



Australian Competition & Consumer Commission

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Minister for Financial Services and Regulation
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In accordance with section 171 of the *Trade Practices Act 1974* and section 63 of the *Public Service Act 1999* the Australian Competition and Consumer Commission is pleased to present you with its sixth annual report, covering the Commission's operations for the year ended 30 June 2001.

Sub-section 63(1) of the Public Service Act requires the responsible Minister to cause a copy of a report given to him or her under section 63 to be laid before each House of the Parliament before 31 October in the year in which the report is given.

Professor Allan Fels
Chairperson

Suresh Bhojani
Commissioner

David Cousins
Commissioner

Ross Jones
Commissioner

John Martin
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Commissioner

E X E C U T I V E O F F I C E





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Glossary and Abbreviations

AAT	Administrative Appeals Tribunal
ABDP	Amadeus Basin to Darwin Pipeline
ACA	Australian Consumers Association
ACCC	Australian Competition and Consumer Commission
ADFF	Australian Dairy Farmers' Federation
AFJA	Australian Fruit Juice Association
AHC	Australian Hospital Care
A New Tax System change	A New Tax System change is defined by the legislation as the ending of Wholesale Sales Tax, the introduction of the GST, and changes to other taxes, excises, subsidies and rebates prescribed (and to be prescribed) in regulations.
ANZFA	Australian and New Zealand Food Authority
APCA	Australian Payments Clearing Association
APEC	Asia-Pacific Economic Cooperation
APRA	Australian Performing Rights Association Limited
APRA	Australian Prudential Regulation Authority
ARTC	Australian Rail Track Corporation
ASIC	Australian Securities and Investment Commission
ATO	Australian Tax Office
ATSI	Aboriginal and Torres Strait Islander
AuDA	au Domain Administration

BML	Boral Masonry Limited	GSM	Global system for mobile communications
B2B	Business to business	GST	The GST is a broad based indirect tax, introduced by the Government to replace the Wholesale Sales Tax and a number of State indirect taxes. Generally, the GST taxes the consumption of most goods, services or anything else in Australia, including things that are imported.
B2C	Business to consumer		
CASE	Consolidated Application Server Environment		
CECS	Consumer Electronic Clearing System		
CHH	Carter Holt Harvey		
Commission, the	The Australian Competition and Consumer Commission		
CPI	Consumer Price Index	Guidelines, the	The price exploitation guidelines
CSBP	Cuming Smith British Petroleum		
CTDA	Commerce (Trade Descriptions) Act	HOCOLEA	Heads of Commonwealth operations law enforcement agencies
CTMs	Certification trade marks		
CWO	Cable & Wireless Optus	IAMA	International Food and Agribusiness Management Association
CWO: C & M	Cable & Wireless Optus Limited: Consumer and Multimedia	IATA	International Air Transport Association
CWO: D & B	Cable & Wireless Optus Limited: Data and Business	IFSA	Investment and Financial Services Association
Diesel Fuel Rebate Scheme	An existing scheme whereby part of the Commonwealth component of customs and excise duty is paid on diesel for certain eligible off-road uses. Under the New Tax System this scheme will be extended to cover 100 per cent of the Commonwealth customs or excise duty paid.	IIP	International Internship Program
DISR	Department of Industry Science & Resources	IMSN	International Marketing Supervision Network
Dual ticketing	Where two prices are displayed on the good (usually a pre 1 July 2000 price and a price from 1 July 2000)	Input tax credits	A credit received by a supplier (who is registered for GST purposes) for GST paid on creditable acquisitions.
EAPL	East Australian Pipeline Ltd	IRPC	Inter-regional Planning Committee
EPO	Electricity Pricing Order (South Australia)	MIA	Medical Imaging Australasia
EU	European Union	MNL	Mayne Nickless Limited
FID	Financial institutions duty	MSORC	Market System Operations Review Committee
FRC	Full retail competition or Full retail contestability	MSP	Moomba to Sydney Pipeline
FTC	Federal Trade Commission	NAB	National Australia Bank
		NCC	National Competition Council
		NECA	National Electricity Code Administrator
		NEM	National electricity market
		NESB	Non-English-speaking background

