectors, import competition is an important component. The ACCC annual report states that the ACCC has not rejected any merger where import competition represented at least ten per cent of the total market.[11] In evidence before the committee, the ACCC said that it '… did not block mergers where there is import competition'. It added that the merger law's focus was on areas where there was no

7 Fels, A. Global need or market greed? *Business Review Weekly*, 15 March 2001; and Australian Competition and Consumer Commission. April 1999. Global mergers – ACCC approach. *ACCC Journal*, no 20, p 1.

8 Moore, A. Interview with John Schubert, Business Council of Australia. *Business Sunday Transcript*, 25 February 2001, p 1.

9 Evidence pp 11-12.

10 Moore, A. Interview with John Schubert, Business Council of Australia. *Business Sunday Transcript*, 25 February 2001, p 1.

11 *ACCC annual report 1999-2000*, op. cit. pp 38-39.

import competition and was not an obstacle where such competition did exist.[12]

2.11 The annual report noted that the argument has been used that, by opposing mergers, the ACCC prevents companies attaining a 'critical mass', i.e. a size that enables them to compete on an international scale. It responded to this argument by commenting that:

> … Size is not always necessary to enable firms to compete in world markets and a merger may not necessarily increase a firm's export potential. Further, there is substantial evidence that successful export performance is enhanced by domestic competition which stimulates efficiency and innovation rather than by domestic market power and monopoly.[13]

2.12 In evidence, the ACCC noted that Qantas had used this argument when the ACCC raised objections to the terms of the Qantas bid for Hazelton Airlines. Qantas had claimed that it was being denied the chance to become '… a major force in world markets'. This conflicted, however, with its initial argument, at the time the bid was made, that the takeover was insignificant in the overall scheme of things.[14]

2.13 In a newspaper article on management by David Uren, the ACCC's policy received some support. The article commented that:

> … behind sustainable advantage in world markets is strong competition at home. Companies benefit from having strong domestic rivals, aggressive home-based suppliers and demanding local customers. These are the pressures that force companies to innovate.[15]

2.14 Closely related to the 'critical mass' argument is another, widely publicised by the BCA, that the ACCC is allowing Australia to become a 'branch-office' economy.[16] When asked about this idea, it said the problem was not related to mergers but mainly to taxation policy. It also said there were other advantages to locating offshore and prominent among them was the desire of a globalised business to get closer to the majority of its customers.[17]

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12 Evidence p 11.

13 *ACCC annual report 1999-2000,* op. cit. p 39.

14 Evidence p 12.

15 Uren, D. Merger mania scorns competition imperatives. *The Australian*, 24 February 2001.

16 Smith, M. ACCC taken to task. *Canberra Times*, 26 February 2001; and Davidson, K. HQs to go offshore? Don't be bluffed. *The Age*, 26 February 2001.

17 Evidence p 11.

2.15 Professor Warren Pengilley of Newcastle University, a former Commissioner of the Trade Practices Commission, disagreed with the ACCC's assessment of this argument. He said that for mergers, if the previous test of market dominance were restored it would help to overcome the problem. He added that it would provide greater certainty than the current test and is well suited to the era of globalisation.[18]

2.16 In evidence to the committee, the ACCC stated that it would not like to see any weakening of the merger provisions in the Act.[19] Professor Pengilley commented that the ACCC saw any change to this part of the law as 'giving in' to big business and took it as axiomatic that competition in Australia would automatically suffer. He said this reasoning was contrary to his own view and the views held by others, including, for example, two former chairmen of the Trade Practices Commission.[20]

2.17 In a recent speech, the Chairman of the ACCC made the comment that since the merger provisions of the TPA involve 'an attempt to enact economics as law', the Commission's interpretation, whatever it might be, is likely to attract criticism and spark debate. He added that:

> … the Commission is the administrator and enforcer of an Act of Parliament introduced to protect the public against anti-competitive forces. The Courts are the final arbiters on whether breaches of the Act have occurred. Further, the Commission's authorisation decisions can be appealed to the Australian Competition Tribunal. There are ample safeguards for businesses who disagree with the Commission, in terms of appeal rights to courts and the Australian Competition Tribunal. Indeed in the former, that is the courts, the onus is on the Commission to prove its case if a business wishes to proceed with a merger considered anti-competitive by the Commission.[21]

2.18 Professor Pengilley addressed this point in his paper, when he commented that, while rights of appeal do exist, commercial realities often put them out of practical reach:

> Rights of appeal can exist as a matter of law but often are commercially useless when time is of the commercial essence.[22]

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18 Submissions pp S48 and S50 (W Pengilley)

19 Evidence p 68.

20 Submissions pp S48-S49 (W Pengilley)

21 Fels, A. *Mergers and market power*, op. cit. pp 4-5.

22 Pengilley, W. April 2001. Competition regulation in Australia: A discussion of a spider web and its weaving. *Competition and Consumer Law Journal*, vol 8, no 3, p 279.

Case studies

2.19 A number of particular merger cases were discussed with the ACCC by the committee. It asked particularly about the sale of Franklins' supermarkets. The ACCC said that when the proposed sale was announced, it was already concerned about the market shares held by the major chains but had no power to break up existing monopolies.[23]

2.20 Subsequently, early in June 2001, the ACCC announced that its reservations over the proposed sale of Franklin's supermarkets had been resolved. Legally-enforceable undertakings had been accepted from Dairy Farm Management Services Ltd, Franklins and Woolworths Limited, on the anti-competitive aspects of the sale which had been of concern to the ACCC. The final agreement provided that Woolworths will purchase 67 stores, half the number originally sought.[24] Most of the stores will go to independent retailers, through an arrangement with a grocery retailer. It said its concern over the earlier proposal, had been due to the intention to sell a larger number of stores to Woolworths.[25]

2.21 To avoid Woolworths gaining too large a proportion of the market in particular areas, the company is required to sell its supermarkets in several Sydney suburbs.[26] The committee asked what would happen to local residents if these stores closed. In the areas affected, many residents do not own cars and being forced to shop in another area would cause difficulties for them.[27] If no other buyer can be found, the committee does not accept that Woolworths should be forced to close stores where there is no alternative supermarket in the shopping centre.

2.22 The ACCC said that Woolworths is required to make every effort to sell the stores, preferably to independent operators – the ACCC will audit those efforts.[28] To a further question about the prospects for employees of Franklins warehouses, the Commission said it was hoped that the facilities will either be taken over by independent operators or that they will set up their own equivalent facilities.[29]

2.23 The committee asked why the ACCC had decided that no action was necessary in the case of the proposed takeover of Woodside Petroleum by

23 Evidence pp 12-13.

24 ACCC. ACCC gets legally-enforceable undertakings from Dairy Farm, Franklins and Woolworths. *Media Release* MR 129/01, 7 June 2001.

25 ACCC. ACCC to examine Franklins sale. *Media Release* MR 87/01, 18 April 2001.

26 ACCC. ACCC gets legally-enforceable undertakings from Dairy Farm, Franklins and Woolworths. *Media Release* MR 129/01, 7 June 2001.

27 Evidence pp 64-66.

28 Evidence pp 64-66.

29 Evidence p 70.

the Shell group. The ACCC said it had found no evidence that the merger would substantially reduce competition in the Australian market. It commented that for the purposes of the TPA, it was irrelevant that the bid was from a foreign company and that the question of whether foreign ownership should be allowed was one for the Foreign Investment Review Board to address.[30] (The Treasurer announced on 23 April 2001 that the takeover had been prohibited on national interest grounds under the *Foreign Acquisitions and Takeovers Act 1975*.)[31]

2.24 There was discussion also on the very important case of the takeover of Hazelton, the regional airline, mentioned above. Both Ansett and Qantas had made bids to take over Hazelton but the ACCC had raised queries with both companies over the terms of those bids. The most significant issue was that the bids did not address the question of the allocation of take-off and landing slots at Sydney airport in peak periods, particularly Mondays and Tuesdays. When Ansett returned to the Commission with a modified proposal which addressed this issue and made a large number of those slots available to regional operators, the ACCC's objection was withdrawn.[32]

2.25 Regional banking was another issue of interest to the committee during the discussion of mergers. The main question was whether a rumoured takeover of the Western Australian regional bank BankWest by one of the major banks, would be approved if it proceeded to a formal bid. The ACCC indicated that it would have very strong concerns about such a move. BankWest was described as an extremely important player in Western Australia.[33]

2.26 During the discussion, a comparison was drawn between the idea of a BankWest takeover and the takeover of the Bank of Melbourne by Westpac which was approved by the ACCC. The Commission described the Bank of Melbourne takeover as probably its most unpopular decision. The difference in the two cases, it said, was the strength and market share of BankWest by comparison with the Bank of Melbourne. The ACCC said that BankWest is a much bigger, more substantial bank, with a market share estimated at 30 per cent; whereas the Bank of Melbourne had only about 10 per cent of the market.[34]

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30 Evidence p 11.

31 Costello, P. The Hon. Treasurer. Foreign investment proposal – Shell Australia Investments Limited's acquisition of Woodside Petroleum Limited. *Press Release* no. 25, 23 April 2001.

32 Evidence pp 13-14.

33 Evidence p 17.

34 Evidence p 17.

2.27 Also falling in the period under consideration was the takeover of Colonial Limited by the Commonwealth Bank. That merger was allowed to proceed when the Commonwealth Bank agreed to significant undertakings to reduce the anti-competitive effects of the change.[35]

2.28 When the Australian Stock Exchange and the Sydney Futures Exchange proposed to merge, the ACCC's market inquiries revealed that the two exchanges would be strong competitors in the future for new products. It judged therefore that a merger would reduce the level of competition in Australia. It was considered unlikely that foreign companies would offer significant competition and, in addition, barriers to entry into the industry were high. The Commission indicated to the two parties that it was likely to oppose the merger and the proposal was withdrawn.[36]

2.29 The main telecommunications issue presently under consideration, is the proposal by Singapore Telecom to take over the assets of Cable and Wireless Optus. As in the case of Woodside Petroleum, mentioned above, the essential question on this proposed merger lay with the Foreign Investment Review Board, rather than the ACCC. The Treasurer announced on 22 August 2001 that no objection would be raised to that takeover on foreign investment policy grounds.[37] The ACCC's role will now be to determine whether the proposed arrangements would significantly reduce competition in the Australian market.

2.30 The ACCC has referred to the low proportion of mergers that it has queried and the fact that many of those proposals later proceeded when undertakings were given on anti-competitive issues, as an indication that it does not unnecessarily oppose mergers. The committee is not convinced that this approach tells the full story. It still has concerns about reports that many merger proposals lapse, because the process of getting ACCC approval is seen as too long and the outcome too uncertain.

2.31 The committee also queried the ACCC's reliance on undertakings to deal with anti-competitive aspects of proposed mergers. Generally, the provisions of these undertakings include a nominated time period, during which it is agreed that specified anti-competitive actions will be avoided. When that time limit expires, however, there is nothing to stop those practices being brought into play. The committee believes that if practices are considered anti-competitive, they should be stopped, not simply delayed.

