



ACCC *update*

Issue 11, June 2002



Leniency policy attracts great interest

Merger knock backs—down but not out

Product safety in cyberspace

Regional network helps local businesses

Calls for criminal sanctions for hard-core cartels



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One of the more pressing issues facing business leaders is how to operate and expand their companies in an increasingly competitive global environment. Australian businesses, large and small, need to be assured that legislation will not act against continued growth and productivity. And consumers need to feel assured that their interests are being looked after. The lead article in this issue of *ACCC update* takes a look at the review of the competition provisions of the TPA.

The Australian Competition and Consumer Commission remains dedicated to strong and effective trade practices legislation to ensure the success and fairness of Australia's business activity. While various aspects of the Trade Practices Act have been reviewed over the past few years, there has not been a comprehensive review of the competition provisions (Part IV) since the Hilmer committee reported in 1993.

In its submission to the review committee, the ACCC strongly supports the introduction of jail sentences for hard-core, high-level collusion—which would put it in line with Australia's major trading partners such as the United States, Japan and Britain. It also supports the introduction of an 'effects test' to supplement the existing purpose test, when assessing whether businesses are misusing their market power.

While concern has been expressed in the business community about mergers, the ACCC considers that s. 50 of the Act and its own informal clearance process for merger assessments is working well. The ACCC is not persuaded that any significant change is required to either.

In a report released in April this year, *Report on the Nature and Impact of Hard Core Cartels*, the OECD calls for strong sanctions against enterprises and individuals to increase the effectiveness of leniency programs

in uncovering cartels and provide incentives for cartel participants to cooperate with investigators and 'blow the whistle'.

The report, following a survey of cartel cases conducted by member nations, declares that cartels harm consumers and have pernicious effects on economic efficiency. It is also covered in this issue of *ACCC update*.

The issue of leniency and cooperation policy was also tackled at an ACCC conference on law enforcement, held in Sydney on 4 and 5 July 2002. This is further addressed in this issue.

But it's not all about enforcing the law. Other stories look at recent successes in regional and rural areas with the ACCC holding a very successful Competing Fairly Forum in May this year, and the expansion of the Rural and Regional Network.

We hope that the breadth of stories in this issue offers something of interest to all our readers.

ACCC hopes the law is strengthened

The ACCC recently presented its submission on the review of the competition provisions of the Trade Practices Act.

Its submission supports the introduction of jail sentences for hard-core, high-level collusion—an issue it has already flagged with the government.

In the United States, Canada and Britain, for example, collusive behaviour carries a very great risk of a jail sentence for the directors who go along with the cartel.

'The review provides a major opportunity for Australian law to come into line with best practices internationally,' the ACCC Chairman, Professor Allan Fels, said.

'More and more, Australian companies are looking to international trade for growth; it's only right that they work under similar law in their home country as that of overseas.'

Professor Fels pointed out that the Act contains compromises that were made with big business in an earlier era when governments were feeling their way with competition policy and when the political muscle of big business was greater.

He said the Act's limitations particularly affect consumers, including small business.

The ACCC will be looking to the review for changes that will assist this important area of the economy.'

Currently, the court can only award financial penalties against businesses for anti-competitive behaviour such as cartels and collusion.

Recently, in a case involving suppliers of power transformers and distribution transformers in Australia, the court ordered penalties of nearly \$15 million. The court also imposed substantial penalties against the managing directors of each of the corporations for their awareness of, and participation in, the covert and illegal conduct.

'Like in many covert price-fixing conspiracies, these companies and their senior executives from time to time abused the opportunity to meet with their competitors before or after industry association meetings', Professor Fels said.

'Secret meetings to rig the outcomes of multi-million dollar contracts took place in hotel rooms, airport lounges and even private residences in various parts of Australia.'

The customers affected by these illegal arrangements included many of the largest electricity transmission and distribution utilities across Australia.

Although these conspiracies were directed at the tender processes for power and distribution transformers, it is the Australian consumer who has ultimately paid the price.

The penalties ordered by the court against the companies' managing directors are equivalent to the highest individual penalties imposed by the court in the history of trade practices proceedings in Australia. In fact, they would have been higher but for the fact that the companies and their management cooperated substantially with the ACCC during its investigations.

But clearly the threat of monetary penalties does little to deter certain anti-competitive behaviour. The behaviour in the transformer cases from 1993–99 seems to have been completely unaffected by the publicity about penalties of \$21 million on building companies around 1995, and of \$15 million on freight express companies around 1993.

The ACCC has also submitted to the Trade Practices Act review that the law should be strengthened to better protect smaller companies against their bigger rivals misusing their market power.

The ACCC believes this can be done best through the introduction of an 'effect' test—that is, whether the misuse of market power had the effect of harming competition. This would complement the current test that ascertains whether the company concerned had an anti-competitive 'purpose'. Safeguards could be written into the Act to ensure genuine, pro-competitive behaviour is not affected by such a change.

Product safety in cyberspace

Consumers are increasingly viewing the Internet as the ultimate global marketplace. The place where they can easily search for that elusive bargain or difficult-to-find item.

With the expanded opportunities that e-commerce provides, come some new issues for consumers. By definition, e-commerce shifts the purchase of a product from the shopfront to the computer, that is consumers normally make purchases without being able to examine the actual product in person.