Net dollar margin	The price of a good or service less cost of goods sold/services supplied, operating costs and selling costs.	RoE	Return of equity
		SBAG	Small Business Advisory Group
Net dollar margin rule	Net dollar margins should not increase as a result of the New Tax System changes alone. Changes in volumes are not taken into account when calculating the net dollar margin.	Section 75AW notice	A notice of price exploitation which constitutes prima facie evidence in Part VB proceedings.
		Section 75 AZ notice	A notice which specifies a maximum price that in the ACCC's opinion may be charged for a product.
NGPAC	Natural Gas Pipelines Advisory Committee	SMHEA	Snowy Mountains Hydro-Electric Authority
NOIE	National Office for the Information Economies	SNK	Simply No Knead Franchising Pty Ltd
NZCC	New Zealand Commerce Commission	TCC	Trade Competition Commission
OECD	Organisation for Economic Cooperation and Development	TFTC	Taiwan Fair Trade Commission
OFTEL	UK Office of Telecommunications	TGA	Therapeutic Goods Administration
PASA	projected assessment of systems adequacy	TGAC	Therapeutic Goods Advertising Code
PCC	public compliance commitment	TGACC	Therapeutic Goods Advertising Code Council
PDL	Pacific Dunlop Limited	TNZ	Telecom Corporation New Zealand
PKI	price key indicators	The Act	Trade Practices Act 1974
PML	Pocket Money Limited	Transition period	During the New Tax System transition period the Commission has oversight of pricing responses to the New Tax System changes. This transition period began on 8 July 1999 and ends on 30 June 2002. Part VB of the Trade Practices Act will operate during this period and will run from 8 July 1999 to 1 July 2002.
Price exploitation	An offence defined in s. 75AU of the Trade Practices Act		
Price exploitation guidelines	The guidelines required to be prepared by the ACCC under subs. 75AV(1) of the Trade Practices Act.		
PSA	Prices Surveillance Act 1983	TUOS	transmission use of system
PSTN	public switched telecommunications network	VoLL	Value of lost load
QNI	Queensland–New South Wales Interconnector	WACC	weighted average cost of capital
RACS	Royal Australian College of Surgeons	WIPO	World Intellectual Property Organisation
RBA	Reserve Bank of Australia	WST	Wholesale Sales Tax
Rebates	Structural discounts often given by suppliers that reduce the cost of the good to retailers as well as the base for calculating Wholesale Sales Tax.	WTO	World Trade Organisation



Review by the Chairman

The welfare of all Australians is greatly enriched by having a competitive and fair business environment, and appropriate consumer protection. In our changing world, characterised by rapid technological change and globalisation, this mandate becomes increasingly challenging. The Australian Competition and Consumer Commission has sought to meet the challenges in a very demanding year. It has continued its extra responsibilities surrounding the implementation of the New Tax System in addition to its enforcement, regulatory and compliance activities. The Commission believes it has maintained the high standard expected of it by business, government and the community.

Highlights of the year's activities

Enforcement

The Commission welcomed several significant court judgments, particularly in price fixing, domestic and international cartel activity, unconscionable conduct and the misuse of market power.

In two important cases, which clarified the interpretation of section 46 of the Trade Practices Act, the Federal Court found that both Boral Ltd and Rural Press had misused their market power in breach of the Act.

The Commission was also successful in proceedings against three multinational vitamin companies for engaging in price fixing and market sharing. Penalties imposed totalled a record \$26 million. The case sent a strong warning to any businesses proposing similar conduct.

During 2000–01, the Commission was in court in 85 matters regarding Parts IV, IVA, V and VB of the Trade Practices Act. These included 43

new court actions, of which 12 alleged breaches of Parts IV and IVA related to price fixing, resale price maintenance, secondary boycotts, the misuse of market power and unconscionable conduct. The remaining 31 relate to breaches of Parts V and VB concerning consumer protection and price exploitation in respect of the New Tax System.

The enforcement section of the Commission has investigated a range of complaints under the industry-specific competition rule.