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35 *ACCC annual report 1999-2000*, op. cit. p 44.

36 *ACCC annual report 1999-2000*, op. cit. p 43.

37 Costello, P. The Hon. Treasurer. Singapore Telecommunications Limited – Application for Foreign Investment Approval to Acquire Cable & Wireless Optus. *Press Release* no. 060, 22 August 2001.

Cartels

2.32 The ACCC has also been active in the identification of price fixing activities by cartels. As part of this process it has cooperated with its international counterpart organisations to identify hard core international cartels. It reported that there is evidence of increased activity by these groups[38] and that they are becoming more complex and harder to detect.[39]

2.33 The TPA does not refer directly to cartels, but their activities are dealt with under section 45 of the Act, which covers restrictive trade practices. The OECD has defined hard core cartels as:

> An anti-competitive agreement, anti-competitive concerted practice or anti-competitive arrangement by competitors to fix prices, make rigged bids (collusive tenders), establish output restrictions or quotas, or share or divide markets by allocating customers, suppliers, territories or lines of commerce.[40]

2.34 The ACCC said that the United States and Europe have been very helpful in sharing information with Australia on international cartel operations that they have uncovered. This is particularly true of the United States, as Australia's treaty with the US allows for the free exchange of confidential information, except for some restrictions on information about mergers.[41]

2.35 The ACCC told the committee that it had achieved some successes in dealing with the actions of cartels. A recent case resulted in a fine of $26 million for price fixing on vitamins for animal food. In another, it has proposed a fine of $7 to 8 million to the court and is awaiting the outcome. Similarly, a case involving a local cartel produced a fine of $16 million on the Queensland fire protection industry.[42]

2.36 The committee asked what powers the ACCC had to take action against an international cartel acting to Australia's disadvantage. It said that in all but a few rare cases, if it affects the local market, it falls within the ACCC's jurisdiction. To act on the problem, it would deal with the cartel's local operations.[43]

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38 Evidence pp 3-5.

39 ACCC. ACCC calls for stronger criminal sanctions including jail sentences for price-fixing offences under Trade Practices Act. *Media Release* MR 131/01, 8 June 2001, p 3.

40 Organisation for Economic Cooperation and Development. Recommendation concerning effective action against "hard core" cartels. *News Release*, Ministerial Meeting, Paris, 27-28 April 1998, p 2.

41 Evidence p 5.

42 Evidence pp 3, 5 and 6.

43 Evidence p 5.

2.37 The ACCC said that since the TPA was amended in 1995, it had applied more widely to professional organisations and the Commission had been devoting an increasing proportion of its enforcement resources to this area. While most professional organisations had so far been relatively unaffected, a number of cases of cartel-like behaviour had arisen, especially in the health sector.[44]

2.38 The ACCC commented that a court case is under way in Western Australia in which it has charged Mayne Nickless and the Australian Medical Association with price fixing. In addition, orthopaedic surgeons had been advised that restrictions on entry into that profession are considered by the ACCC to be anti-competitive and in breach of the Act. The surgeons are in the process of seeking authorisation for the restrictions.[45] The Commission added that other problems had included issues such as boycotts of country hospitals by doctors, boycotts of bulk billing, cases of price fixing and boycotts by anaesthetists.[46]

2.39 Using the case of anaesthetists in Sydney as an example, the ACCC explained that they had made a written agreement to put up their prices, 'so that was just straightforward price fixing'. They had also, as a group, told some hospitals that they would not attend operations unless they got the requested increases, 'so that is a collective boycott, unlawful.'[47]

2.40 The ACCC went on to explain:

> They should not have done that collectively. Individually, they can. That is the point. They can do all these things; they can withdraw their services, individually. It is only having an agreement between them that raises issues under the Trade Practices Act. They can talk about certain things, as long as they do not reach agreements. Then they have to seek authorisation.[48]

2.41 The ACCC Chairman had previously commented on the monopoly position enjoyed by the medical profession and the consumer protection problems which would be raised if that position were exploited. He said the profession had reserved large areas of work to itself, restricted entry to the profession and restricted competition between members by, for example, restrictions on pricing and advertising. While there may be justification for some of these restrictions – adequate return on their investment in education, generation of high quality services and

44 Evidence p 3; and *ACCC annual report 1999-2000*, op. cit. p 30.

45 Evidence p 3.

46 Evidence p 31.

47 Evidence p 36.

48 Evidence p 36.

protection of the public from unqualified practitioners – it was clear, the ACCC said, that this should not grant immunity from competition law.[49]

2.42 The issues arising in the health care profession have obvious implications for other professions also. For example, the circumstances surrounding the legal profession are very similar. The ACCC has noted, however, that the legal profession has not been nearly as successful in restricting access to the profession or maintaining income levels.[50] The Commission advised that it has recently established a Professions Unit, dedicated to enforcement of the competition and consumer protection provisions of the TPA in the various professional sectors.[51]

2.43 The committee said that the signs of increased activity by international cartels were disturbing. The ACCC was asked to keep the committee informed of any major developments in this area.

Authorisation

2.44 The Trade Practices legislation seeks to ensure that opportunities are not lost through rigid application of guidelines to technical breaches of the TPA. To provide the flexibility to achieve this, the ACCC has been given the power, under section 88 of the Act, to authorise practices or conduct (other than misuse of market power) which would otherwise be in breach of the TPA. Before granting an authorisation, however, it must be satisfied that there is sufficient public benefit to justify overriding the anti-competitive effects [52] or that there is such an obvious public benefit that the practices or conduct should be permitted.[53]

2.45 Practices which may be authorised in this way include: anti-competitive agreements, primary and secondary boycotts, price agreements, anti-competitive covenants, exclusive dealing arrangements, resale price maintenance, and mergers that would lead to a substantial lessening of competition in a market.[54]

2.46 The ACCC said that this power to, in effect, authorise companies to be in breach of the TPA and exempt them from prosecution in relation to the authorised practices, is unique to Australia. Such authorisations based on

49 Fels, A. What the Doctor Ordered, Left Field. *Australia's BRW*, 2 February 2001.

50 Fels, A. What the Doctor Ordered, Left Field. *Australia's BRW*, 2 February 2001.

51 Submissions p S66 (ACCC)

52 Submissions p S55 (ACCC)

53 Fels, A. Prof. *Competition policy*: *The road ahead for Egypt*. Speech, 24 May 2001, Cairo. http://www.accc.gov.au/speeches/fs-speeches.htm p 8.

54 ACCC. Nov 1999, op. cit. p 15.

public benefit are not permitted by the legislation in the USA or the European Union.[55]

2.47 To determine whether authorisation will be granted, the ACCC undertakes a public assessment process and, as part of that process, the views of interested parties are sought. The committee noted that one of the criticisms made of the ACCC, is that the authorisation process is too difficult and too expensive for small business.

Case studies

2.48 At present, the ACCC has under consideration two important applications for authorisation. The Royal Australasian College of Surgeons (RACS) has applied in respect of some conditions of entry into the profession – accreditation, training and examination procedures and its procedures for accrediting overseas trained doctors. The Dairy Farmers' Federation is seeking authorisation for a collective bargaining arrangement to assist individual dairy farmers in their price negotiations with milk processors.[56]

2.49 Using the first of these cases as an example, the ACCC is conducting the initial assessment of the RACS application and it appears that some of the College's procedures are likely to breach the anti-competitive conduct provisions of the TPA. That being so, the RACS will be required to demonstrate the justification for approving those procedures. If the ACCC is not satisfied that there is sufficient public benefit to warrant authorisation, it has the choice of refusing the application or granting authorisation conditional on specified changes being introduced.

2.50 When assessment of the application is complete and the ACCC has formed its proposals, a draft determination will be issued. The draft will set out the proposed action and the ACCC's reasons for reaching its conclusions. Interested parties will then be given the opportunity to comment on the draft proposals, prior to the Commission's final determination.[57] Determinations by the ACCC are, however, subject to appeal to the Australian Competition Tribunal.[58]

2.51 In the case of the Dairy Farmers' application, the ACCC commented that, having found some benefits in other farm-based applications:

> We have indicated in general terms to the dairy farmers that we think there may well be public benefits, and we practically invited them to seek authorisation. It has had some improved effects on

55 Evidence pp 11-12.

56 Submissions p S55 (ACCC)

57 Submissions pp S55-S56 (ACCC)

58 Evidence p 19.

their bargaining. It prevents the exploitation of individuals, and there are some economic benefits from their doing some degree of collective bargaining.[59]

Assistance to rural medical services

2.52 There has been a considerable amount of concern in rural areas regarding the availability of medical services. Much of this concern springs from uncertainty over the types of agreements which doctors can enter without breaching the TPA. The ACCC has made it clear that it has no problems with weekend and after-hours rosters[60] but this has not allayed fears over such issues as agreements on the number of a particular type of specialist needed to service a particular area.

2.53 The Government announced on 29 August 2001, that it would review the impact of Part IV of the TPA on the recruitment and retention of medical practitioners in rural and regional areas. The review is in response to continuing concerns in those areas, about the impact of the TPA on some working arrangements.[61]

2.54 As an additional measure, the Government will also provide support for groups of general practitioners with the submission of applications for authorisation of their arrangements to the ACCC.[62]

Protection of small business

2.55 A growing area of concern for the ACCC is the misuse of market power by large companies against small business. Amendments to the TPA in 1998 and the appointment of a Commissioner to deal with small business problems, have assisted in this area. Additional amendments to the TPA, passed this year, will further enhance the ACCC's ability to deal with problems such as predatory pricing by market leaders.

2.56 Small businesses face a number of problems in dealing with big business. These fall especially in the areas of:

- lack of bargaining power for small trade and professional firms dealing with powerful corporate clients;

59 Evidence p 42.

60 Evidence p 53.

61 Howard, J. Prime Minister of Australia. Government to review impact of Trade Practices Act on doctors in rural and regional Australia. *Media Release*, 29 August 2001, p 1.

62 Howard, J. Prime Minister of Australia. Government to review impact of Trade Practices Act on doctors in rural and regional Australia. *Media Release*, 29 August 2001, p 1.

- lack of bargaining power of small producers – especially rural producers – dealing with powerful buyers;
- discriminatory pricing by suppliers and refusals to deal with small businesses; and
- the exercise of market power by big businesses in competition with small businesses.[63]

2.57 The ACCC is taking an increasing interest in ensuring that small businesses are properly informed of their rights and obligations under the TPA. This has followed the Government's decision in 1998 to strengthen sections of the Act applying to small businesses having difficulties with big companies – unconscionable conduct (section 51AC) and franchising (section 51AD). These changes add to the powers already available to the ACCC under section 46, which covers misuse of market power. The importance of this area of the Commission's work has been given recognition by the appointment of a full-time Commissioner responsible for small business matters.[64]

2.58 The ACCC told the committee that it had been more active in the small business area in the last couple of years. Five court rulings have been obtained and the ACCC won four of them. The single unsuccessful case is being appealed (as is one of the successful cases). The availability of the full-time Commissioner and the support of better funding, have also allowed it to achieve some successes in relation to unconscionable conduct.[65]

2.59 Dealing with predatory pricing by large retailers is one of the main areas of difficulty for small business. In determining whether a company is engaging in predatory pricing, the ACCC would consider factors such as, whether:

- the company is cross-subsidising discounting in one market with profits from another area of its activities;
- price cuts are selective;
- the company will be able to recoup lost profits once the competitor has been eliminated or damaged; or

63 House of Representatives Standing Committee on Industry, Science and Technology. May 1997. *Finding a balance: toward fair trading in Australia.* Canberra, AGPS, p 121.