The ACCC and product safety

The ACCC is strongly committed to ensuring that products sold in Australia and to Australian consumers comply with the Trade Practices Act. The Act contains general product liability provisions whereby action can be taken against the supplier of unsafe or defective goods. Several product types are also covered by mandatory product safety and information standards in the Act.

These products include bicycles, bicycle helmets, cots, children's nightwear, sunglasses, vehicle jacks and others. For a full list of the products covered by

the Act, please refer to the Product Safety page of the ACCC website.

Product standards are in place to reduce or eliminate the potential for goods to cause injury or death. As such, severe penalties may apply when a trader is found to be supplying non-complying goods.

Are consumers protected in cyberspace?

Yes. *The Trade Practices Act 1974* is the Commonwealth's major consumer protection legislation. The Act is technology-neutral, meaning that online traders are also subject to its requirements. Just because a trader does not have a physical store, does not mean that they can get away with even minor breaches of the Act.

Complaints received about online traders normally relate to misleading or deceptive conduct. Of course some of these matters are genuine mistakes made by legitimate traders. However, the perceived 'anonymity' of the Internet means that it is often used by less scrupulous operators.

Genuine online traders will be determined to maintain and improve their reputation through responsible practices. However the global nature of e-commerce means that different approaches may be needed to trace and deal with some online traders.

Online traders should give a physical contact address on their site. This not only provides a contact point, but also reassures customers that they are not dealing with a 'fly-by-night' operation.

Consumers should be wary of websites that do not clearly state the full price of items, and inform users of all relevant terms and conditions. Consumers should also be aware of their rights as enshrined within the Act, and avoid traders who wrongly seek to disclaim these.



Product safety in e-commerce

Consumers should always remember that overseas product standards might not be as stringent as the corresponding Australian standard. There may not even be a standard in place at all.

When shopping on the Internet, consumers should therefore check to see if the product meets a published standard and, if possible, how it compares with the Australian standard. Of course, when the online retailer is an Australian company, their products will be required by law to meet any and all relevant mandatory standards.

Recently, the ACCC took action against Easybuy.com.au, trading as Bikes Direct an online trader found to be supplying bicycles that failed to meet the relevant standard (see the box right).

This case was important, as it was the ACCC's first involving a product safety issue in e-commerce. It reflects a growing awareness that e-commerce activity is on the rise, and that the same laws apply as in 'the old economy'.

Businesses wishing to establish a website and start trading online should be aware that it involves more than putting up a

few pictures and brief descriptions.

In the case of product safety, current and potential traders must be particularly vigilant. Traders must ensure that the goods they are offering comply with any and all relevant product standards.

The ACCC does not distinguish between traders operating online or through traditional means when enforcing the Act. With product safety, the Bikes Direct case clearly demonstrates this.

Bikes Direct

Late last year the ACCC received complaints over the price comparisons contained on the website of NSW-based Bikes Direct. Upon investigation, the ACCC also found disclaimers on the site about consumer rights and warranties that were void under section 74 of the Trade Practices Act.

The ACCC was also concerned that the site did not display information on the mandatory bicycle safety standard. This led to tests on various models of Bikes Direct. Some of the models tested failed to comply with the standard, and a recall was implemented. The ACCC has since received an enforceable undertaking from the company in relation to this matter.



The ACCC targets price fixing in Victoria

After a two-year investigation, prompted by a phone call from a whistleblower, the ACCC instituted court proceedings against seven companies and seven individuals in the Ballarat region alleging that they fixed retail petrol prices in breach of the *Trade Practices Act 1974*.

Just before Easter 2000, Mr Trevor Oliver, a Buangor service station owner, alleged that he had been telephoned by his supplier, Leahy Petroleum Pty Ltd, about a rise in retail petrol prices of about 10 cents at 10 am that day. Several weeks later, Leahy Petroleum ceased supplying Mr Oliver's business.

The ACCC then began its investigations. After two years of gathering information, it has instituted proceedings against the following companies and individuals:

- Leahy Petroleum Pty Ltd, Leahy Petroleum-Retail Pty Ltd and Mr Robin Palmer
- Triton 2001 Pty Ltd and Mr Anthony Rosenow
- Brumar (Vic) Pty Ltd and Mr Garry Dalton
- Justco Pty Ltd and Mr Justin Bentley
- Apco Service Stations Pty Ltd and Mr Peter Anderson
- J Chisholm Pty Ltd
- Mr John Gourley and Mr Robert Levick of Balgee Oil (Externally Administered) Pty Ltd.

The ACCC alleges the respondents were involved in distributing or retailing petrol in the Ballarat area under the Swift, Apco, Mobil, BP, Shell and Ampol/Caltex brands and that they were part of a long-standing price-fixing arrangement between distributors and retailers of petrol.

According to the ACCC, the companies arranged to raise prices by telephoning one another and communicating the size and approximate time of the price rise. It is alleged they then contacted retail sites to implement the rise. It is also alleged that when one became aware that a service station had not raised its price, further calls were made to try to have the site raise its prices.

Although the ACCC alleges the arrangement pre-dated June 1999 it is only seeking penalties for 69 occasions from June 1999 until December 2000 (when the arrangements came into effect) because the time period exceeds the 3-year statute of limitations for a civil case.

The ACCC also alleges that the arrangement involved several meetings between competitors, including one in the private home of an employee of Mobil Oil Australia.

