



CHAIRMAN'S REVIEW

Current issues

The inquiry dealing with the Review of the Trade Practices Act, which is being chaired by Sir Daryl Dawson, presented the Commission and other interested parties with an opportunity to comment on the efficacy of the legislation primarily enforced by the Commission. The Commission has always encouraged critical debate on the role it plays in administering the Act, and welcomes the opportunity presented by the Dawson Inquiry to provide public comment on its processes and procedures.

The Commission has made a comprehensive submission to the inquiry outlining its proposals for changes to the Act, particularly in relation to an 'effects' test for matters involving allegations of misuse of market power, and criminal sanctions for hard-core cartel behaviour. The theme of the Commission's submission is that these changes are necessary to strengthen the existing protections in the Act for consumers and small business, and to bring Australian competition laws into line with international best practice.

The Dawson Inquiry has also given the business sector the opportunity to raise issues about the Commission's accountability, transparency and its approach to publicity.

The Commission regards itself as being at the high end of the accountability spectrum among regulators. The organisation as a whole is accountable to many parties. Like any private litigant, the Commission must make its case to

the court, which is the ultimate arbiter of fact and law, as well as being subjected to its scrutiny. Furthermore, decisions made by the court are appealable. Similarly, decisions made by the Commission on authorisations and notifications are reviewable by the Australian Competition Tribunal.

The Commission, as with all regulators, is accountable to the public in many ways. The public has the right to know about the Act and how the Commission enforces it. Parliament's intention in this regard is reflected in section 28 of the Act, which obliges the Commission to publicise the Act and its work. The Act is an important, far reaching law intended to promote the welfare of all Australians. All Australians are entitled to know how the Act affects their rights, their obligations and their welfare, to know how it is being implemented.

Making the public aware also builds public confidence in the law and its administration, and enables informed debate and criticism of its shortcomings.

The taxpayer is entitled to a full explanation of how the Commission's budget is being spent, as are relevant ministers and parliament. The Commission must also be prepared to explain its actions to other bodies such as the Commonwealth Ombudsman, the Administrative Appeals Tribunal, the Australian Competition Tribunal and various consultative committees.



The media therefore has a vital role in disseminating important information to the public and the business community, and in provoking debate about the law. The Commission has found that the most efficient and effective way to bring matters to the attention of the public is by issuing a media release. The purpose of such releases is to publicise outcomes in court cases, whether the Commission has been successful or otherwise, to let business know that the court has deemed certain conduct as illegal, and to heighten the awareness of consumers and businesses in similar situations.

Fewer than 15 per cent of this year's media releases announce the fact that the Commission has instituted court proceedings. The rationale for doing so lies in the fact that the Commission is part of a system of public justice—that is, once the Commission or any law enforcement agency institutes proceedings, it is a public matter.

The Commission also publicises its deliberations on merger proposals for two reasons—first, when there are no competition concerns arising from a merger, it tells the public that the parties have approached and obtained the Commission's sanction for the transaction. Second, if a proposed merger potentially raises competition concerns, media coverage can generate interest in the transaction and prompt all interested parties to come forward. The Commission is then better placed to assess any competition effects by speaking to all those affected.

Media coverage and scrutiny of the Commission's activities also plays a significant role in ensuring that the Commission is transparent. By consulting widely, describing its processes and explaining its decisions, the Commission maintains its transparency. It is very clear to the Commission that it cannot be accountable without also being transparent.

The publicity accorded to competition and consumer protection law and its regulation has increased in most countries, reflecting greater activity by regulators and the greater importance of their activities to their countries' economies.

Highlights of the year's activities

Enforcement

The Commission continued its commitment to stamp out the most serious contraventions by business, such as price fixing and market sharing. In one recent judgment, the Federal Court imposed almost \$15 million in penalties against several electric transformer corporations for price fixing and market sharing arrangements covering the supply of power and distribution transformers. Penalties were also imposed against the corporations' managing directors for their participation in the covert and illegal conduct.

Another multinational corporation, Colgate-Palmolive, was found to have engaged in resale price maintenance, trying to stop discount retailer, Chickenfeed Bargain Stores, from advertising various Colgate and Palmolive lines at cheap prices. In this case, the Federal Court imposed penalties of \$500 000.

The Commission also appeared as *amicus curiae* (or friend of the court) in an intellectual property action brought by Sony regarding chipping of game consoles—a case which will benefit consumers wanting to use games bought overseas in their consoles.