64 *ACCC annual report 1999-2000,* op. cit. pp 3-4.

65 Evidence p 4.

- there are rational economic reasons for price cutting (e.g. seasonal factors, increasing utilisation of capacity, special promotions or disposal of superseded stock).[66]

Case studies

2.60 The ACCC referred specifically to a case involving Boral as an example of this part of its operations. When a small firm entered the market for concrete blocks, Boral responded by dropping its prices below its variable costs and, despite making a loss, increased its output. The aim was to drive the newcomer out of the market. The Full Federal Court agreed with the ACCC, that Boral had a substantial amount of market power, which it had been using to drive out a competitor.[67]

2.61 In another example of the misuse of market power, the actions of Telstra following the shut down of the One.Tel network, have led to a court injunction against the company. The ACCC sought the injunction to stop Telstra engaging in 'unlawful misleading and deceptive conduct.' It said that Telstra representatives were advising former One.Tel customers that they must transfer to Telstra or pay fees to One.Tel for the early termination of their contract. The ACCC said: 'Clearly the customer must not incur a penalty when it is the business that stopped providing its services.'[68]

2.62 On 6 July 2001, an interim court injunction was issued, restraining Telstra from continuing its representations to former One.Tel customers. The case was then adjourned but the ACCC indicated that it would continue to seek: declarations of unlawful conduct; a permanent injunction; an opportunity for consumers who were misled to rescind their Telstra contacts without penalty; corrective advertisements and a compliance program by Telstra.[69]

2.63 The committee raised several matters of concern relating to the difficulties of small businesses in the smash repair industry. The most important of these concerns claims that small panel beating businesses are being driven out of business because the National Roads and Motorists Association (NRMA) and the Royal Automobile Club of Victoria (RACV) provide a limited range of choices to members needing smash repairs. The ACCC

66 Trade Practices Commission. Feb 1990. *Section 46 of the TPA: Misuse of market power*. Canberra, Trade Practices Commission, pp 43-44.

67 Evidence p 3.

68 ACCC. ACCC institutes against Telstra for misleading One.Tel customers. *Media Release* MR 153/01, 5 July 2001.

69 ACCC. Court grants injunction against Telstra for One.Tel representations. *Media Release* MR 156/01, 6 July 2001.

said that this type of complaint has been investigated but the evidence does not indicate that what is being done is either unlawful or unconscionable.[70]

2.64 Legal advice given to the ACCC indicated that the key issue is that it is the NRMA (or RACV) that engages the contractor to repair a vehicle, not the owner. Consequently, those organisations cannot be said to have forced policy holders to use a particular firm's services and there is no breach of section 47 of the TPA.[71] Nor do they appear to have breached the unconscionable conduct provisions of the Act, even though some clients may see their actions as inflexible, unfair or unreasonable. On the basis of this legal advice, it has decided that, without additional supporting evidence, it is unable to take any action on these issues.[72]

Legislative changes

2.65 On 12 July 2001, the ACCC noted that new legislative changes introduced by the Government will further enhance its ability to assist small business. The latest amendments to the TPA include:

- court discretion to allow the ACCC to intervene in private proceedings where the issues are of public interest;
- increased maximum monetary penalties for breaches of the consumer protection sections of the Act;
- confirming that States / Territories can also use the Act's unconscionable conduct provisions;
- giving the ACCC the right to undertake representative actions and seek damages on behalf of third parties for most breaches of the Restrictive Trade provisions;
- giving the ACCC the right to seek declarations from the court on the operations of the Act – a relatively quick and inexpensive operation; and
- extending the period for lodging claims under the Act to 6 years.[73]

2.66 The committee welcomed the enhancement of the ACCC's ability to assist small business. It encouraged the Commission to increase its efforts in

70 Evidence p 7.

71 Submissions p S21 (ACCC)

72 Submissions p S21 (ACCC)

73 ACCC. Greater A.C.C.C. support for small business. *Media Release* MR 163 / 01, 12 July 2001, p 1.

this area, particularly in cases of unconscionable conduct by big business against small firms.

2.67 The committee considers that it is important that, where a clear public benefit can be demonstrated, competition policy should be flexible enough to find a solution which allows that benefit to be achieved. Small businesses, in particular, need to see a flexible approach to competition policy, which permits a rapid review of unnecessarily difficult situations and the adoption of practical solutions.

3

Prices oversight

Background

3.1 A second strand to the ACCC's work is its prices oversight responsibilities. Prices oversight encompasses:

> …a range of instruments used by governments to examine, monitor, influence or control pricing by businesses. The principal instruments for prices oversight…[price control, price notification, price monitoring and inquiries into pricing] vary in their degree of intrusiveness on the operation of businesses.[1]

3.2 Australia has a long and complex history of prices oversight by both State and Commonwealth governments stemming from government imposition of controls during wartime to prices oversight now being part of competition policy.[2] In this context prices oversight focuses on pricing by firms with substantial market power in important markets. It is seen as a last resort facility if the market does not operate.

3.3 Traditionally there had been doubts about the Commonwealth's constitutional powers to directly control the prices of goods and services but it appears to be now generally recognised that the corporations power in the Constitution is adequate (section 51(xx)).[3]

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1 Productivity Commission. March 2001a. *Review of the Prices Surveillance Act 1983: Draft report*. http://www.pc.gov.au/inquiry/psa/draftreport/psa.pdf p 2.

2 For a detailed history see: Productivity Commission. March 2001a, op. cit. pp XV-XVI and 11-31; and ACCC. June 2000. *Submission to the Productivity Commission review of the Prices Surveillance Act 1983.* http://www.pc.gov.au/inquiry/psa/subs/sub010.pdf pp 3-27.

3 Productivity Commission. March 2001a, op. cit. p 12.

Current prices oversight powers of the ACCC

3.4 The current prices oversight powers of the ACCC mainly are embodied in the *Prices Surveillance Act 1983* (PS Act) - the only general Federal pricing legislation[4]. There are also powers under the *Trade Practices Act 1974*, that is, under Part IIIA in relation to access regimes, Part VB - price exploitation in relation to New Tax System (NTS) and the ACCC's review powers of a range of price controls on Telstra under Parts XIB and XIC - Telecommunications. Informal monitoring of prices also is undertaken by the ACCC.

Prices Surveillance Act 1983

3.5 The PS Act :

> …enables the ACCC, where the Government declares products or services, to examine prices with the objectives of promoting competitive pricing wherever possible and restraining price rises in markets where competition is less than effective.[5]

3.6 The PS Act does not give the ACCC powers of price control rather compliance is voluntary. '…Moral suasion through publicity, and the threat of the minister initiating an inquiry, are the principal enforcement mechanisms under the Act…'[6]

3.7 The Productivity Commission (PC) has reviewed the PS Act in association with the reviews of the national access regime and telecommunications competition regulation.[7] In its draft report on the PS Act the PC found that the Act overlaps with other regulatory regimes and has a number of deficiencies.

> …It does not have clearly defined objectives…it is too easy to implement price notification - an indirect form of price control - without proper investigation…inquiries under the Act are not required to consider relevant policy options and there is insufficient guidance as to the role of price monitoring.[8] [and]

4 ACCC. June 2000, op. cit. p 11.

5 ACCC. May 2000. *Summary of the Trade Practices Act 1974: and additional responsibilities of the Australian Competition and Consumer Commission under other legislation*. Canberra, ACCC, p 75.

6 Productivity Commission. March 2001a, op. cit. pp 3-4; and see also ACCC. June 2000, op. cit. p 16.

7 Productivity Commission. March 2001b. *The access regime: Position paper*. http://www.pc.gov.au/inquiry/access/positionpaper/access.pdf 346p; and Productivity Commission. March 2001c. *Telecommunications competition regulation: Draft report*. http://www.pc.gov.au/inquiry/telecommunications/draftreport/index.html

8 Productivity Commission. March 2001a, op. cit. p I.

> …the regulator is the primary adviser on the need for prices oversight.[9]

3.8 In commenting on the review to the committee the ACCC said: the PS Act needs modernisation not abolition; former government business enterprises with monopoly power need some independent regulation of their prices; prices oversight is a 'last resort' where other pro-competitive reforms are not feasible; and it sees a role for price regulation backed by strong powers to ensure compliance.[10]

3.9 The ACCC's pricing actions under the Act are through declaration, monitoring or inquiry. These areas are discussed below. The PC reported that on a spectrum of prices oversight instruments available to government from direct prices control to light handed price monitoring, the notification and inquiry functions under the PS Act can be seen as intermediate instruments.[11]

Declarations and the price notification process

3.10 Declaration is by the Minister or the ACCC with the approval of the Minister. Under a declaration companies have to notify the ACCC of price increases. Areas where declarations currently exist are: harbour towage, Australia Post ('reserved services' where Australia Post has a legislated monopoly), Airservices Australia and airports (where price regulation is by a price cap).[12]

3.11 In addition to the concerns raised above, in its submission to the review of the PS Act the ACCC itself raises the following concerns with the current notification regime:

- reliance on voluntary compliance with ACCC decisions, particularly a concern since 1998 when Waratah Towage Pty Ltd failed to comply with the ACCC's determination - the only occasion on which non-compliance has occurred;
- the ACCC's information gathering powers are not strong enough to get the information it needs from firms to consider a price notification;
- the time for assessing price notifications is difficult to achieve (21 days) and the Act does not set out clearly the actions that the ACCC can take in response to a price notification;

9 Productivity Commission. March 2001a, op. cit. p XIX.

10 Evidence p 61 and Submissions p S27 (ACCC)

11 Productivity Commission. March 2001a, op. cit. p XV.

12 ACCC. June 2000, op. cit. pp 11-12.

- the wording of the Act is not in 'plain english' and the criteria to assess notifications and section 20 directions are outdated; and
- the Act is not well structured to enable a range of means of assessing prices that may include CPI-X or rate of return regulation.[13]

Inquiries into pricing

3.12 Under the PS Act the Minister can direct the ACCC to hold an inquiry into specified matters and report its findings to the Minister, who then makes decisions on the recommendations. Companies are liable to a penalty if they increase prices during the inquiry without approval from the ACCC. The inquiry body normally has powers to obtain information and summons witnesses. Key examples of inquiries are the numerous government inquiries into the petrol industry over the last decade.[14]