The ACCC has also instituted legal proceedings against Leahy Petroleum and its general manager, Mr Robin Palmer, in relation to the termination of supply to Mr Oliver. The ACCC alleges that they made telephone calls to Mr Oliver about prices and withheld supply contravening the resale price maintenance provisions of the Act.

In both cases the ACCC is seeking penalties, injunctions, declarations, findings of fact, the implementation of a trade practices compliance program and costs.

A directions hearing was held on 14 June and the next is scheduled for 13 September 2002.



Leniency policy a hot topic at conference

A major issue discussed at the ACCC's upcoming law enforcement conference was its policy of cooperation and leniency.

The ACCC's leniency policy is attracting great interest in light of the current high profile investigation into Australian oil companies and the recent court decision awarding nearly \$15 million penalties against several manufacturers of electrical transformers. The conference was held at The Regent Hotel in Sydney from 4–5 July. Speakers include Mr Jim Griffin, Deputy Assistant Attorney General from the United States Department of Justice, Mr Adrian Walker Smith, Director of Cartel Investigations at the United Kingdom Office of Fair Trading, and Mr Fred Brenchley from *The Bulletin*.

On the first day, the international speakers drew on their own experience in developing and managing a leniency policy, and on the second, addressed the issue of criminal penalties for hard core collusion.

Other speakers included Australian experts in the fields of competition and consumer protection law enforcement, such as:

Louise Castle,
Allens Arthur Robinson

Louise Sylvan,
Australian Consumers Association

Peter Cashman,
Maurice Blackburn Cashman

Damien Bugg QC,
Director of Public Prosecutions

Peter Armitage,
Law Council of Australia

Bret Walker SC,
NSW Bar Association

Michael Potter,
Council of Small Business Organisations
of Australia

Allan Myers QC

Liza Carver,
Gilbert and Tobin

John Kench,
Blake Dawson Waldron

Michael Corrigan,
Clayton Utz

Christopher Hodgekiss,
NSW Bar Association

Don Davies,
Phillips Fox

The role of practitioners was discussed at the conference with Allan Myers presenting a paper on the distinction between public enforcement and private enforcement; Peter Cashman highlighting developments in consumer protection litigation and offering tips for practitioners; and various speakers presenting their own perspectives on ACCC reform proposals.

Mr Fred Brenchley from *The Bulletin* reviewed the community and media viewpoints.

To balance these views, the ACCC Chairman, Professor Allan Fels, explained how the ACCC sets its own priorities in enforcement work, and its litigation trends. The conference also gave participants the opportunity to hear first-hand the ACCC's proposals for a criminal regime for hard-core collusion and cartels.

ACCC Commissioner, Sitesh Bhojani, outlined a more comprehensive leniency policy for Australian competition law enforcement.

The conference is a unique opportunity for corporate lawyers, compliance professionals and trade practices lawyers, to hear and discuss the outcomes, trends and developments in the enforcement of Australian, US and UK competition and consumer protection laws.

Conference papers will be available on the website from the end of July <<http://www.accc.gov.au>>.

Boost in funds triggers more investigations

Since the boost last year in ACCC funding to set up a dedicated Professions Unit, the number of investigations involving professionals and professional associations has risen dramatically.

The ACCC received \$1 million in extra funding, and now has the resources to pursue those professionals who have little regard for the law.

The vast majority of professional people and their representative bodies comply with the law, but there are occasions when appropriate action must be taken.

In 1995 the Trade Practices Act was changed to apply not only to professionals in a corporate business structure, but also to individuals. The area of the Act that was extended to include both incorporated and unincorporated professionals deals with anti-competitive conduct, such as fixing prices and sharing markets—practices which result in less choice and higher prices for consumers.

The ACCC then conducted a concentrated education strategy for the professions about their rights and obligations under the Act. This included publicity, publications, seminars and speeches, supplemented by an extensive educational program by private sector law firms and professional associations.

The message for professionals was that the ACCC is applying the Act to the professions in the same way as for all other businesses.

In the past few years the ACCC has taken action against different professional groups for breaching the Act.

This includes court actions against the Australian Society of Anaesthetists and four NSW anaesthetists, the AMA in Western Australia (both of which dealt with allegations of price fixing), and against three Rockhampton obstetricians, which is currently in court.

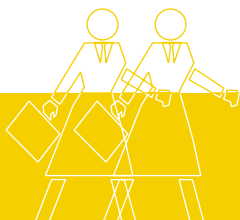
The ACCC instituted proceedings in October 1997 alleging that a group of anaesthetists at three private hospitals had reached an agreement to charge \$25 per hour for on-call services. The ACCC also alleged certain anaesthetists reached an agreement to tell hospital administrators that, unless the hospital agreed to pay for the supply of on-call services, they would not supply such services (a boycott agreement). The anaesthetists and the Australian Society of Anaesthetists gave undertakings to the court that they would not engage in similar conduct in the future and the matter was settled.

The ACCC currently has several matters in court relating to breaches of the misleading and deceptive conduct provisions of the consumer protection provisions of the Act by various health funds.

Some types of conduct by professionals and professional associations can raise anti-competitive concerns.

Reserving specific work for specific professionals

Some State Governments and/or professional associations have considered introducing regulations to restrict types of work to particular groups of professionals. That is, reserving entire fields of activities to a particular group of professionals which limits competition with other professionals. For example, only lawyers are allowed to do conveyancing work in some States thereby restricting licensed conveyancers from providing these services in competition with lawyers. The ACCC's concern is that these sorts of restrictions may prevent competition from other categories of professionals who are adequately trained and/or qualified to provide such services.