The Commission also maintained its education and information role, reminding the business community that complying with the law is ultimately best for business and consumers.

Professions

Some of the additional funding provided in the 2001–02 Budget will be used for a dedicated team to work on the application of the Trade Practices Act to the professions. The unit will determine the level of compliance achieved by the various professions since the Act was extended in the mid-1990s to cover all professions. The unit will ensure that the Commission's approach to the professions is consistent and coordinated.

This team has completed the Commission's third report to the Senate on anti-competitive practices by health funds in regard to private health insurance.

The New Tax System

The Commission's role was to ensure that the benefits of the New Tax System were passed on to consumers, and that businesses did not engage in price exploitation or misleading and deceptive conduct in relation to the New Tax System changes. It also monitored the implementation of the Commonwealth Fuel Sales Grant Scheme and the reduction in the Commonwealth excise on petrol, diesel and draught beer during the year. Over 64 000 inquiries were handled, including about 24 000 complaints.

The results of the Commission's price surveys this year, together with Consumer Price Index outcomes, confirm that the tax changes affected prices mostly in the September 2000 quarter.

Average price changes were within the Commission's estimates and there was no evidence of significant opportunistic pricing to increase margins. Although some prices have risen since the initial impact during the September 2000 quarter, average increases have generally been in line with inflation trends that existed before the New Tax System.

Average price changes resulting from the New Tax System were fairly consistent across geographical locations, even though price levels may have been different. The results also showed no substantial differences in the price changes between the States and Territories, although again prices may have been at different levels. The differences between small and large businesses were also insignificant.

After one year of the GST the Commission found that most businesses have fully complied with its pricing guidelines. Businesses generally acted correctly in adjusting prices to take account of the tax changes. However, there were instances of inappropriate pricing and price representations. Commission staff investigated approximately 6000 matters and took five cases to court this year, resolving a further 31 matters with court enforceable undertakings.

Regulatory activities

The Commission has many roles in the regulation of utilities, including administration or approval of access arrangements. These arrangements are designed to ensure that owners of essential facilities, such as telecommunications networks, make their infrastructure services available to access seekers. This needs to be on terms that encourage investment by owners of facilities while allowing the access seekers to compete in industries upstream and/or downstream of the regulated services.

In addition, long-standing powers to authorise conduct that would breach the competition provisions of the Trade Practices Act have particular application in moulding the regulatory framework — and price monitoring has been supplemented by the administration of price caps to lessen the impact of monopoly power.

The Commission's regulatory activities have continued to grow over the year.

The Commission released five draft access assessments under the national gas code and approved the Marsden to Dubbo pipeline. It also completed an assessment of an application for GPU GasNet to revise its existing access arrangements to incorporate the South West pipeline in Victoria. It is currently considering proposed rule changes to the Victorian Market System Operation Rules.

Many electricity code changes were assessed, including the entry of Tasmania into the national electricity market. On 1 January 2001 the Commission commenced regulation of South Australian and Victorian transmission networks. In Queensland this begins on 1 January 2002, and the Commission released a draft determination of the network revenue caps assessment.

In telecommunications, the Commission has expended considerable resources on its dispute resolution functions. In association with the resolution of 25 arbitrations, the Commission has released detailed pricing principles for access to fixed (PSTN) and mobile (GSM) networks. A further 21 arbitrations were still current at the end of the year. The Commission continues to review the extent of regulation as competition develops.

In transport, the Commission completed a report on a proposed price increase at Sydney airport and assessed price cap compliance for regulated airports. It is currently assessing access undertakings from the Australian Rail Track Corporation covering the terms and conditions of access to tracks owned or leased by ARTC.

In fulfilling its price-monitoring role, the Commission monitored unleaded petrol prices from July 2000 to June 2001. It also released a report about market milk product sales in April 2001, which demonstrated that during the monitoring period, the falls in farm-gate prices for raw milk brought about by deregulation were passed on to consumers.

There have been reviews by the Productivity Commission of the Prices Surveillance Act, the general access arrangements under Part IIIA, and the regulatory arrangements in telecommunications and airports. The Commission has provided submissions to these reviews.