3.13 Concerns are raised in the PC's review about how inquiries are undertaken. These include: time taken; cost; reporting time; not required to consider relevant policy options; make reasons for recommendations publicly transparent; and difficulties of establishing the efficiency and effectiveness of such inquiries etc.[15]

Price monitoring

3.14 When directed by the Minister the ACCC also has the power to monitor prices, costs and profits of a company or industry and report to the Minister the results. Monitoring can provide a better understanding of the workings of markets. Industries currently being monitored by the ACCC are container stevedoring companies and airport services (airport services not covered by the price cap where airport operators could be expected to exert significant market power).[16]

3.15 As well as the general criticism highlighted above, the PC's review also points to the following more specific concerns with the monitoring process: the objectives of monitoring not specified; the indicators for monitoring are not disclosed; the need for more rigorous time limits on monitoring; the need for greater control on who initiates the monitoring; and the danger that monitoring could approach de facto price control; etc.[17]

13 ACCC. June 2000, op. cit. pp 28-34.

14 Productivity Commission. March 2001a, op. cit. p 15.

15 Productivity Commission. March 2001a, op. cit. XXIII and 88p.

16 ACCC. June 2000, op. cit. p 12.

17 Productivity Commission. March 2001a, op. cit. XXIII and 88p.

3.16 Of particular interest at the committee's hearings was the recent completed monitoring of the leviable milk products.[18] Following dairy deregulation the Minister for Financial Services and Regulation asked the ACCC to formally monitor prices, costs and profits of businesses dealing with market milk product sales. The monitoring was to start on 8 July 2000 and end six months later. The ACCC used financial performance data from milk processors and major supermarket and convenience chains selling milk products as well as commissioning several price surveys.[19]

3.17 The results indicated that 'Since deregulation, most Australians have access to low-priced milk because of the availability of standard priced generic-labelled milk in the major supermarket chains.'[20]

3.18 At its second hearing with the ACCC the committee, like some milk processors and dairy farmers, questioned the finding that supermarket profit margins on milk had declined.[21] In response to the many concerns the ACCC looked further into margins and sought further information from processors. The ACCC's review of its findings revealed that:

> …On the basis of the information available, and a review of the methodology used for monitoring, the ACCC has no reason to doubt its conclusions on the profitability of supermarkets.
>
> In a limited number of cases, the ACCC discovered rebates of which it was not previously aware. However, the value of those rebates was not significant enough to change the ACCC's aggregate measures of the impact on margins at each level of the industry - the farm gate, processing and retail…[22]

3.19 The committee also queried whether a process of self-monitoring could be achieved with prices surveillance. The ACCC responded that while self-regulation has a role in certain circumstances, it:

> …does not consider it to be an appropriate tool for addressing pricing inefficiencies given the current focus of prices surveillance as an instrument of competition policy…firms currently subject to prices surveillance are monopolies…they have a high degree of

18 Evidence pp 41-42 and 73-74.

19 *ACCC annual report 1999-2000.* 2000. Canberra, ACCC, p 106; and ACCC. April 2001. *Impact of farmgate deregulation on the Australian milk industry: study of prices, costs and profits.* Canberra, ACCC, p xv. (Monitoring report)

20 ACCC. April 2001, op. cit. p xix.

21 Evidence pp 73-74.

22 ACCC. ACCC confirms findings of milk monitoring report. *Media Release* MR 172/01, 27 July 2001, 1p.

market power and little incentive to comply with a system of self-regulation…[23]

Trade Practices Act 1974

Part IIIA - The access regime

3.20 Under Part IIIA the ACCC's responsibilities stem from pricing roles in the context of undertakings and arbitrations in relation to facilities of national significant such as gas and electricity infrastructure.[24] The ACCC reported that in the utilities area things have moved on from declarations to the '…hard end of setting prices and naturally there is a huge campaign being run by the infrastructure industries whose only interest is in getting prices up as high as possible…'[25]

Part VB - Price exploitation in relation to NTS

3.21 On 8 July 1999 Part VB was introduced into the TPA. This provided the ACCC with new temporary pricing regulation powers that prohibit price exploitation only in relation to the NTS. These provisions commenced on 1 July 1999 and will expire on 1 July 2002.

3.22 The ACCC reported that its work in this area has been its highest profile work during 1999-2000. It has roles in: educating and informing businesses of their obligations; raising consumer awareness of the effects of the GST on prices; and taking enforcement actions against businesses for misrepresentations and anticipatory price increases.[26]

3.23 The bulk of the Commission's price survey work is undertaken by specialist price checking companies. The work ranges from visits by price collectors to stores, to expansion of the Commission's existing petrol price monitoring activities. The data collected covers both city and regional areas. The price changes are assessed against the ACCC's expectations of price changes resulting from the NTS.[27]

3.24 The ACCC reported that in the two years from July 1999 to June 2001, it had made detailed investigations of around 5,000 GST issues. The results of those investigations had been:

23 Submissions pp S27-S28 (ACCC)

24 ACCC. June 2000, op. cit. p 12.

25 Evidence p 5; and some of the concerns in this area are highlighted in the following paper: Cousins, D. Commissioner ACCC. How is the current regulatory regime contributing to further reform and competition in Australia? *Paper presented to the UTLICON 5th Annual National Gas Conference, 24 July 2001, Melbourne Convention Centre.* Unpublished, 14p.

26 *ACCC annual report 1999-2000*, op. cit. pp 2, 17-27 and 135; and Evidence p 4.

27 *ACCC annual report 1999-2000*, op. cit. pp 19-20.

- nine Federal Court actions concluded;
- 40 court enforceable undertakings;
- over 600 administrative undertakings (apologies and refunds, corrective advertising, written undertakings, etc); and
- refunds totalling nearly $9.5 million, to about 528,000 consumers.[28]

3.25 At the end of the first year of operation (July 2001) the ACCC concluded that: most businesses had fully complied with the pricing guidelines; the net effect on prices had been a 2.5per cent increase, slightly less than most commentators had expected; the main impact had been in the September 2000 quarter with price increases since then being in line with underlying inflation; and there was little evidence of significant anticipatory behaviour by businesses. In undertaking this work the ACCC stressed that it attempted to strike a balance between businesses and consumers.[29]

3.26 It also noted that the further we get from 1 July 2000 that factors other than the NTS are bearing more heavily on prices.[30]

3.27 In looking at the way the ACCC had undertaken its role in introducing the NTS, some Committee members were concerned about:

> …the heavy-handedness that caused a lot of fear amongst small businesses? They are now saying they have absorbed … a lot of the price impact of the GST, that we will not really see some of the flow-through of that until next year, and that it has had, in some respects, some negative impact on many small businesses who are going under because they have had to absorb such a lot of the GST load.[31]

3.28 In response Prof Fels said 'What I have always said about the GST is that we were, above all, interested in getting some information into the marketplace that would create the right expectations of the price effects of the GST…'[32] The ACCC was concerned that a number of businesses had self-interest in inflating expectations and it sought to dampen those in an appropriate manner. Information to consumers and to some extent businesses, especially small business, was seen as the key. The emphasis

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28 ACCC. One year on and most businesses comply with ACCC Price Guidelines. *Media Release* MR 152/01, 3 July 2001, p 1.

29 ACCC. One year on and most businesses comply with ACCC Price Guidelines. *Media Release* MR 152/01, 3 July 2001, p 1; and Evidence pp 39 and 61- 63.

30 Evidence p 39.

31 Evidence p 39 and see also p 62.

32 Evidence p 39.

was on small business because the ACCC believed that big business could take care of itself.[33]

3.29 For the ACCC this was a balancing act - educating businesses on what sort of price changes were appropriate such that prices didn't go up too much but they were increased by a legitimate amount.[34] The watchdogs were consumers and the ACCC.

3.30 The ACCC has acknowledged that 'There has been some criticism from business lobby groups that the ACCC's approach has harmed business'.[35] In evidence the ACCC commented that if businesses are suffering hardship because they had not taken account of all the implementation costs then:

> …if a business wished to increase its prices and the reason why it wished to increase its prices was that it did not allow enough implementation costs initially, and it can reasonably establish that, there is no reason why they cannot subsequently adjust their prices.[36]

3.31 The committee remains concerned about the impact of the ACCC's approach on small business. Further comments on this issue are made in the next chapter.

Informal price monitoring

3.32 As well as its formal price monitoring work the ACCC undertakes some informal monitoring. The difference between the two is that with formal monitoring the Commission has powers to require entities monitored to provide the required information. With informal monitoring the Commission has to rely on voluntary cooperation in getting information.[37]

3.33 In its submission to the PS Act review the ACCC notes that it undertakes informal preliminary inquiries to make recommendations about when monitoring should be conducted.[38] This gives the ACCC considerable power. Informal monitoring is occurring in relation to petrol prices, bank fees and charges and sound recordings.

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33 Evidence p 39-40.

34 Evidence pp 39-40 and 61-62.

35 ACCC. One year on and most businesses comply with ACCC Price Guidelines. *Media Release* MR 152/01, 3 July 2001, p 1.

36 Evidence p 62.

37 Evidence p 30.

38 ACCC. June 2000, op. cit. p 40.

Petroleum products

3.34 Petrol pricing has a long history of price oversight since 1939.[39] Concern with this issue has been a recurring theme in the committee's reviews of the ACCC. Although there are both informal and formal aspects of the ACCC responsibilities in this area, all aspects are discussed here so that conclusions can be draw relevant to the sector as a whole.

3.35 Since deregulation of petrol pricing under the PS Act on 1 August 1998 the ACCC's main role has been to monitor petrol prices particularly focusing on 'hot spots'. Under Part VB of the TPA the ACCC has initiated an expanded monitoring program as well as being required by the Treasurer when the fuel sales grant was introduced to monitor the pass through of that grant.[40] As well in early March 2001 the Government asked the ACCC to examine the feasibility of placing limitations on petrol and diesel retail price fluctuations throughout Australia.[41]

3.36 As well as its own monitoring work the ACCC uses Informed Sources (Aust) Pty Ltd to undertake some of its monitoring on petrol and gets data from the independent retail price monitoring scheme.[42]

3.37 Some conclusions reached by the ACCC from its monitoring are:

- from July 1999 to June 2000 unleaded retail petrol prices were higher in metropolitan and country areas due to the higher refined product price in Singapore and the decline in the Australian exchange relative to the US dollar;
- indicative profit margins (difference between retail prices and the Commission's import parity indicator) over most of the financial year were lower in both metropolitan and country areas compared to pre-deregulation;
- in all capital cities (except Darwin and Hobart) there was greater discounting evident by a comparison of the ACCC's import parity indicator with market prices and there was little discounting evident in country areas;
- in general terms the gap between petrol prices in city and country areas has not widened; and

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39 See Productivity Commission. March 2001a, op. cit. Box 2.1 p 15; and ACCC. June 2000, op. cit. pp 7-8.