Entry restrictions

Entry restrictions can be defined as regulating entry into the market,

specifically by imposing educational and competency standards, licensing and certification requirements, and restricting entry by foreign professionals or para-professionals.

For example, the ACCC has investigated allegations that the Royal Australasian College of Surgeons restricted entry to advanced medical and surgical training and allegations that this restriction breached the Act. Following the investigation, the college applied for authorisation of its processes in selecting, training and examining surgical trainees; accrediting hospital posts as being suitable for training positions; and assessing the qualifications of practitioners trained overseas.

Authorisation:

Sometimes the ACCC will authorise corporations or organisations to enter anti-competitive contracts or arrangements if the public benefit outweighs the anti-competitive detriment.

Recommended fee schedules

The ACCC has consistently taken a strong stand against recommended fee schedules issued by professional or trade associations. The inevitable purpose of issuing fee schedules is that the association expects many, if not all, of its members to follow the recommendation. This could constitute an anti-competitive agreement.

The AMA's recommended fee schedules

The ACCC acknowledges that the AMA publishes a recommended fee schedule. The only reason why the ACCC has not taken action against the AMA for publishing this schedule is because there does not appear to be evidence that the association expects its members to adhere to it. However, if this were to change in the future, the ACCC would investigate. This has been acknowledged by the federal AMA, which has stated, 'Further problems could occur with the ACCC if there was greater adherence to the AMA fee' (Gap insurance: bridging the gap without contracts, AMA Federal Secretariat, Canberra, April 1999 found at <<http://www.ama.com.au>>).

Joint negotiations

Generally professional associations are not allowed to negotiate fees on behalf of their members with any buyer of their members' services. Professional associations can advise their members, but the final decision about the appropriate level of fees is up to the professional and their client. Practitioners and their associations need to be aware that there is a fine line between discussing or consulting on the one hand and negotiating on the other.

Visiting medical officer contracts

Doctors considering Visiting Medical Officer contracts with hospitals would be able to approach their representative organisation for advice about the contract's terms or the remuneration offered, but the representative organisation could not negotiate on behalf of the doctors with the hospital for better terms.

Prohibition on advertising or promotion

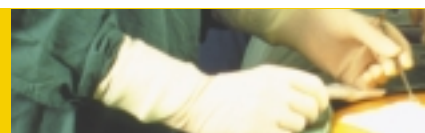
If the form and content of advertising material is restricted beyond the prohibitions in the Act, it may prevent consumers from receiving useful information about particular professional services. Some state governments, in the aftermath of concerns about rising insurance premiums and pay-outs, are keen to ban or restrict advertising of legal services and to curb contingency fees. The ACCC believes that as long as it is honest and accurate, advertising helps consumers make a genuine and informed choice about professional services.

Professional services are now advertised over the Internet. Even if advertising restrictions were imposed in one state, it would not stop consumers in that state from viewing advertising from professionals in other states.

International studies have shown that bans on advertising limit price competition by lawyers and lead to higher prices for legal services: when advertising bans are lifted prices have fallen sharply.

The Commission considers that all professionals, including doctors, lawyers and engineers and their associations, should be treated the same as others engaged in supplying services and goods to the public and who choose to operate a business.

It is important that professionals and their associations consider their trade practices obligations and not engage in anti-competitive conduct.



First conference for new global network

The inaugural International Competition Network conference will be held in Italy in September this year. In meetings held in Paris in early June, ACCC Chairman, Professor Allan Fels, and Commissioner Ross Jones have discussed the development of the ICN's work program.

The ICN is a unique international forum dedicated to improving global cooperation in competition (anti-trust) law enforcement by addressing practical competition issues. The network aims to encourage convergence between different countries' competition laws and promote effective competition law enforcement worldwide.

The ACCC, as a founding member, fully supports the objectives of the ICN by actively participating in several major projects, including merger review policy and competition advocacy.

The ICN was officially launched in October 2001 in New York and operates as an informal, project-oriented, consensus-based network of competition agencies from around the globe. Particular effort will be made to focus on the concerns of countries with new competition law regimes.

The ICN will hold its inaugural annual conference at the Castel dell'Ovo in Naples, Italy on 28 and 29 September 2002. ICN members, including Australia, Canada, the European Union, France, Germany, Israel, Italy, Japan, Korea, Mexico, South Africa, the UK, the USA and Zambia, will attend.

Key issues for discussion at the conference will include the advocacy and education roles of competition agencies around the world, and the merger control process in the multi-jurisdictional context. The latter will help companies overcome the problems they face when applying for merger approval in multiple countries and jurisdictions.

The focus of the conference will be to produce guidelines and best practice recommendations for member agencies to use in enforcing competition laws.

Guiding the ICN until the inaugural conference is the Interim Steering Group headed by Chairman, Konrad von Finckenstein, the Commissioner of Competition at the Canadian Competition Bureau. The steering group has identified various areas of interest and several working groups have been created to examine individual issues. The working groups comprise mergers, advocacy, membership, non-governmental advisers and funding, covering issues such as investigative techniques and competition policies and procedures.