In a number of deregulating utility sectors there has been greater competition with an increased number of participants. For example in telecommunications there are now around 70 carriers and over 100 telephony service providers. Consumers have benefited from lower prices and greater choice in a number of sectors. A report by BIS Shrapnel has shown strong growth in investment in telecommunications. In the gas pipeline sector, plans totalling some \$9 billion to build thousands of kilometres of pipelines have been reported. In electricity regulated networks have proposed to significantly increase investment in their networks.

Mergers

The Commission assessed 265 merger and acquisition proposals of which 13 raised major competition concerns. Ten proceeded after the parties signed section 87B undertakings to lessen any anti-competitive effects and three were withdrawn.

Merger activity was lively in the health, building materials, airline, agribusiness and retail sectors. The number of mergers also rose in deregulated industries, such as dairy and energy, and in global industries including the media, finance, pharmaceutical and resources.

Some major mergers that the Commission did not oppose in 2000–01 included the acquisition of Impulse Airlines by Qantas Airways; the sale of Franklins supermarkets to a number of supermarket entities including Woolworths; and the acquisition of Australian Hospital Care by Mayne Nickless. Each of these mergers involved significant analysis and public inquiry by the Commission. They were only concluded after each of the parties provided section 87B undertakings to the Commission to lessen any anti-competitive detriment.

Consumer protection

The Commission's focus on traditional consumer protection, such as misrepresentation and misleading and deceptive conduct, continued. In September 2000, the Commission took action against Target Australia for false, misleading and deceptive advertising. This was upheld by the Federal Court, which ordered Target to review its trade practices compliance program, broadcast corrective advertisements, and pay the Commission's costs. It also issued an injunction restraining Target from advertising in the same way for four years.

The Commission examined health insurance and petrol issues, and matters of undue harassment, pyramid selling and coercion. It also developed its cooperation with other government agencies and finalised eight matters regarding breaches of product safety standards.

E-commerce

Extra funding for work in e-commerce and computer forensics has prompted investigations into possible trade practices breaches in Internet markets, B2B (business to business), B2C (business to consumer) transactions and online marketing.

The Commission has undertaken significant research into the potential competition issues surrounding e-commerce transactions, and the impact this may have on Australian consumers.

In April 2001 the Commission launched Slam-A-Cyberscam to enable consumers to lodge complaints against online traders. The Commission also led an Internet Sweep Day evaluating websites with overseas regulatory agencies for their level of compliance with the *OECD Guidelines on Consumer Protection in E-commerce*.

Fair.com was one of several new Commission publications to educate Internet service providers and businesses regarding fair dealing in domain name registration and website advertising.

Small business

The Small Business Unit, now in its third year, continued to build its outreach program to inform small businesses about dealing with the Trade Practices Act. It launched the Competing Fairly forums, which involve satellite broadcasts to over 60 towns throughout Australia. The forums inform rural businesses and consumers of their rights and obligations under the Trade Practices Act. They aim to build connections between the Commission, industry and community organisations and have been very effective in reaching the bush.

The corporate video, *Fair Game or Fair Go*, explains the meaning of unconscionable conduct to small businesses while several publications, some written in cooperation with other agencies such as the Australian Retailers Association, take up similar themes.

Adjudication

The Commission received 53 applications for authorisation, 345 notifications for exclusive dealing and made 30 determinations. It also took part in a joint study with the Reserve Bank of Australia on access and interchange fees in Australia's debit and credit card schemes. As a result the interchange scheme is now subject to the regulatory processes of the RBA.

Since the coverage of the Trade Practices Act was extended in the mid-1990s, more matters have been coming before its Adjudication Branch. They cover industries where the Act did not previously apply, because of its limited jurisdictional reach or overriding legislation, and include the Royal Australasian College of Surgeons authorisation application and various determinations concerning the rural sector.

International unit

Activity between regulators and competition authorities at the international level has grown, particularly regarding international airline agreements and e-commerce issues. The Commission has attended meetings about establishing new forums for discussing global competition policy and law enforcement. The Commission is also helping several countries introduce competition laws.