40 The fuel sales grant covers 1 or 2 cpl paid to retailers in non-metropolitan areas and remote areas, respectively, for sales of petrol and diesel after 30 June 2000. It aims to ensure that the country / city differential should not increase with the introduction of the NTS.

41 ACCC. June 2001. *Reducing fuel price variability: Discussion paper.* http://www.accc.gov.au/petrol/submissions/Reducing_Fuel_Price_Variability.PDF p 3.

42 *ACCC annual report 1999-2000*, op. cit. pp 103-105.

- only one of the major oil companies appears to post prices which could be considered close to genuine terminal gate prices.[43]

3.38 At the March 2001 hearing in commenting on the pass through of the fuel sales grant the ACCC reported that '…so far we have not found any evidence to suggest that the individual retailers are not passing the grant on. '[44] However, the ACCC, like others, had some suspicions that some oil companies were not passing the grant onto retailers in rural areas and it investigated that further. There is a difficulty in this area because the nature of the bill paying arrangements between oil companies and retailers means that individual records of payments are difficult to distinguish.[45] In June 2001 the ACCC reported that following its investigations of alleged price exploitation by Caltex, Shell, Mobil and BP in relation to the introduction of the grant, the ACCC could find no evidence of this.[46]

3.39 Some key issues raised by the ACCC in its discussion paper on reducing fuel price variability are:

- retail price volatility is generally confined to the major capital cities and some strategically located rural towns on major highways;
- in January to April 2001 the average petrol price increase between the trough and peak of the price cycle was 5.0 cents per litre in Sydney and 6.5 cents per litre in Melbourne and the number of working days between the trough of one cycle and the next is about 5.5 days in both locations;
- a comparison of wholesale petrol prices (deregulated 1 August 1998) data for 2001 and 1998 show that the average petrol price increase between the trough and peak of the price cycle in both Sydney and Melbourne was higher in 2001 than 1998 and this may reflect greater competition in the market;
- retail diesel prices do not display short term price volatility;
- while some consumers are frustrated with price fluctuations, others benefit by being able to purchase petrol at lower prices than average prices at the bottom of the cycle; and
- there are a number of options for limiting price fluctuations but a number of these may lead to higher prices than currently occur etc.[47]

43 *ACCC annual report 1999-2000*, op. cit. pp 103-104; and Evidence p 19.

44 Evidence p 19.

45 Evidence pp 19-20.

46 ACCC. *ACCC finalises fuel investigation*. *Media Release* MR 127/01, 1 June 2001, 1p.

47 ACCC. June 2001, op. cit. p 3; and Submissions pp S22-S23 (ACCC)

3.40 Notwithstanding all of the inquiries and research done, the committee remains concerned about the petrol price differential between city and country markets and feels that despite the considerable effort by the ACCC that the situation seems no closer to a solution at present.

Bank fees and charges

3.41 An area of critical concern to the community and the committee has always been bank fees and charges. At present the ACCC monitors these informally as it does not have a formal reference from Government. It reported that to date it has not experienced any problems from the banks in getting the information it needs for this purpose. The value of this monitoring is in providing information. However, the ACCC said '…Without further direction from government, it is not within our remit to then act on that information…'[48] As the Reserve Bank of Australia (RBA) and others[49] currently prepare detailed annual publicly available surveys on bank fees, the committee is not inclined to encourage further work by the ACCC in this area at this time.

3.42 The other area of bank fees that the ACCC recently has been involved with is debit and credit cards and interchange fees and access.[50] The ACCC as well as the Payments System Board (PSB) of the RBA have regulatory responsibilities in this area. This matter is now being considered under the designation powers of the PSB. The committee has commented on this issue in its June 2001 report on the RBA so readers are referred to that document.[51] The committee will continue to follow-up this issue through its future biannual hearings with the RBA.

Proposed changes to PS Act

3.43 In summary the PC's draft report on the PS Act concluded that the Act should be replaced with provisions for inquiries and price monitoring within the TPA.

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48 Evidence p 31 and see also p 64.

49 Reserve Bank of Australia. July 2001. Bank fees in Australia. *RBA Bulletin*, Sydney, RBA, pp 1-6; and Cannex (Aust) Pty Ltd. June 2001. *Deposit account fee analysis.* Hamilton Central, Cannex, 22p.

50 See Reserve Bank of Australia and the Australian Competition and Consumer Commission. Oct 2000. *Debit and credit card schemes in Australia: A study of interchange fees and access.* Sydney, RBA, v 82p.

51 House of Representatives Standing Committee on Economics, Finance and Public Administration. June 2000. *The Centenary of Federation hearing: Review of the Reserve Bank of Australia annual report 1999-2000*. Canberra, CanPrint, pp 29-32.

3.44 More specifically the PC proposed:

> …the PS Act be repealed, and that modified inquiry and monitoring functions (but not price notification) be written into a new section of the Trade Practices Act. The proposed section would set time limits for the duration of inquiries and impose threshold tests to rule out unnecessary inquiries.
>
> - Price control (for example, through CPI-X regulation) could be recommended in cases of substantial market power, but only where it could be demonstrated to be superior to lighter handed instruments. Implementation would be through industry-specific legislation.
>
> -The inquiries could also recommend price monitoring, but the form of monitoring would be constrained to ensure that it does not become de facto price control.
>
> Given the increased exposure of Australian markets to competition in recent years, it is anticipated that the new provisions, which are designed to be light handed in application, would be used infrequently.[52]

3.45 Obviously this curtails some of the powers of the ACCC.

3.46 In contrast to that proposal the ACCC had suggested the PS Act be amended to enable prices oversight functions to focus on monopoly utilities.[53] Commenting on the PC draft report the ACCC stated '…the proposal accords with much of the ACCC's submissions…'[54] but the ACCC raises the following three major areas of concern:

- it does not include provision for a generic price regulation function;
- it emphasises monopolistic pricing and only provides limited scope for prices oversight of oligopolistic industries; and
- it questions the effectiveness of the proposed monitoring function, in particular:
  - ⇒ the absence of a strong information gathering power to support the monitoring regime;
  - ⇒ that monitoring can only be implemented following a public inquiry;
  - ⇒ that a body independent of the regulator be required to nominate the indicators to be monitored;

52 Productivity Commission. March 2001a, op. cit. p I.

53 ACCC. June 2000, op. cit. pp 3-4 and 34-41.

54 ACCC. May 2001. *Submission to Productivity Commission on Draft report of the Review of the Prices Surveillance Act 1983.* http://www.pc.gov.au/inquiry/psa/subs/subdr025.pdf p 2.

- ⇒ the inability of the regulator to make determinations or recommendations using information gathered as part of the monitoring exercise; and
- ⇒ the lack of a review process after the initial monitoring period has passed.[55]

3.47 In its final submission to that inquiry the ACCC suggests that a generic prices oversight regime is justified with prices regulation, monitoring and public inquiry functions part of the regime.[56]

3.48 On 14 August 2001 the PC forwarded its final report to the Treasurer. The Treasurer has 25 parliamentary sitting days to table the report or release it out of session. The committee has not seen that report, and the related draft report on the access regime and the final report on telecommunications competition regulation have yet to be released. Accordingly, the committee does not consider that it is in a position to comment on the above proposals and counter-proposals other than to say it is conscious of the importance of independent assessment before extending the powers of the ACCC. The committee believes that the Economics Committee should look at this issue again early in the next parliament. The committee encourages the Minister to refer any new legislation on this issue to it for review.

55 ACCC. May 2001, op. cit. pp 2-9.

56 ACCC. May 2001, op. cit. p 10.

4

Enforcement issues

Allegations of 'arm twisting' by the ACCC

4.1 There is no doubt that the Parliament has given the ACCC considerable coercive powers so that it can satisfactorily perform its diverse range of functions. These include powers to: issue a notices which effectively reverse the onus of proof in relation to conduct in the telecommunications industry and price exploitation; publish guidelines on the operation of the law which may be used by the courts; and seek large financial penalties and adverse publicity orders. The committee has become aware of claims from the business community, practitioners and academics that the ACCC has a tendency to use its position of strength to 'bully' business into complying with its directives without necessarily sticking to the formal legal process. Professor Pengilley articulated this contention in a recent paper[1] and before the committee.

4.2 He stated that the ACCC sometimes employed tactics designed to convince the company involved that it would be too time consuming and expensive to fight the matter through. In this way, he said, it achieved its ends but avoided having issues tested in a court of law.[2] Examples of bullying or arm-twisting nominated included:

- continually talking up the threat of sizeable penalties even where the most minor transgression of the law is involved;

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1 Pengilley, W. April 2001. Competition regulation in Australia: A discussion of a spider web and its weaving. *Competition and Consumer Law Journal*, vol 8, no 3, pp 255-293.

2 Pengilley, W. April 2001, op. cit. p 284.

- misrepresenting its views as the 'law' or generally overstating its powers;
- requiring voluminous disclosure from companies without any reciprocal supply details about the ACCC's concern about a particular transaction or behaviour;[3]
- engaging in demonstration trials to induce compliance. Such proceedings are sometimes settled pre-trial; and
- using adverse publicity to imply or state that a party has breached the law.[4]

4.3 The committee asked the ACCC whether it considered Professor Pengilley's criticism of its operations was fair. The ACCC replied that the criticism had no real basis. When the committee pointed out that a number of leading trade practices practitioners had found no fault with the propositions espoused by Professor Pengilley, the ACCC claimed that these were the lawyers who represent big business.[5] Professor Pengilley rejected this contention. He specified two particular areas of concern namely: telecommunications and price exploitation. These areas are discussed below.

Telecommunications

4.4 The Parliament has given the ACCC strong powers in Part XIB of the Trade Practices Act (TPA) to promote competition into the telecommunications sector. Section 151AK of the TPA prohibits carriers from engaging in anti-competitive conduct. This is known as the 'competition rule'. A carrier will engage in anti-competitive conduct if they have a substantial degree of power in a telecommunications market and they take advantage of that power with the *effect or likely effect* of substantially lessening competition in a telecommunications market.[6] Section 151AL allows the ACCC to issue a 'Part B competition notice' setting out the details of the contravention. This notice is *prima facie* evidence in any subsequent court proceedings.[7] In effect, it shifts the onus

3 This was said to be a particular problem in merger cases. Professor Pengilley suggested that in these cases it is difficult to assess ACCC's case or respond to it without resorting to litigation. (See Pengilley, W. April 2001, op. cit. p 294). The prospect of litigation may mean that the merger proposal in no longer considered viable. Consequently the Tribunal or the Court will not review the ACCC's decision on the merger.

4 Pengilley, W. April 2001, op. cit. pp 284-285.

5 Evidence p 56.

6 Section 151AJ

7 Section 151AN

of proof to the carrier to prove that they did not breach the law. Under section 151BX, if the Federal Court is satisfied that a person has contravened the competition rule, the Court may impose a pecuniary penalty of up to $10 million plus $1 million for each day the contravention continued.