Professor Fels is a member of the steering group, the advocacy and membership working groups, as well as contributing to work in relation to analytical frameworks for the mergers working group. Commissioner Jones is also a member of the mergers working group. They will both be attending the ICN conference in September, with

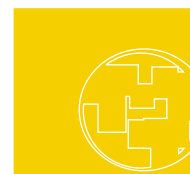
Commissioner Jones scheduled to chair a discussion on merger policy.

Any national competition agency responsible for the enforcement of antitrust laws may apply to become a member of the ICN. Currently the ICN has 61 members. Advice and contributions from the private sector and non-governmental organisations will be sought but, because the ICN is designed to promote convergence in government competition enforcement policy, only members will make decisions.

The ACCC's involvement on ICN projects has included input into a study on the merger review process, contributions to work on competition advocacy, and providing information on Australia's merger laws and regulations.

The ICN will be cooperating with other international organisations such as the OECD, WTO and UNCTAD and will seek input from them, as well as competition law and policy experts and practitioners, industry and consumer associations and academics.

Further information about the ICN and their inaugural conference in September can be found on their web site at <http://www.internationalcompetitionnetwork.org>



The cost of cartels

The worldwide economic harm from cartels is clearly very substantial ... conservatively, it exceeds many billions of US dollars per year.

The Competition Committee of the Organisation for Economic Cooperation and Development stated the above in its *Report on the Nature and Impact of Hard Core Cartels*, April 2002.

The report, following a survey of cartel cases conducted by member nations, declares that cartels harm consumers and have pernicious effects on economic efficiency. Cartel price mark-ups, in some cases as much as 50 per cent or more, create an undisclosed transfer of wealth to the cartel operators.

A cartel shelters its members from the full exposure to market forces, thereby reducing pressures on them to control costs and innovate.

The OECD calls for strong sanctions against enterprises and individuals to increase the effectiveness of leniency programs in uncovering cartels and provide incentives for cartel participants to cooperate with investigators and 'blow the whistle'.

While the competition laws of most countries impose large fines on companies for cartel conduct, the report questions if the maximum fines deter them. It suggests penalties high enough to take away the financial gains of cartel arrangements.

Because not all cartels are uncovered and punished, many experts contend that effective deterrence requires imposing a fine against organisations participating in a cartel that is a multiple of the estimated gain on those cartels that are uncovered.

A study of cartel prosecutions between 1996 and 2000 found that only four attracted fines larger than the estimated gain to the companies involved in market rigging.

In Australia the ACCC wants the existing maximum fine of \$10 million for each offence raised to a maximum equivalent of 10 per cent of the offending firm's annual turnover. It also wants the courts to have the option of jailing individuals who have engaged in hard-core cartel activity such as market sharing, price fixing and bid rigging.

The ACCC says the OECD findings support its case for tougher penalties.

Currently seven countries have the prison option but in only two, the United States and Canada, have the courts used it.

Companies may pay the fines for executives, but they can't go to prison for them. Many consider it the ultimate deterrent because of the shame, the loss of freedom and loss of income.

New ACCC Commissioner

Ms Jennifer McNeill has recently been appointed as a Commissioner of the ACCC for a five-year term. Ms McNeill was a national partner in the firm of Blake Dawson Waldron until this appointment. Her practice has focused on litigation and advice work for Commonwealth departments, statutory authorities and industry associations. She has been involved in various trade practices matters mainly about consumer protection issues.

Ms McNeill will start at the Commission on 22 July. She will primarily be involved in the Commission's enforcement work.



Merger knock-backs—down but not out

Proposed company mergers that get a knock-back from the ACCC's mergers branch have not necessarily reached the end of the road, as pharmaceutical wholesalers API and Sigma are showing.

The two companies want to combine in a massive \$1.4 billion merger designed to rationalise the pharmaceutical wholesaling business in Australia.

An assessment recently conducted by the ACCC found that the merger would be likely to result in a substantial lessening of competition in that market. For this reason the companies were advised the ACCC would oppose the merger as a breach of one of the key competition provisions of the Trade Practices Act—section 50.

The merger would have led to a duopoly of full-line pharmaceutical wholesalers in Australia, reducing the current three players—API, Sigma and Faulding to just two, with a combined API-Sigma accounting for 60–70 per cent of pharmaceutical products wholesaled to retail pharmacies.

The ACCC was concerned that the merger might lead to a cut in the quality of services and lower rebates than those now received by retail pharmacies.

API and Sigma believe, however, that their merger would benefit not only their own shareholders but also retail pharmacies and the nation.

The two companies argue that the public benefits of the proposed merger outweigh any anti-competitive effect, and that an 'on balance' assessment taking public benefit factors into account will show that the merger should be allowed.

An alternative route to merger approval—the authorisation process—is provided in the Trade Practices Act for companies in just this situation.

API and Sigma announced in June that they would take their proposed merger back to the ACCC and seek authorisation on public benefit grounds. If successful, this would give the merger immunity from being blocked under s. 50 of the Act.

By following the authorisation route, the companies get a fresh chance to convince the ACCC that the merger should be allowed.

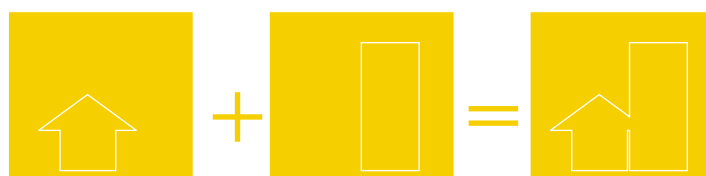
The Trade Practices Act spells out the kinds of public benefit that can be persuasive in an authorisation application.