In a drive to enhance compliance in the travel industry, the Commission accepted court enforceable undertakings from Qantas and Virgin Blue not to exclude additional taxes, levies and charges from the advertised price of their airfares.

During the year, over 60 proceedings commenced and as at 30 June 74 matters were still in court. The Commission also accepted 38 court enforceable undertakings under section 87B of the Act.

Education and information about the Act remained a priority, with the Commission reminding the business community that compliance with the law is ultimately the best for business and consumers. It held a high profile law enforcement conference, with expert



speakers from the US and the UK, as well as Australia, at which it invited comment on a draft leniency policy for cartel behaviour. The draft policy is aimed at encouraging individuals possibly in breach of the law, to come forward to assist Commission investigations.

Professions

The Commission continues to give high priority to the conduct of business in the professions, especially the health and medical sectors. It is incumbent on professional people and their organisations to deal fairly with consumers and to practise ethically within the law. Illustrating the importance of this position, the Federal Court in a landmark judgment ordered the Australian Medical Association (WA branch) and two officers to pay penalties and costs of \$285 000 for price fixing and primary boycott breaches. It was the first time the Federal Court had imposed penalties on a professional association for price fixing and primary boycott conduct in breach of the Trade Practices Act.

The Commission engaged extensively with relevant organisations, and made submissions to governments about professions issues. Claims about private health insurance coverage and other health-related goods and services have also attracted Commission attention.

One of the Commission's important roles is to educate the professions about their responsibilities under the Trade Practices Act. During the year it released the draft *General Medical Practitioners Guide to the Act*. The guide will be published after final determination of the Royal Australian College of General Practitioners' authorisation application to the Commission, and completion of the federal government's *Review of the impact of Part IV of the Act on the recruitment and retention of medical practitioners in rural and regional Australia*.

The New Tax System

During its third and final year of responsibility for the price exploitation provisions of the New Tax System (NTS), the Commission was again highly successful in ensuring compliance. Since

July 1999 the Commission has investigated about 6700 relevant matters. As a result numerous businesses have taken corrective action to remedy contraventions related to the tax changes, resulting in nearly \$18 million being refunded, benefiting around two million consumers.

In the last financial year alone, the Commission handled just under 5000 NTS-related inquiries, including around 3500 complaints. Considerable resources were also devoted to ensuring that businesses did not misrepresent the price of goods and services using GST-exclusive price displays. For example, in a case brought by the Commission, Domaine Homes agreed to refund almost \$2 million in GST collections to 260 new homebuyers who had been misled about the effect of the New Tax System on the construction costs of their homes.

Mergers

In 2001–02 the Commission finalised 237 mergers, asset sales and joint ventures. Of these it objected to nine because they were likely to substantially lessen competition, and four of these proceeded following enforceable undertakings being provided under s. 87B of the Act. One matter, API/Sigma, has been resubmitted for authorisation under s. 88. One other matter was withdrawn before decision after the Commission expressed concerns.

Transport and health industry mergers formed a larger proportion of mergers considered than in the previous year while the proportion of communications, mining/forestry and finance/banking matters remained broadly stable.

Consumer protection

Misleading and deceptive advertising continues to be the Commission's enforcement priority in the protection of consumers, with the misuse of fine print and deceptive pricing of special concern.

In July 2001 the Commission obtained urgent interim orders against Telstra in relation to its conduct following the collapse of One.Tel. The Commission alleged that Telstra had misled



former One.Tel customers about the transfer of mobile services to Telstra, including that customers would be liable for early termination fees if they did not switch their service to Telstra before a certain date. In December the Federal Court in Melbourne made orders against Telstra, by consent, for the partial repayment of minimum monthly access fees and costs to about 3000 former One.Tel mobile phone customers.

Product safety and compliance with mandatory product standards and bans under the Act are also an important part of the Commission's consumer protection objectives. The focus is on improving industry awareness of mandatory standards and bans, and surveying for compliance. The Commission accepted s. 87B undertakings and took proceedings concerning non-complying bicycles, toys, sunglasses, vehicle ramps, and vehicle and trolley jacks during the year.

The Commission established the Consumer Consultative Committee, to ensure better communication between the Commission and consumer groups. This committee is comprised of peak national consumer advocacy and research organisations.

The Commission also commenced a monthly publication *Consumer express* to provide a snapshot of matters affecting consumers, and 'how to' guides to help resolve consumer concerns.