4.5 In the commercial churn case, which related to Telstra's customer transfer procedures, the ACCC issued a competition notice in October 1998. The matter was not ready for trial until March 2000.[8] According to Telstra's counsel, the period of delay meant that by the time the hearing was due to commence Telstra faced a penalty of up to $500 million.[9] In February 2000, Telstra and the ACCC settled the case after Telstra agreed to a $4.5 million package for service providers. Commenting on the outcome Professor Pengilley accused the ACCC of preferring '…to apply the pressure of huge and continuing penalties than to seek the resolution of issues through court process…'[10] He also contended that Commission's approach to the case restricted external scrutiny of its approach to the issue:

> …we will never know whether the ACCC's wishes that Telstra spend significant sums in assisting access to its network was a wise or efficient use of those funds or whether the ACCC, in demanding such expenditure, was engaged in regulatory error.[11]

4.6 The ACCC stated the case was one that was critical for the development of competition in the local telephony market. In its view, the anti-competitive nature of Telstra's customer transfer procedures could only be addressed by the introduction of an efficient billing system. In an implied concession that the commercial pressure of continuing penalties helped it to achieve its desired outcome, the ACCC acknowledged that:

> …A Court would not make such an order as an interlocutory injunction; in fact it would be difficult even as a final order.[12]

4.7 The committee notes that the issue of the telecommunications competition regime is currently being examined by the Productivity Commission (PC). In its draft report released in March 2001, the PC recommended that Part

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8 For an extended chronology of the 'churn' case see Productivity Commission. March 2001. *Telecommunications competition regulation: Draft report*. http://www.pc.gov.au/inquiry/telecommunications/draftreport/index.html p 5.15.

9 Roger Featherstone cited in Pengilley, W. April 2001, op. cit. p 289.

10 Submissions p S41 (W Pengilley)

11 Pengilley, W. April 2001, op. cit. p 290.

12 Submissions p S76 (ACCC)

XIB should be repealed and that telecommunication be subject to the general conduct rules in Part IV. The PC stated that:

> The competition notice regime in Part XIB increases the likelihood that a firm will modify alleged anti-competitive conduct rather than challenge the matter in the courts. This reduces the opportunities for judicial review of the ACCC's decisions.[13]

Price exploitation

4.8 As outlined in Chapter 3 section 75AU of the TPA prohibits 'price exploitation'. [14] That is, the charging of prices that are 'unreasonably high' having regard only to the new tax system changes.[15] A breach of section 75AU is punishable by a penalty of up to $10 million where the breach is committed by a corporation or $500 000 where the breach is by an individual.

4.9 The ACCC is required by section 75AV to issue guidelines about when prices may be regarded as unreasonably high. The Court can have regard to these guidelines in any litigation for price exploitation. Under section 75AW, if the ACCC regards a corporation as having engaged in price exploitation, it may issue a notice to the corporation to that effect. The notice is prima facie evidence of a breach of the law.

4.10 In 2000 the Parliament made further amendments to the TPA to prohibit conduct in connection with the supply of goods or services, that falsely represents, or misleads or deceives a person about the effect of the new tax system changes.[16]

4.11 Many of the allegations of ACCC 'bullying' arise from the application of its powers in relation to price exploitation. Examples of such comments include:

- an allegation by the Australian Retailers Association (ARA) that the ACCC had 'overreacted to inadvertent errors by retailers'. The ARA also said that retailers had been 'singled out and victimised'. These

13 Productivity Commission. March 2001, op. cit. p 5.1.

14 Due to limitations in the Commonwealth's power, all jurisdictions (except the ACT) have implemented a uniform New Tax System Price Exploitation Code (the schedule or personalised version of Part VB). The state legislation essentially gives the ACCC the same powers and functions as Part VB, but in respect of persons rather corporations.

15 To contravene the section, the price must be unreasonably high even after taking into account the supplier's costs, supply and demand conditions and other relevant matters.

16 Section 75AYA.

comments followed ACCC action against Franklins for charging 'GST' on Goods and Services Tax (GST) free goods;[17]

- the Australian Chamber of Commerce and Industry (ACCI) accused the ACCC of 'prosecution by press release'. The ACCI said that the ACCC had scared people into lower price outcomes than would have otherwise been the case resulting in lower levels of growth and lower levels of employment than would otherwise have been achieved;[18]
- Australian Business Limited said there was a reasonable amount of fear about the ACCC's price exploitation powers;[19]
- retailer Gerry Harvey accused the ACCC of acting in 'a totally un-Australian way';[20]
- former Trade Practices Commissioner Bob Baxt described the ACCC as a 'bully' for its advocacy of the view that any price rises in excess of ten per cent was unlawful;[21]
- in June 2000 *The Australian* editorialised that the ACCC was 'bullying businesses proposing price rises';[22] and
- Professor Pengilley said that the ACCC's powers were 'heavy-handed' and that in most sectors of the economy the Government could rely on competition to keep prices down.[23]

4.12 In March 2001, the ARA reported that that 55 per cent of retailers surveyed had absorbed costs and taken lower profit margins since the start of the GST. While some have argued the fear of the ACCC restrained business from raising their prices, it is by no means clear that the reluctance to raise prices was not largely the result of tough competitive conditions. The CEO of Council of Small Business Organisations of Australia, Rob Bastian, has suggested that both factors were at work.[24]

4.13 The ACCC strongly refuted such claims of 'bullying'. It pointed out that it was given a strong mandate to prevent price exploitation by

17 Australian Retailers Association. Australian Retailers Association expresses concerns about ACCC's action for inadvertent GST errors. *Media Release*, 25 July 2000. The matter was resolved when Franklins consented to discounts on 11 items for three weeks and ran full page advertisements apologising for the error.

18 Patterson, M. Industry concerns over ACCC. *Transcript ABC AM Program*, 6 July 2001.

19 Southgate, L. Watchdog overawes retailers. *The Australian*, 15 March 2001.

20 Harvey lets fly at 'unAustralian' ACCC. *Australian Financial Review*, 14 August 2000.

21 Towers, K. Bullies, says latest critic. *Australian Financial Review*, 2 June 2001.

22 Editorial. Investigation, not bluster, is ACCC role. *The Australian*, 9 June 2000.

23 Evidence p 83.

24 Southgate, L. Watchdog overawes retailers. *The Australian*, 15 March 2001.

Commonwealth, State and Territory Parliaments. The ACCC informed the committee that it put a lot of resources into educating small business about the magnitude of permissible price rises. It said that its guidelines gave business greater certainty during the transition to the GST.[25] The ACCC also argued that its high profile activities also helped business by increasing the confidence of consumers about the price effects of the GST. Consequently, it said, consumers spent more liberally than would have otherwise been the case.[26]

4.14 Furthermore, the Commission stated that it had avoided a heavy-handed approach in enforcing the law. The ACCC informed the committee that it could have instigated 233 actions for price exploitation. However as most cases involved small business, it pursued other remedies. The ACCC told the committee:

> Quite often the mistake, in terms of charging GST when it should not have been charged, was inadvertent. We sought other remedies in terms of refunds and discounts on goods.[27]

4.15 As stated earlier in this report, over the last two financial years the ACCC has conducted 5000 GST pricing investigations resulting in 600 administrative undertakings and 40 court enforceable undertakings.[28]

4.16 The most high profile price exploitation case to date concerned Video–Ezy. This matter was settled in April 2001 with the company consenting to court orders that it had misled its customers over the impact of the GST on new video releases. It also agreed to a range of remedial measures to compensate customers.[29]

4.17 Another major case concerned Westpac. The bank increased a large number of its fees by the full ten per cent after the introduction of the GST. The ACCC pointed out that banks are input taxed and therefore cannot claim GST credits. Consequently, the GST did have an 'impact' on their fees. After carefully examining the Westpac's fee increases the ACCC concluded that they did not seem to be in breach of the TPA.[30]

4.18 With only minimal resort to litigation the ACCC was able to report in July 2001 that most businesses have complied fully with its guidelines and that

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25 Evidence p 40.

26 AAP. Jail for price collusion: Fels call. *Canberra Times*, 14 June 2001.

27 Evidence p 48.

28 See paragraph 3.28.

29 ACCC. ACCC and Video Ezy settle litigation. *Media Release* MR 96/01, 27 April 2001.

30 Evidence pp 40-41.

the overall net effect of the new tax system on prices was 2.5 per cent.[31] This was less than the Government's estimate of around 2.75 per cent in the 2000-2001 budget. Whether this outcome is primarily attributable to the ACCC's education campaign, business fear of the Commission or competitive conditions in the market is a matter where there is insufficient evidence for the committee to draw a conclusion.

Did the ACCC overstate its powers?

4.19 On one occasion highlighted by Professor Pengilley, the ACCC stated that:

> …The ACCC can impose severe penalties for businesses that fail to pass on tax savings for lower prices - up to $10 million per offence for corporations, and up to $500 000 per offence for individuals…[32]

4.20 Professor Pengilley pointed out that in fact, such penalties can only be imposed by the Federal Court on application from the ACCC. He described the situation as one where the Commission had 'blatantly and wrongly' claimed powers that it does not have.[33] Professor Fels conceded to the committee that the ACCC had erred but stated that it was a rare mistake:

> I cannot recall any time in the last 10 years that anyone from the Commission has ever said that we can fine people, with the one exception of the statement that Pengilley—who spends his life fault-finding with the ACCC—has managed to uncover. So I congratulate him on this discovery of his. It should not have been said. We do doubt very much that anyone ever saw it, apart from Pengilley. I very much doubt that this particular publication actually reached a lot of people. We have always tried to make it clear that the level of penalties, if any, in a case are up to the courts.[34]

4.21 While the committee accepts that this was an inadvertent and uncharacteristic error by the Commission, the reaction of the Chairman suggests an intolerance for criticism, even where it is well-founded. The committee is concerned that other justified questions about the ACCC's performance are being similarly dismissed.

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31 ACCC. One year on and most businesses comply with ACCC Guidelines. *Media Release* MR 152/01, 25 July 2000.

32 ACCC. June 2000. *ACCC update.* Special GST issue, Issue 7, p 2.

33 Pengilley, W. April 2001, op. cit. p 292.

34 Evidence pp 47-48.

The 10 per cent rule

4.22 In March 2000 the ACCC revised its price guidelines to explicitly state that prices should not rise by more than 10 per cent as a result of the new tax system. The ACCC insisted that its pricing guidelines were enforceable.[35]

4.23 This claim was subject to extensive criticism. Professor Pengilley argued that the ACCC overstated the legal effect of its guidelines to intimidate business into compliance.[36] While the law requires the ACCC to develop the guidelines and states that the Court may take the guidelines into account in any litigation regarding price exploitation, the guidelines do not replace the test for price exploitation contained in section 75AU, namely: – is the price unreasonably high? Debate about the legal effect of the guidelines centred on the so called 10 per cent rule. Professor Pengilley emphasised the point that there is nothing in the law that caps price rises at 10 per cent:

> the compliance costs of some entities (in some cases on a continuing basis by virtue of legal changes forcing managerial changes) plus the imposition GST meant an increase of more than 10 % in prices if costs were to be recovered.[37]

4.24 Other academic commentators have similarly stated that:

> It is difficult to understand how section 75AU precludes a price increase of more than 10 per cent by reason of additional compliance costs if it can be shown that the price increase is justifiable.[38]

4.25 The ACCC argued that there had been a misplaced emphasis on the 10 per cent rule.

> The vast majority of price changes due to the New Tax System will be nowhere near 10 per cent. A significant number of price falls will occur due to the removal of the Wholesale Sales Tax and its replacement by the Goods and Services Tax and due to other cost savings attributable to the New Tax System.[39]

35 ACCC. Pricing Guidelines enforceable: ACCC. *Media Release* MR 84/00, 2 May 2000.

36 Pengilley, W. April 2001, op. cit. p 290.

37 Pengilley, W. April 2001, op. cit. p 290.

38 Fisse, B, Cass-Gottlieb, G and Wijewardena, M. 2000. The New Bitter? Price exploitation under Part VB of the Trade Practices Act. *Trade Practices Law Journal*, vol 8, p 102.