As well as having to take into account any general public benefit the parties may argue, the Trade Practices Act says the ACCC 'must regard' a significant increase in the real value of exports and a significant substitution of domestic products for imported goods as benefits.

Authorisation is a public process under which anyone with an interest in the outcome of a merger can make a submission—and that includes consumers. Submissions are open for inspection on a public register. The companies concerned can get commercially sensitive information protected by having confidential elements held back from the register.

The Australian Competition Tribunal exists as a final safeguard in the merger approval system. Should companies in the situation of API and Sigma fail to convince the ACCC that the public benefits of the proposed merger outweigh any substantial lessening of competition in the market, it can appeal the decision to the tribunal.

The tribunal reaches its own conclusions on whether authorisation should be granted and under what conditions.



Mergers and acquisitions recently approved

The ACCC decided not to oppose GE Capital's acquisition of AGC from Westpac Bank.

'In regard to the provision of in-store credit, some retailers did express their concern to the ACCC with respect to the competitive consequences of this merger', ACCC Chairman, Professor Allan Fels, said.

'However, it is the view of the ACCC that the provision of in-store credit is just one of a number of payment options available to consumers.'

Nor was the Pacific Access acquisition of Fairfax's Citysearch online business opposed.

The primary issue of concern to the ACCC was the control Pacific Access would have over copyright of Citysearch's online business directories, and consequential ability to limit competitive conduct. Fairfax's retention of the right to license, lease or sell the copyright to other parties free from Pacific Access interference resolved this concern.

'The ongoing availability of Fairfax business data and access to directory copyright held by Fairfax for any business seeking to enter the market, or to use the data to provide related services, satisfied the ACCC that the proposed acquisition was unlikely to substantially lessen competition', Professor Fels said.

The Commission also approved the merger of the Australian partnerships of accountants Arthur Andersen with Ernst & Young.

Extensive market inquiries confirmed that after the merger the combined partnerships would still face vigorous and effective competition from the remaining 'big four' accountancy firms, as well as from small global and Australian accountancy firms.

Other transactions allowed by the ACCC recently include:

- the merger between Bayer AG and Aventis Crop Science, two agrochemical companies
- the Grainco Australia and ConAgra Trade Group joint venture, Marketlink, performing the grain trading and marketing operations of both groups in Australia
- the merger of global computer companies Hewlett-Packard and Compaq.

In the past three years the ACCC has considered 685 mergers and has opposed only a handful each year.

SYDNEY	HONG KONG
3432.1	43.0
15868.1	111
AL IND	0.00
ALLEN	0.00
ALN SPRNG	0.31
ALN	0.40
ALN RST	0.00
ALN PNC	0.21
ALN	0.00
ALN	0.70
ALN	0.41
ALN	0.185
ALN	1.35
ALN	0.00
ALN	0.355
ALN	0.31
ALN	-
ALN	0.05
ALN	1.50
ALN	0.74
ALN	0.42
ALN	0.25
ALN	0.70
ALN	20.00
ALN	0.15



ACCC regional network helps local businesses

Since the national launch of the ACCC's Rural and Regional Program on 19 March 2002, over 40 organisations have signed up as ACCC network supporters and many more are expressing an interest.

The network will help spread the word about trade practices in rural and regional areas where small business are especially vulnerable to the problems caused by excessive market concentration, lack of information or misuse of bargaining power.

By setting up the Rural and Regional Program, the ACCC is helping rural industries and consumers understand their rights and obligations under the Trade Practices Act.

A key feature of the program is having Regional Outreach Officers (or ROOs) who regularly visit regional communities and are building the regional network.

The network includes state government agencies, local government, area consultative committees, business enterprise centres, chambers of commerce and others. These organisations are using their contacts in business, community and government to promote understanding of the Trade Practices Act and the role of the ACCC. Network supporters will also offer businesses better access to ACCC resources, including guides, newsletters, brochures and journals.

The program was launched in Bendigo by ACCC Chairman, Professor Allan Fels, and Minister for Regional Services, Territories and Local Government, Mr Wilson Tuckey.

Since then several state launches have followed. ACCC Commissioner, Mr John Martin, launched the NSW program in Tamworth on 23 April 2002 and the Western Australia program on 22 May. ACCC Commissioner, Dr David Cousins, with the Minister for Business Industry and Resource Development, Mr Paul Henderson, launched the program in the Northern Territory on 26 April 2002. The Tasmanian launch is scheduled for 12 July in Launceston, with the Queensland launch to follow on 15 July in Cairns.

For more information about the Rural and Regional Program call the ACCC Infocentre on 1300 302 502 or visit the website <<http://www.accc.gov.au>>.



International action against marketers of abdominal toners

The ACCC and the US Federal Trade Commission have filed separate legal proceedings against the marketers of electronic abdominal exercise belts as part of a cooperative international enforcement effort.

The proceedings allege that the belts, promoted as aids to weight loss and fitness, have been misleadingly advertised.

Both actions have been supported by ongoing liaison and cooperation between consumer protection staff from the two enforcement agencies.

The ACCC's complaint, filed in May in the Brisbane Federal Court, relates to the promotion of an abdominal toning belt called the 'Abtronic'. The ACCC alleged that marketing company Danoz Direct Pty Ltd, its director and a number of other individuals have engaged in misleading and deceptive conduct in promoting the Abtronic's firming and slimming capabilities.