E-commerce

Electronic communications are an integral part of business, and the Commission's enforcement activities routinely address matters involving electronic documents and Internet trading. In August 2001 the Commission established an Electronic Investigation Support Unit, to provide technical support to investigators in identifying and obtaining electronic evidence, storing it, and presenting it to the court. The unit has responded to over 150 requests for assistance in investigations, indicating the increasing need for these types of services in modern law enforcement.

More accessible telecommunications facilities and growing acceptance of web-based marketing have seen perennial consumer and business problems (such as pyramid selling, referral selling, miracle cures, unsolicited and

undelivered goods and services, and scams in general) migrate to these networks.

The borderless nature of transactions, relatively low cost and high speed, and instant payment and money transfer facilities, enhance returns for unscrupulous traders around the globe.

The Commission is working to address these circumstances and again led an annual international Internet Sweep Day to detect web-based misrepresentation. The Slam-A-Cyberscam website continued to enable consumers to lodge complaints against online traders.

It also hosted a 2-day e-commerce conference in November 2001 to bring consumers, business and regulators together to discuss the burgeoning global e-commerce trade and how the challenges inherent in it are being met.

Small business

Small businesses are always vulnerable when dealing with larger more powerful companies. The Commission has been especially active this year in targeting unconscionable conduct to protect the interests of small business. One landmark case involving Farrington Fayre shopping centre and a tenant, is now waiting to be heard in the High Court, the outcome of which will have a profound impact on future cases. Another case involved the supply of water under market garden leases to people lacking formal education, English language skills and commercial experience. In a successful outcome for the Commission and the lessees, the Federal Court declared Avanti Investments had contravened the unconscionable conduct provisions of the Act.

The Commission's Small Business Program entered its fourth year of providing specialised information and guidance for small businesses about their rights and obligations under the Act.

The Commission continued as an official Observer at the Franchising Policy Council. It also continued to liaise with its Small Business Advisory Group, which is comprised of business and professional representatives who meet biannually to discuss trade practices matters affecting small business.



On 19 March 2002, with the Minister for Regional Services, Territories and Local Government, the Hon. Wilson Tuckey, I launched the Rural and Regional Program in Bendigo Victoria. Dedicated Regional Outreach Officers, or ROOs, have been appointed to implement the program. It aims to improve communication between the Commission and people in rural and regional Australia, promoting understanding of the Trade Practices Act.

The Competing Fairly Forum satellite broadcasts to rural and regional communities continued, providing an opportunity for these communities to communicate with the Chairman of the Commission, Commissioners and other experts in trade practices and related fields.

Adjudication

The Commission's adjudication process involves assessing the public benefits and detriments resulting from certain anti-competitive practices. If there is a net public benefit, the Commission may grant immunity from legal proceedings. A case in point is the Commission's consideration of the application from the Royal Australasian College of Surgeons to authorise its selection, training and examination of surgical trainees. The Commission has long held concerns that RACS' procedures may constitute a breach of the Act because they restrict entry to advanced medical and surgical training.

Many businesses operating in rural and regional Australia have taken advantage of the authorisation process to help them make the transition from a regulated to a more competitive environment. In particular, the Commission has considered applications relating to collective bargaining arrangements between primary producers and their processors.

The Commission has continued to receive and consider applications relating to distribution and marketing arrangements in the electricity industry, particularly those relating to the national electricity market. It has also considered and finalised several applications regarding gas transmission.

During 2001–02 the ACCC received 36 new applications for authorisation and 307 notifications for exclusive dealing. The Commission made 51 determinations, three of which were subject to applications for review to the Australian Competition Tribunal. Two of those appeals were withdrawn and one was resolved by the Tribunal agreeing to issue a determination consented to by interested parties.

Regulatory activities

Across the industries for which it has regulatory responsibility, including telecommunications, energy, airports and rail, the Commission released a number of major decisions this year.

The Commission published several pricing papers in telecommunications, which will help encourage ongoing competition in the telecommunications market. Earlier this year, the Commission issued information on prices that it believes Telstra should be charging other telecommunications companies for access to its copper lines. The Commission also issued Telstra with a Competition Notice when it believed that Telstra was effectively charging its wholesale ADSL (which provides high speed data services) customers more than it charged its BigPond retail customers. As a result, Telstra reduced its wholesale prices by around 25 per cent. The Commission also now regularly updates its Snapshot of Broadband Deployment, a report of statistics on broadband take-up across Australia.