39 ACCC. Pricing Guidelines enforceable: ACCC. *Media Release* MR 84/00, 2 May 2000.

ACCC's arguments for stronger trade practices laws

The effects test

4.26 The ACCC submitted that section 46 of the TPA should be strengthened by adding an 'effects' test.[40] Section 46 would then prohibit a corporation that has a substantial degree of power in a market from taking advantage of that power for the purpose or *effect* of:

- eliminating or substantially damaging a competitor of the corporation or of a body corporate that is related to the corporation in that or any other market;
- preventing the entry of a person into that or any other market; or
- deterring or preventing a person from engaging in competitive conduct in that or any other market.[41]

4.27 The committee notes that the proposal to move to an effects test has been considered on five occasions since 1989 during various reviews of the TPA.[42] All five inquiries expressed concern that the effects test would not be able to satisfactorily distinguish between desirable and undesirable competitive activity by firms.

40 Evidence p 60.

41 The Committee notes that the Senate Legal and Constitutional References Committee is currently examining another proposal in relation to section 46, namely the reverse onus of proof test. Under this approach once the ACCC can demonstrate that a company has a substantial degree of market power and has taken advantage of that power, the onus will then shift to the company to prove that it did not use its market power for an improper purpose. The ACCC did not raise this matter with the Committee in its evidence or submissions.

42 House of Representatives Standing Committee on Legal and Constitutional Affairs. 1989. *Mergers, takeovers and monopolies: Profiting from competition?* (Griffiths). Canberra, AGPS, pp 29-30 and 41; Senate Standing Committee on Legal and Constitutional Affairs. 1991. *Mergers, monopolies and acquisitions: Adequacy of existing legislative controls.* (Cooney). Canberra, AGPS, pp 81-86 and 96; Hilmer, J. 1993. *National Competition Policy: Report by the Independent Committee of Inquiry*. Canberra, AGPS, pp 70-71 and 74; House of Representatives Standing Committee on Industry, Science and Technology. 1997. *Finding a balance: towards fair trading in Australia.* (Reid). Canberra, AGPS, p 132; and Joint Select Committee on the Retailing Sector. 1999. *Fair market or market failure.* (Baird). Canberra, Parliament, p 100.

4.28 The committee notes that there is already an effects test in telecommunications competition regime.[43] This regime is currently being reviewed by the PC. In its draft report the PC recommended the removal of the provisions containing the effects test.[44]

4.29 The ACCC informed the committee of three recent cases on section 46: *Melway*[45], *Boral*[46] and *Rural Press*[47]. It argued that *Melway* and *Boral* in particular had broadened the scope of section 46. In *Melway*, the ACCC intervened submitting the argument that a firm may take advantage of market power if it does something that is materially facilitated by the existence of the power, even though it may not have been absolutely impossible without the power. Although the small distributor seeking relief against Melway ultimately lost the case[48], the High Court accepted the ACCC's submission in *obiter* comments. Reflecting on the decision, the ACCC told the committee:

> the High Court adopted a more expansive view of section 46 than in the past. The hurdles that have to be got over have been lowered significantly by the High Court.[49]

4.30 The *Boral* case concerned an allegation of predatory pricing. The ACCC said that prior to the Federal Court's decision the ACCC faced a 'big hurdle' in that it was considered necessary to establish that the firm pricing below cost could recover its losses after eliminating its competition. The Commission stated that in *Boral* the Full Federal Court had held that section 46:

> does not have these theoretical economic doctrines written into it and, if the purpose is to drive someone out of business and it is

43 Subsection 151AJ(2) provides: A carrier or carriage service provider engages in anti-competitive conduct if the carrier or carriage service provider has a substantial degree of power in a telecommunications market; and either:

- takes advantage of that power with the effect, or likely effect, of substantially lessening competition in that or any other telecommunications market; or
- takes advantage of that power, and engages in other conduct on one or more occasions, with the combined effect, or likely combined effect, of substantially lessening competition in that or any other telecommunications market.

44 Productivity Commission. March 2001, op. cit. p 5.1.

45 *Melway Publishing Pty Ltd v Robert Hicks Pty Ltd* (2001) 178 ALR 253.

46 *ACCC v Boral Ltd* (2001) ATPR 41-803

47 *ACCC v Rural Press* [2001] FCA 116

48 The small distributor failed in *Melway* because the majority of the High Court concluded that Melway had not 'taken advantage' of its market power. Therefore the imposition of an effects test would have had no impact on the outcome of the case.

49 Evidence p 2.

> connected with the misuse of market power, then it is a breach of the law. [50]

4.31 Given these breakthroughs in the interpretation of section 46 and the repeated concerns expressed by various inquiries about the move to an effects test, the committee's preference is to await the outcome of further cases on section 46 before considering any change to the law.

Cease and desist power

4.32 The ACCC also told the committee that its ability to enforce the TPA would be enhanced if it had the power to issue 'cease and desist' orders. These would be issued by the ACCC where its suspects that a breach of the Act has occurred. The recipient of such orders could not engage in the conduct specified in the notice unless it could prove in court that it did not contravene the TPA. Failure to comply would be punishable in the Federal Court. Compensation may payable if loss or damage was caused by a breach of the order. The ACCC indicated that such orders could be particularly useful in the context of cases involving an allegation of misuse of market power:

> If we, for example, form the view that there is some predatory behaviour going on then we would have to collect evidence and win a case in court which can take a long time. There needs to be some look at how quickly action can be taken. The possibility of cease and desist orders or something like may need some consideration. [51]

4.33 In a submission to the committee the ACCC suggested that cease and desist orders could be used to target 'blatant damaging anti-competitive conduct'.[52] The ACCC argued that such a power is necessary in order to ensure that corporations breaching the law do not get the benefit of removing competition while the matters are being brought to court.

4.34 There are domestic and international precedents for such powers. The ability to issue a cease and desist order is possessed by the ACCC's counterpart in the United States, the Federal Trade Commission. [53] The Australian Securities and Investments Commission can issue 'stop orders' under section 739 of the *Corporations Act 2001* where there is a misleading a deceptive statement in a disclosure document. In addition, the Minister

50 Evidence p 6.

51 Evidence p 68.

52 Submissions p S66 (ACCC)

53 See section 5 of the Federal Trade Commission Act 15 USC 45.

also has a cease and desist power under section 65F of the TPA in relation to compulsory product recalls.

4.35 The request of the ACCC for a cease and desist power is not a new one. The ACCC's predecessor the Trade Practices Commission made such a submission in 1991. At that time the Attorney-General's Department counselled against it for constitutional reasons, namely that as an administrative body, the ACCC cannot exercise judicial power[54] The proposal was also rejected by the Hilmer Inquiry in 1993.

4.36 The advantages and disadvantages of cease and desist power were considered by the Australian Law Reform Commission (ALRC) in 1993. Advantages identified by the ALRC included that it was:

- a useful tool to deal with minor infringements of the TPA;
- a more cost effective enforcement mechanism than litigation; and
- a useful device to quickly curtail or halt breaches of the TPA.

4.37 However, the ALRC stated that the value of the cease and desist orders should not be over estimated because time and resources would still be needed to gather evidence. Furthermore, the ACCC would still need to meet the requirements of natural justice, by giving affected parties a reasonable opportunity to give evidence and make submissions to the ACCC before it gives an order.

4.38 The ALRC concluded that enforcement tools such as urgent judicial injunctions and enforceable undertakings already allow the ACCC to respond quickly and effectively to contraventions of the TPA and recommended against the granting of power to issue cease and desist powers.[55] The Hilmer Inquiry reached the same conclusion. It also described such orders as being particularly harsh where complex economic matters are involved.[56]

4.39 The ACCC does have the capacity to seek an injunction or interim injunction under section 80 of the TPA from the Federal Court. Simply stated the test for the granting of an interlocutory injunction is that the Court has to be satisfied that there is a serious question to be tried. If the answer to this question is yes, then the Court must consider the balance of

54 Senate Standing Committee on Legal and Constitutional Affairs.1991, op. cit. p 131.

55 Australian Law Reform Commission. 1993. *Compliance with the Trade Practices Act 1974.* Sydney, ALRC, pp 87-88. (Discussion Paper no. 56)

56 Hilmer, J. 1993, p 168.

convenience.[57] The ALRC reported that the ACCC can obtain an interim injunction can be obtained in less than 48 hours. In blatant cases it would not seem difficult for the ACCC to obtain an injunction. Indeed no evidence has been brought by the ACCC to suggest otherwise.

4.40 In addition, the committee notes that the ACCC has the power to issue competition notices under the telecommunications competition regime in Part XIB. Such notices reverse the onus of proof and failure to comply with the notice renders the recipient liable to penalties at a $1 million a day. According to the PC these powers effectively amount to cease and desist orders. The PC has recommended their repeal.[58]

Imprisonment

4.41 The ACCC informed the committee that 'hard core' cartel activity is on the increase both domestically and at an international level. Hard core cartels include collusive arrangements to fix prices, rig bids, and share markets. [59] Such behaviour is prohibited under Part IV of the TPA (see especially sections 45, 45A). The principal sanction for contravening the TPA is the imposition of a pecuniary penalty. Presently section 76 of the Act provides for penalties of $10 million per offence and $500 000 for an individual. It is important to note that criminal penalties do not apply for a breach of the provision of Part IV. Section 76 imposes pecuniary penalties where the civil standard of proof -the balance of probabilities -applies.[60]

4.42 In response to the increase in cartel activity, the ACCC has called for the deterrent effect of the law to be strengthened by giving the courts the option of imposing the penalty of imprisonment in certain circumstances. The ACCC told the committee:

> We believe that there is now a strong case for introducing jail sentences for defined acts of hardcore collusion—not for breaches of the whole of Part IV of the Act, which covers many forms of behaviour of anti-competitive mergers, misuse of market power, and so on. The acts that we would see as being defined as fit for possible jail sentences would be price fixing agreements between

57 *Australian Coarse Grains Pool Pty Ltd v Barley Marketing Board of Queensland* (1983) 57 ALJR 425 per Gibbs CJ.