Advertisements and 'infomercials' for the Abtronic, aired repeatedly on Australian television, claimed the belt would give users flat stomachs, toned muscles and enable them to lose their 'love handles' all without any exercise. The ads further claimed that the belt would give the results of up to 600 sit-ups in just ten minutes, without any effort.

The Abtronic was also promoted on Channel Ten's *Good Morning Australia* and *Bright Ideas* programs, and similar claims appeared in a Danoz product catalogue and on the company's Internet site.

The ACCC is seeking orders from the court to prevent Danoz from making further misleading representations about the Abtronic.

The US action also involved allegations of deceptive claims about the Abtronic, as well as two similar products called the AB Energizer and Fast Abs. The FTC filed separate complaints against the promoters of all three toning belts, challenging claims that the belts were 30 per cent more effective than normal exercise, and that users would 'lose 4 inches in 30 days guaranteed'.

The products were heavily advertised in the US, largely through infomercials aired on national cable television stations and on the promoters' Internet sites. The infomercials featured fitness professionals, user testimonials and alleged expert opinions to sell the products. According to the FTC each of the 30-minute long infomercials was aired well over a thousand times.

Among the most concerning allegations made by the FTC were false claims about the products' safety for all users.

This contradicts findings by the US Food and Drug Administration and expert studies on the effects of electronic muscle stimulation. These findings suggest that such devices are not always safe, and should not be used by people with a range of conditions such as those with pacemakers.

Canadian authorities are also reported to be investigating the abdominal toners following filing of the US and Australian lawsuits. According to press reports Health Canada is investigating claims made about the belts in Canada, which include that users will lose weight and achieve 'six pack' abdominal muscles without exercising.

The ACCC and FTC have advised consumers to be wary of claims which sound too good to be true they probably are!



Pyramid selling and the Internet (money and you)

By Professor Allan Fels, Chairman of the Australian Competition and Consumer Commission

The Internet is an easy, quick way to keep in touch with friends and family but unfortunately the scam merchants have quick and easy access to you. They can flash amazing opportunities to make fast money on your computer.

The promotion of pyramid type schemes on the Internet is of growing concern to the ACCC and other consumer protection agencies around the world. Modern technology allows pyramid recruiters to build their clientele via direct access to consumers worldwide. This means that recruitment is faster and more widespread giving the potential for even greater harm to the bank accounts of victims.

There seems to be a tendency for some people to put greater trust in what they see on their computer screens than in the media or through the post. But it is unwise to drop your guard because the Internet has seen many old scams revived including pyramid selling.

Pyramid schemes are usually illegal because they don't sell products, only false promises. You pay a fee on joining but to get your money back and come out ahead you must recruit fee-paying new members. For all to make a profit there needs to be an endless supply of newcomers. But this does not happen; recruits lose their money while the scheme's organisers take their ill-gotten gains and disappear.

Examples of pyramid schemes are chain letters, mailing lists and so-called moneymaking clubs.

There can be confusion between an acceptable multilevel distribution marketing scheme and a pyramid scheme. Both will exhibit a pyramid structure, but a multilevel marketing scheme will reward participants for the sale of genuine products by them or by the people they have brought into the scheme. Rewards are based on product sales not for enlisting others. Goods sold must be genuine products; the type consumers buy from time to time.

Pyramid selling may involve the pretence of selling goods but often they are over-priced, of poor quality, difficult to sell and of little value. But promotion and sales are of little importance; the target is recruiting people and collecting their fees.

Late last year court proceedings instigated by the ACCC resulted in the International ATM Card Scheme, marketed and promoted by World Netsafe Pty Ltd and Terence Butler being ruled an illegal pyramid scheme by the Federal Court.

World Netsafe and Terence Butler promoted the card scheme on the Internet and by email throughout Australia and overseas. They told the thousands who paid \$2389 to join that they could generate lifetime residual income 24-hours a day without leaving home. On evidence put forward by the ACCC, the court ordered World Netsafe and Mr Butler to return money paid by

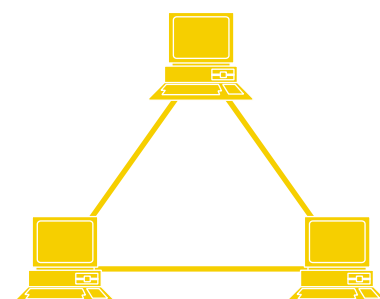
members and refrain from operating this scheme or any similar one.

This case was a part of the ACCC's work to protect consumers from Internet scams on a global basis. The scheme was marketed in countries other than Australia and the ACCC has an ethical responsibility to protect overseas consumers. But it is also in Australia's interest to protect our business reputation which can be damaged by scam merchants misleading overseas consumers.

Consumers were misled by claims that reputable companies backed the card and the promise they could earn income by becoming a member, by introducing others to the scheme and from the transactions of other members.

Be wary of schemes that promise you money for the recruitment of others and the proceeds from their sales. This reeks of an illegal pyramid selling scheme.

If concerned notify the ACCC Infocentre on 1300 302 502.



Prevention is better than cure

The ACCC's fourth Competing Fairly Forum was broadcast via satellite to over 110 venues across regional Australia on 21 May 2002.

The May forum focused on the idea that complying with the Act is not only good for business but is also not hard to do. A responsible approach to business has a positive impact on customers and fellow businesses.