Summary of financial report

The Commission's budget for 2000–01 was \$75.6 million, which included a once-off injection of approximately \$25 million to fund the GST activities and \$10 million to boost its legal resources.

The budget for 2001–02, after removing the once-off funding of \$35 million, is an increase of about 27 per cent on 2000–01. The increase will fund the Commission's activities in a number of existing areas as well as new activities such as in e-commerce. A litigation reserve fund, initially of \$10 million, will assist court actions. The fund will build to a reserve of \$20 million and will strengthen the Commission's ability to deal with major litigation. The budget for 2001–02 is \$73.4 million.

A funding review by the Department of Finance and Administration evaluated the Commission's key operating environment and costing systems. It interviewed various stakeholders and benchmarked strategic functions against other Australian and overseas agencies. It is not uncommon for such a review to lead to reduced funding. However, in the Commission's case, after rigorous evaluation, it was found that a substantial increase was warranted. This was done in the May 2001 Budget.

With the additional funding the Commission can maintain its current high standard of service delivery and meet emerging priorities such as e-commerce and rural and regional issues.

ACCC staff

Mr Allan Asher's term as Deputy Chairman expired on 3 November 2000. He left to take up a new position at Consumer International's headquarters in London, as the global director of campaigns. Mr Asher was appointed to the Trade Practices Commission in 1988, and when the Australian Competition and Consumer Commission was established in 1995, he was appointed Deputy Chairman. During his term he chaired the Enforcement Committee, the Energy Committee and the OECD Consumer Policy Committee. Mr Asher made a major contribution to all aspects of Commission activities, driven by his deep-seated personal values and concern for the welfare of others.

The Commission also thanks ex officio member Mr Graham Scott for his contributions. Mr Scott's term expired on 1 April 2001. He was replaced by Mr Lew Owens, the South Australian Independent Industry Regulator, from 29 June 2001. Mr Alan Tregilgas, the Utilities Commissioner in the Northern Territory, was appointed on 18 October 2000.

The Commission recruits high quality employees and 2000–01 was no exception. From a highly competitive field, the Commission recruited 29 graduates and two international interns, who are presently completing rotations throughout various work areas. Skills at the middle and senior ranks were also developed through training courses and seminars. The Commission prides itself on its highly attractive work environment, study assistance scheme and support for staff at all levels.

Liaison

The Commission's activities greatly benefited this year through effective liaison with community organisations, businesses, consumers and Federal, State and Territory agencies. It works with many overseas agencies in promoting trade practices compliance.

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, page 179 for greater detail) 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 to transactions up to \$3 million in value from unconscionable conduct by a stronger party;
- broadening the powers for the Commission to take representative actions and seek declarations; and
- altering the 'market' definition in the mergers and acquisitions test to include a substantial market in regional Australia.

The Commission believes the amendments will increase protection for consumers and small businesses against unscrupulous business practices.

Outlook

The last 10 years have seen substantial change in competition law both domestically and internationally. The Australian Competition and Consumer Commission was formed by a merger of the Prices Surveillance Authority and the Trade Practices Commission in 1995. Codes regulating access to essential facilities have been formulated and improved. Penalties have increased sharply, the consumer protection provisions are more vigorously enforced, merger law has been strengthened and the protection for small businesses against anti-competitive behaviour is more robust. The Commission has conducted more cases under both Parts IV and V in the 1990s than in the 1980s. These cases have generated a great deal more publicity and public discussion regarding the Act and competition policy.

As a result of the Hilmer Report, broader reforms in competition policy have occurred under the *Competition Policy Reform Act 1995*. Responsibility for the Trade Practices Act has been transferred from the Attorney General to the Treasurer. These changes have lifted the profile of the Act and the Commission and its ability to promote the welfare of all Australians.

Looking forward: future challenges for the Commission

Three major forces are driving change in the modern economy: globalisation, the emergence of new technology and progressive liberalisation of markets, both local and international. All have major implications for the future of competition law and will have a substantial impact on the work and focus of the Commission. For example, when globalisation leads to increased international competition, this is taken into account by the Commission in assessing questions about competition in Australia.