58 Productivity Commission. March 2001, op. cit. p 5.1.

59 Eatwell, J, Milgate, M, Newman, P and Palgrave, R. 1987. *The New Palgrave: a dictionary of economics*. London, Macmillan, p 372.

60 Miller, RV. 2000. *Miller's annotated Trade Practices Act 2000.* 21st edition, LBC Information Services, p 527.

> competitors, bid rigging, probably market sharing and, quite likely, agreements between competitors to boycott.[61]

4.43 The ACCC stated that with the scale of cartel activity was so large that in some cases the penalties applicable may be exceeded by the benefits of collusion. [62] In addition, the fact that some firms have re-offended after an initial fine is further evidence that the current range of penalties are an insufficient deterrent.[63] The proposed penalty is targeted against big business. The ACCC said that trade unions and small business should be exempted from the jail penalties.

4.44 Professor Pengilley, a critic of the ACCC on a range of other matters, supported the call for the penalty of imprisonment to be available. He noted that in addition to the deterrent effect the possibility of a jail sentence may have another effect:

> …Coupled with an appropriate immunity guarantee policy, gaol sentences are a significant incentive for one party in a price fixing agreement to inform on another and avoid incarceration. The risk taking stakes are thus considerably increased. Thus all collusive activity has greater in built insecurity...[64]

4.45 Professor Pengilley argued however that further explanation was required on the scope of offences that would be potentially subject to the penalty of imprisonment. For example, he queried what the ACCC meant by 'blatant price fixing'. He also expressed great concern about any move to extend the penalty of imprisonment to cover breaches of section 46 because, in his view, that the law in that area is too uncertain.[65]

4.46 The option of providing for jail penalties in the context of the TPA has been previously debated. The ACCC informed the committee that it was considered when the TPA was enacted but was dropped after a campaign by big business.[66] While there has never been the option of a custodial sentence for breaches of Part IV, section 79 of the Act originally permitted to imposition of up to six months imprisonment for breaches of consumer protection provisions in Part V. This provision was repealed in 1977. The option of imprisonment was also considered by the ALRC in 1993 in its report into compliance with the TPA. At the time the ALRC found no

61 Evidence p 58.

62 AAP. Jail for price collusion: Fels call.*Canberra Times,* 14 June 2001.

63 Professor Fels has cited the example of TNT subsidiary –J. McPhee and Son. Fels, A. Jail would hurt more than fines. *Canberra Times,* 5 July 2001.

64 Submissions p S46 (W Pengilley)

65 Submissions p S47 (W Pengilley)

66 Evidence p 58.

compelling reason to 'resort to the extreme sanction of gaol'.[67] In 1993 the Hilmer Inquiry reported that the current remedies provide an appropriate level of deterrence and compensation.[68]

4.47 The committee believes that the increase in cartel activity in recent years suggests that it is now time to reconsider these conclusions. As noted by the ACCC, jail sentences for cartel activity apply under the competition laws of our major trading partners such as the United States, Canada, Japan and Korea. In the UK, the Government has released a white paper setting out proposals to introduce criminal sanctions for individuals who participate in hard core cartels.[69]

4.48 It is possible that any move to introduce a penalty of imprisonment may be largely symbolic as the courts are not likely to find many cases of collusive behaviour that meet the higher standard of proof required in criminal cases.[70] Furthermore, the ACCC may not often seek such an outcome as they may be more likely to achieve results seeking penalties under the civil standard of proof.[71]

4.49 Nevertheless, the committee believes that there is a need to be vigilant against the upsurge in cartel behaviour and serious consideration should be given to amendments to the TPA to permit the imposition of a penalty of imprisonment for participants in hard core cartels. Such a penalty should only be sought by the ACCC in the most blatant cases.

Splitting the ACCC

4.50 Prior to 1995, the competition regulator, the Trade Practices Commission, was principally focused on enforcing the restrictive trade practices and consumer protection provisions of the TPA. The passage of the *Competition Policy Reform Act 1995* saw price surveillance functions formerly performed by the Prices Surveillance Authority assumed by the new competition regulator - the ACCC. In addition, the Commission was given responsibility to arbitrate on disputes about access to facilities of national significance. Since that time the ACCC has assumed the role of

67 Australian Law Reform Commission. 1993, op. cit. p 75.

68 Hilmer, J. 1993, op. cit. p 161.

69 Department of Trade and Industry. July 2001. *A world class competition regime.* London, The Stationery Office. http://www.dti.gov.uk/cp/whitepaper/523301.htm

70 Editorial. Fels well armed in new skirmish. *Australian Financial Review,* 13 June 2001.

71 McCrann, T. Tread carefully, Inspector Fels. *Herald Sun,* 14 June 2001.

AUSTEL as the telecommunications regulator, as well as powers to prevent price exploitation in the transition to the new tax system.

4.51 Professor Pengilley submitted to the committee that the Commission has too many roles and that competition policy would be better served by breaking up the regulator:

> The ACCC has far too many divergent functions. It cannot be price setter, competition enforcer, adjucator and arbitrator. Inevitably, one function runs into the other and impartiality is infringed…[72]

4.52 Professor Pengilley argued that there is a conflict of interest between the regulatory and competition roles performed by the ACCC. The example he gave was in the area of telecommunications where under the access regime in Part XIC the ACCC has to assess the rate of return in arbitration disputes. He stated that the consumer protection role that the Commission has conflicts with this function:

> Telstra would believe—and there is a lot to be said in the old adage that justice must not only be done but must appear to be done—that it could not get a fair shake out of the ACCC, because the ACCC has a consumer interest and it is going to balance it that way.[73]

4.53 All states and territories except Western Australia have established their own statutory bodies to arbitrate access disputes and regulate the pricing policies of Government owned businesses. These bodies include the Independent Pricing and Regulatory Tribunal (NSW), the Office of the Regulator General (Vic), the Queensland Competition Authority. One option to address the issues raised by Professor Pengilley would be to establish a body at a Commonwealth level that would perform similar functions. Professor Pengilley said that there seemed to be little disquiet about the performance of the State regulators. He attributed this not to the possibility that they may be better at setting prices but rather that were structurally independent so that participants in the process felt that they had obtained a fair hearing.

4.54 The committee notes the PC is examining or has examined three major 'regulatory' functions of the ACCC: namely access regimes, the PS Act and the telecommunications competition regime. The committee believes that it would premature to make any recommendations about the appropriate structure of the ACCC pending the outcome of these reports and the

72 Submissions p S53 (W Pengilley)

73 Evidence p 79.

government response. Nonetheless the committee believes that this issue should be re-examined in the next Parliament.

ACCC's performance overall

4.55 The committee considers that the ACCC has shown itself to be an effective regulatory body, as evidenced by its handling of its responsibilities relating to the introduction of the NTS.

4.56 The committee is concerned that the ACCC has been subject to considerable criticism for its tactics in some cases and allegations of a heavy handed approach. It has also exhibited a dismissive attitude toward criticism of its actions. If the public, or even a single firm, considers that there is a problem, it needs to be dealt with in a positive way. Even where the complaint has no substance, the ACCC needs to address community perceptions.

4.57 Overall, the committee would like to see the ACCC ensure that it adopts a balanced approach to its responsibilities.

4.58 Regarding the Commission's requests for further powers, the committee's assessment is that the existing powers generally seem adequate to allow the ACCC to carry out its responsibilities in an efficient manner. However, an exception to this is in relation to cartels, where the deterrent effect of the law needs to be strengthened. In this context, the committee believes that serious consideration should be given to amendments to the TPA to permit the imposition of a penalty of imprisonment for participants in hard core cartels.

4.59 The committee is aware that there have already been suggestions that the wide range of the powers administered by the Commission produces some conflict of interest. Consequently, the committee believes that very serious consideration should be given to the implications, before any further powers are assigned to the ACCC.

David Hawker MP
Chair
17 September 2001

A

Appendix A - List of submissions

Submission No.	Individual/ Organisation
1	Australian Dairy Farmers' Federation Limited
2	Australian Automobile Association
3	Australian Competition and Consumer Commission
4	Professor Warren Pengilley
5	Australian Competition and Consumer Commission (supplementary submission)
6	Australian Competition and Consumer Commission (supplementary submission)
7	Professor Warren Pengilley (supplementary submission)

B

Appendix B - List of exhibits

Exhibit No.	Description
1	Australian Chamber of Commerce and Industry. nd. *Competition policy*. Canberra, ACCI, 5p. (Provided by Mr M Paterson, Chief Executive, ACCI)
2	Pengilley,W. April 2001. Competition regulation in Australia: A discussion of a spider web and its weaving. *Competition and Consumer Law Journal*, vol 8, no 3, pp 255-310. (Provided by Professor Pengilley, Spark Helmore Professor of Commercial Law, University of Newcastle and Special Counsel to Sydney lawyers, Deacons)
3	Pengilley, W. June 2001. Video Ezy case settled: ACCC price exploitation publicity pre-litigation contrasted with the realities of the settlement. *Australian and New Zealand Trade Practices Law Bulletin*, vol 17, no 2, pp 9-11. (Provided with submission no 7)

C

Appendix C - List of hearings and witnesses

Public hearings

Friday, 30 March 2001

Australian Competition and Consumer Commission

Mr Brian David Cassidy, Chief Executive Officer

Mr Joe Dimasi, Executive General Manager, Regulatory Affairs Division

Professor Allan Fels, Chairman

Mr John Grant, Executive General Manager

Mr Timothy Paul Grimwade, Acting General Manager, Adjudication Branch

Ms Helen Lu, General Manager, Corporate Management Branch

Mr Mark John Pearson, General Manager, Mergers and Asset Sales

Mr David Frank Smith, Executive General Manager

Monday, 25 June 2001

Australian Competition and Consumer Commission

Ms Margaret Peta Arblaster, General Manager, Transport and Prices Oversight

Mr Brian David Cassidy, Chief Executive Officer

Mr Richard Arthur Mailey Farmer, Director, Compliance - GST Division

Professor Allan Fels, Chairman

Ms Helen Lu, General Manager, Corporate Management Branch

Ms Joanne Palisi, Director, Adjudication Branch

Mr Chris Pattas, Senior Manager, Telecommunications

Mr Mark John Pearson, General Manager, Mergers and Asset Sales

Mr David Frank Smith, Executive General Manager, Compliance Division

Public briefing

Thursday, 23 August 2001

Professor Warren Pengilley, Faculty of Law, University of Newcastle

Private briefings

Monday, 4 June 2001

Australian Dairy Farmers' Federation

Mr John McQueen, Chief Executive Officer

Mr Patrick Desmond Rowley, President

Australian Automobile Association

Mr John Metcalfe, Director, Research and Policy

Australian Chamber of Commerce and Industry

Mr Mark Ian Paterson, Chief Executive

Thursday, 28 June 2001

Australian Pipeline Industry Association

Dr Allen Beasley, Executive Director