In electricity, a series of changes to the National Electricity Code were assessed, covering issues such as full retail competition in the industry, Tasmania's entry into the national electricity market, and network planning and development. The Commission also released its revenue cap decision for the Queensland electricity transmission network—that is, capping the revenues of transmission networks to constrain monopoly pricing but allowing a high enough return to fund the network's operation and expansion. During the year, work began on setting revenue caps for the Victorian and South Australian electricity transmission networks. The Commission assumes regulatory responsibility for these transmission networks from 1 January 2003.



Final decisions were released on the terms and conditions of transporting gas via the Moomba to Adelaide Pipeline system; Ballera to Mt Isa; and Roma to Brisbane pipelines. Final approvals for the Wallumbilla to Rockhampton; and Ballera to Wallumbilla pipelines were also released. The ACCC is concerned that the access arrangements proposed by the suppliers of the gas are fair, so that suppliers do not receive a revenue stream that is higher than the efficient costs of providing services. Otherwise consumers and industry would face excessive energy charges in the future, which would discourage investment and harm the economy. The cost of energy inputs for manufacturers is critical. In South Australia, for example, natural gas accounts for about 45 per cent of energy use in the industrial sector. Gas is increasingly an input to electricity generation. In the Commission's view these access arrangements are very much a material factor in the cost of doing business.

The Commission has dealt with complex aeronautical pricing issues at Sydney airport and the Federal Court ruled on taxi charges. In May 2002 the federal government released the Productivity Commission's inquiry *Report on Price Regulation of Airport Services*, recommending that Sydney, Melbourne, Brisbane, Perth, Adelaide, Canberra and Darwin airports be subject to price monitoring for five years. In adopting the report's recommendations, the government also removed the Commission's regulatory role of administering price caps on the charges for aeronautical services applied by airports. The situation will be reviewed in five years. The Commission also released its Virgin Blue access determination, deciding not to apply access regulation in relation to the domestic terminal at Melbourne airport because the airline was already using the facilities under a commercially negotiated contract.

There were also other major developments in the Commission's transport and prices oversight activities in the past year. In rail, the access undertaking submitted by the Australian Rail Track Corporation was accepted. Covering access to interstate rail track, this is the first rail access undertaking accepted by the Commission. The Commission completed its report to the Treasurer on fuel price variability in December

2001. Work also started on the assessment of the proposed increase in the price of assorted postal services, including the price of the basic postage stamp.

Much of the framework governing the Commission's regulatory work has recently been reviewed, or is currently being reviewed. The Productivity Commission has reviewed the *Prices Surveillance Act 1983*, the regime for access to essential facilities under the *Trade Practices Act 1974*, the telecommunications-specific competition regulation (including Parts XIB and XIC of the *Trade Practices Act 1974*) and, as noted above, the airport price oversight arrangements. The Council of Australian Governments has also established a review of future directions in the electricity and gas markets. As the declaration of the harbour towage service expires in September, the prices oversight arrangements are being reviewed by the Productivity Commission.

While the Commission is largely responsible for telecommunications, airports, postal services and liner shipping conferences, the states and territories retain very significant roles in electricity, gas, rail and waterfront regulation. The consistency of regulatory approach by the Commission and state and territory regulators is facilitated through the Utility Regulators Forum, a committee of all Commonwealth, state and territory regulatory agencies.

International

The Commission's international activities aim to help other countries achieve effective competition and consumer protection regimes. This can mean more competitive and fairer overseas markets, and better access to those markets for Australian exporters.

On 16 May 2002 the Commission entered into a Memorandum of Understanding with the Commerce Commission of the Fiji Islands to promote cooperation and coordination of enforcement, training and technical assistance activities in respect of consumer protection and competition issues.

Negotiations with a number of other competition and consumer protection agencies around the



world are currently under way. These negotiations can lead to the exchange of information, cooperation and assistance in enforcement matters, and the provision of technical assistance from Australia to emerging economies.

The Commission is increasingly cooperating with its international counterpart agencies on competition, consumer protection and regulatory matters to facilitate the effective enforcement of laws both in Australia and overseas.

One avenue through which this is occurring is the recently established International Competition Network (ICN), a global forum through which individual national competition agencies are liaising on common issues.

Summary of financial report

The Commission's budget for 2001–02 was \$83.4 million, an increase of 10 per cent from 2000–01. The appropriation includes an amount of \$10 million towards a litigation reserve fund. This fund, which will increase yearly by \$1 million up to a cap of \$20 million, is to enable the Commission to meet unusual litigation costs.