The forums give small businesses, especially those in regional and rural areas, practical information on the Trade Practices Act through a simultaneous satellite broadcast from Sky TV studios.

Convenors in each of the locations around the country invite local businesses to their particular venue to participate in the forum, either by listening to the panel discussion or responding by phone to the issues raised.

This time the forum panel consisted of Professor Allan Fels, ACCC Chairman; Mr Suresh Bhojani, ACCC Commissioner; Louise Castle, Australian Law Council; David Newton, Managing Director of the Accord Group and from the Office of the

Mediation Adviser; Ken Carlsund, Registrar, NSW Retail Tenancy Unit; and Bruce Reid, Principal Associate, Government Relations and Business, Australian Regional Consulting Group.

Scenarios dramatising problems that can arise in running a small business were used as reference points for panel discussion. Issues covered were: entering into a business arrangement without knowing the facts; supply chain problems; unconscionable conduct and warranty problems.

The forum's overall message was that prevention is better than cure. It saves on lost customers and lost income.

Clear messages to small business operators were sent out by the panel:

- do your homework—find out all the facts before entering into any business arrangement
- keep good records—a diary of conversations and meetings is very useful in a dispute
- put in a compliance program so that everyone involved in the business knows the rules

- find out about any industry codes or associations for your industry for support and information
- if it does not pass the 'smell test', beware there may be something wrong.

Following these simple strategies can help avoid difficulties and possible disputes. If a problem does arise face up to it straight away. Discuss the problem and outline any possible solutions. If this fails, mediation is a cost-effective way of dealing with disputes.

The next Competing Fairly Forum will be on 15 October 2002.

For more information on complying with the Act or the Competing Fairly Forum call the ACCC Infocentre on 1300 302 502.



Heavy penalty imposed on Colgate Palmolive

Federal Court judge, Justice Weinberg, in handing down his judgment in a case involving Colgate Palmolive Pty Ltd imposed penalties of \$500 000. He said that:

Contraventions of s.48 (resale price maintenance) are serious violations of the conditions laid down by Parliament for the conduct of corporate trade and commerce ... deliberate contravention of that prohibition should be visited with heavy penalties.

On 15 May 2002, following action by the ACCC, the Federal Court found that Colgate-Palmolive had tried to stop Tasmanian discount retailer, Chickenfeed Bargain Stores, from advertising Colgate's Ajax, Palmolive and Colgate lines at cheap prices.

In 1994 Colgate had received complaints from Woolworths (Victoria) Pty Limited, trading as Purity and Roelf Vos supermarkets in Tasmania, that Chickenfeed was undercutting it on Colgate toothpaste. When Chickenfeed tried to order additional stock, Colgate refused unless Chickenfeed agreed not to advertise the stock below Woolworths' normal price. Chickenfeed declined and Colgate cut off supply to Chickenfeed and its wholesaler.

The court also found that in 1997, Chickenfeed again tried to order Colgate toothpaste plus Palmolive detergents and Ajax cleansers. Colgate again required Chickenfeed to undertake not to advertise the lines below Woolworths' normal price.

Justice Weinberg said:

The prohibition upon resale price maintenance is intended to create conditions under which the public will benefit from traders competing with each other in respect of prices, unfettered by price restraints imposed by suppliers of goods upon retailers.

In addition to the penalties imposed, the court ordered declarations, injunctions, findings of fact and costs. Colgate has also provided an enforceable undertaking to the ACCC to update its corporate compliance program.

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New on the bookshelf

The ACCC has released the following publications in the past few months.

Small business publications

Best and Fairest—revised and updated compliance manual for small business. (\$100)

News for business

- Commercial unconscionable conduct (s. 51AC)
- Fresh fruit and vegetables and the Trade Practices Act

Small business brochures about compliance

- How to comply with the Trade Practices Act
- Service industries and the Trade Practices Act
- Primary producers and the Trade Practices Act
- Retailers and the Trade Practices Act

Videos (\$10 each)

Competing Fairly Forum

'Prevention is better than cure'—fourth forum held in May 2002

Straight talking

advertising and selling and the Trade Practices Act

Keeping good company

corporate video.

Other publications

ACCC Journal 37, 38, 39

a bi-monthly subscription publication, also available on CD-ROM, (\$75 a year)

Protecting consumers worldwide—IMSN brochure

ACCC update 10—free magazine special consumers issue

Network 10—a free magazine from the Utility Regulators Forum

Report to the Minister under section 75AZ of the Trade Practices Act 1974—the latest analysis on the effect of the GST (9th report)

The 'Working in ...' series—reports from each state and territory highlighting the year's activities

ACCC intervention in private proceedings—procedural guide series (\$10)

Regulators Forum discussion paper—National regulatory reporting for electricity distribution and retailing business

Tobacco report—response to Senate motion 1031 (\$10)

Insurance report—Insurance industry market pricing review—a report to the Minister, (\$10)

Draft greenfields guideline for natural gas transmission pipelines—a guide to the access regulation framework and options for new natural gas transmission pipeline developments in Australia

Storecharter—a service charter for stores serving remote and Indigenous communities.(booklet and pamphlet)

Report to the Australian Senate on anti-competitive and other practices by health funds and providers in relation to private health insurance—4th Senate health report (\$10)

Submission to the Trade Practices Act Review—June 2002

Cooperation policy for enforcement matters—a brochure on leniency in enforcement matters

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