The budget appropriation for the 2002–03 year is \$61.8 million. Apart from the once only appropriation of \$10 million towards a litigation reserve fund the reduction from the previous year is due to the cessation of funding for the Commission's role in the transition to the New Tax System.

ACCC staff

The Commission continued its tradition of recruiting high quality staff in 2001–02, with 26 graduates selected from a highly competitive field of around 450 applicants.

The graduates and two international interns commenced at the beginning of 2002, and will do three rotations during their 10-month program.

Total full-time equivalent employees increased to 478 (up from 438 in 2000–01), including six full-time holders of public office (Commission members). The increase in the staffing levels was reflected in the various areas of regulatory activity, the new professions unit, the

establishment of the regional program and the ACCC Infocentre.

The Commission also continued to provide its staff with job learning opportunities, access to information and formal training programs with a greater emphasis on the online environment as a delivery medium.

Liaison

The Commission's activities greatly benefited during 2001–02 through effective liaison with community organisations, businesses, consumers and federal, state and territory agencies. The Commission also works with many overseas agencies in promoting trade practices compliance.

Major amendments to the Trade Practices Act

On 26 July 2001 amendments to the Trade Practices Act relating to small business and strengthening the enforcement provisions came into effect. These amendments (see appendix 1) include:

- raising penalties for breaches of the consumer protection provisions to \$1.1 million for corporations and \$220 000 for individuals
- extending the protection for small businesses from unconscionable conduct by a stronger party to transactions up to \$3 million in value
- broadening the powers for the Commission to take representative actions and seek declarations
- altering the 'market' definition in the mergers and acquisitions test to include a substantial market in a region in Australia.

On 15 December 2001 a new Part VC (Offences) of the Act came into operation, giving effect to the requirements of the Commonwealth Criminal Code by separating the civil and criminal elements of Part V (Consumer Protection). The new Part VC establishes a separate criminal consumer protection regime by mirroring many of the Part V consumer protection provisions. However the new provisions are drafted to comply with the general principles of criminal responsibility contained in the Criminal Code. Part V retains the civil consumer protection provisions, as they



previously operated. The consumer protection prohibitions should remain substantially the same and the introduction of Part VC is unlikely to have a significant practical impact on the consumer protection regime under the Act.

The *Financial Services Reform Act 2001* began on 11 March 2002 and amended the *Australian Securities and Investments Commission Act 2001*. Consequential amendments were also made to other legislation, including the *Trade Practices Act 1974*. The main thrust of these changes has been a shift in legislative responsibility for consumer protection issues in relation to:

- foreign exchange contracts and credit from the ACCC to the Australian Securities and Investments Commission (ASIC)
- health insurance from ASIC to the ACCC (although note that before the amendment, the ACCC had, for a number of years, been empowered to deal with consumer protection issues for health insurance pursuant to a statutory delegation from ASIC).

The *Trade Practices Amendment (Telecommunications) Act 2001* commenced on 27 September 2001, making a series of amendments to Part XIC of the Act to streamline the telecommunications access regime. The amendments encourage commercial negotiation and expedite the resolution of access disputes notified to the Commission.

Outlook

The Commission operates in a constantly evolving environment. Each year a substantial effort is made by the Commission to confront new issues that have the potential to affect the Commission's performance and the law under which it operates.

For example, the Commission is involved in several reviews involving various aspects of competition and consumer protection law. The Commission regards its participation in these reviews as being of the utmost importance because they give all parties an opportunity to comment on existing laws and practices with the aim of refining their future implementation.

Similarly, the Commission's actions in testing the scope and application of the Act are based on two important objectives: to ensure that those who contravene the law are dealt with appropriately by the court; and that the court gives due consideration to the application of the law as Parliament intended. To meet these objectives the Commission is currently involved in an unprecedented number of court actions—seven of which are before the High Court of Australia, and 10 are on appeal to the Full Court of the Federal Court of Australia. These cases involve important tests of key provisions of the Act, and whatever the outcome in each case, there is likely to be some impact on the way the Commission enforces the Act in the future.

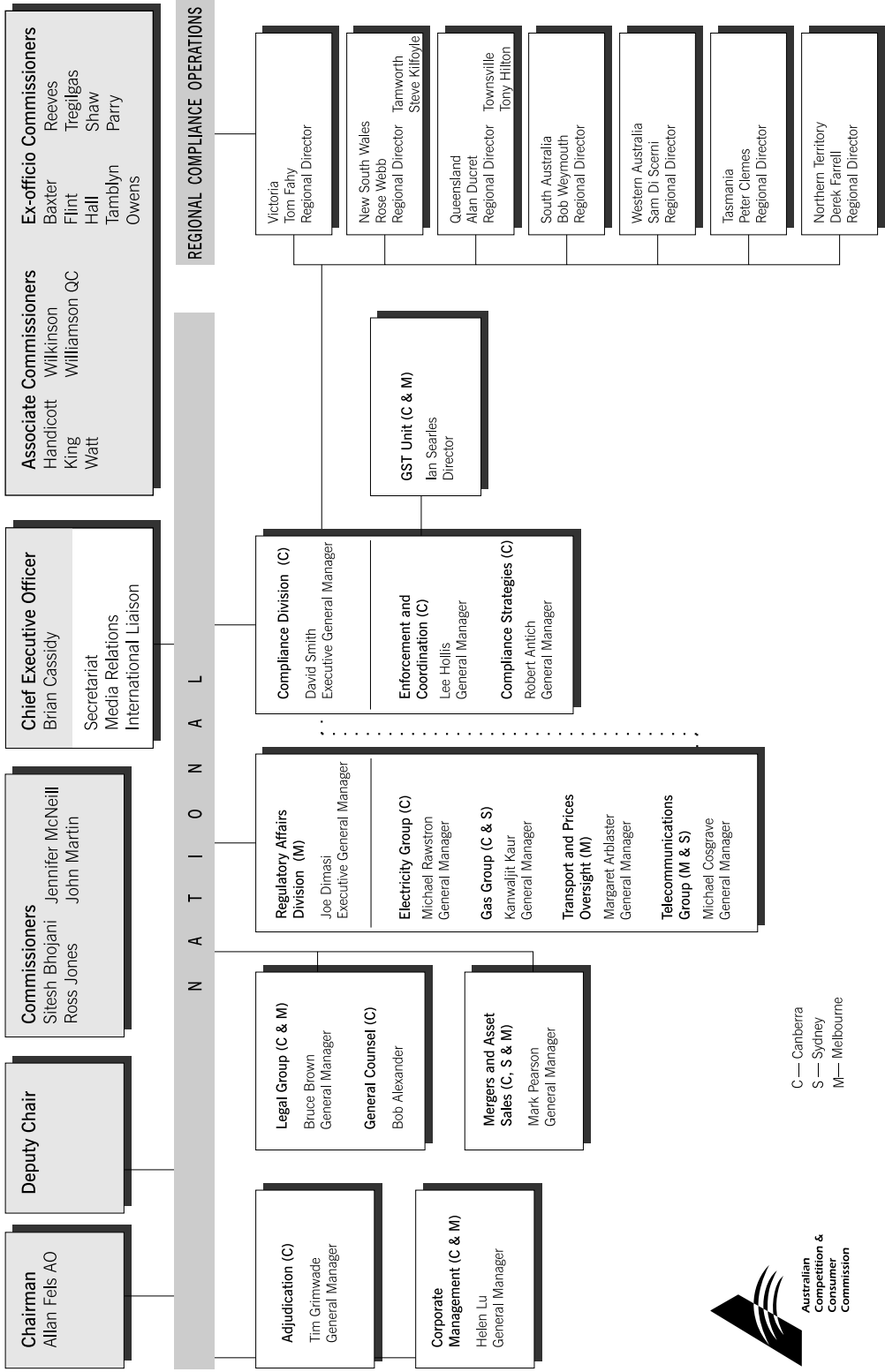
The Commission faces a number of major decisions in its regulatory activities. In electricity in particular the Commission has taken on the function of transmission regulator and will be making revenue cap decisions for the networks in Victoria and South Australia. The Commission is also moving to continually improve the practice of regulation especially as it applies to new or 'greenfield' projects.

A number of reviews of the regulatory laws affecting network industries have either been completed or are under way. A challenge for the Commission will be to implement changes to the regulatory schemes that have either been announced or are under consideration.

The Commission continues to secure positive outcomes for consumers and business by actively enforcing and promoting the benefits of compliance with the Act. I would like to thank Commission staff for their dedication, professionalism and integrity, and in particular for their ability to meet the challenges and demands placed on them in such a dynamic work environment.



AUSTRALIAN COMPETITION AND CONSUMER COMMISSION ORGANISATION CHART



C— Canberra
S— Sydney
M— Melbourne