These forces, while generally beneficial for consumers and businesses, may require some scrutiny by competition and consumer protection regulators.

Globalisation

The increasing interdependence between nations generally benefits competition and consumers. However, in some cases globalisation can be associated with anti-competitive behaviour such as international cartels. Recently in such a case, the Federal Court of Australia imposed record fines on three subsidiaries of overseas animal vitamin suppliers for price fixing and market sharing in breach of the Trade Practices Act. The conduct in Australia was a manifestation of arrangements made overseas by the parent companies, and its resolution reflected the cooperation between the Commission and international regulatory agencies.

The number of global and multi-jurisdictional mergers has also grown. Usually, the global character of mergers has not caused major difficulties in Australia. Most are not anti-competitive.

However, when they have anti-competitive effects in Australia, the Commission has opposed the merger. In some circumstances, it has been possible to find a solution to the anti-competitive effects. For example, the worldwide merger of British American Tobacco PLC and Rothmans Holding would have led to a substantial lessening of competition in the Australian cigarette market. The divestiture of certain brands to another international cigarette company enabled the merger to proceed. However, in other circumstances, such as the proposed acquisition by The Coca Cola Company of Cadbury Schweppes international soft drink brands, the anti-competitive effects of the proposal were not able to be resolved by the merger parties and the deal was blocked in Australia (and a number of other countries).

The international dimension to competition policy has expanded, with greater cooperation, and more agreements and treaties between countries. Multilateral activity at the OECD, World Trade Organisation, APEC and other regional groupings has increased. During the year the establishment of a global competition initiative was discussed, instigated by the International Bar Association. The OECD has also set up a global competition forum and the WTO has established a working party to study the interaction of trade and competition policy.

Perhaps the most important global development in competition policy in the next 20 years will be the emergence of competition policies in developing countries. Australia is helping to train regulators in other countries in applying competition law. Australian business will gain through better access for exports to these countries. The adoption of competition law will help reduce restrictive practices that currently hinder Australian exports and foreign investment.

New technology and e-commerce

The Commission has devoted increased resources to the study of B2B, B2C and other related issues. Most e-commerce developments benefit consumers through greater efficiencies, wider choice and improved purchasing systems. It also aids competition because lower entry barriers increase the field of competitive suppliers. However, some B2B arrangements could involve competitors reaching anti-competitive agreements or the creation of new sources of market power. These require the scrutiny of regulators.

There are concerns that consumers have less protection in Internet transactions, especially where cross border transactions occur. The provisions of the Act regarding misleading and deceptive conduct, implied warranties, product safety, as well as privacy and fraud, may not apply or be easily enforced in these situations.

One view is that competition law should not apply in the same way in high technology sectors, as any market power will soon be displaced by further advances in new technology itself. It is said that regulators and courts cannot foresee the effects of technology, and therefore their decisions are likely to be wrong.

Others believe new technology can lead to a large accumulation of market power in a short period and that the scope for consumer exploitation and anti-competitive conduct is immense. The counter is a fast and effective application of competition law to stop the conduct before it spills over into related markets.

The accumulation of market power in some network industries appears to be large. This has affected competition policy in the utilities, high technology and financial sectors and will be

central to the Commission's policy work in future years.

Liberalisation

Liberalisation of international trade, foreign investment, and domestic deregulation is generally beneficial to competition.

When governments liberalise markets, businesses sometimes resist. The sharp increase in international cartels in recent years reflects efforts by some corporations to counter lower trade and investment barriers. As barriers fall, businesses that have had domestic monopolies or near monopolies face competition from overseas as well as easier entry to overseas markets. One response can be the formation of international cartels to fix prices and share markets. This calls for attention by regulators and often requires coordinated action across national borders.

Such conduct also occurs domestically. While deregulation generally promotes competition, it also provides incentives for anti-competitive behaviour such as cartel activity, the misuse of market power or anti-competitive mergers. Anti-competitive activity that follows in the wake of deregulation is high on the Commission's agenda.

Other forces — regional and rural Australia

While the impact of globalisation has triggered much debate, the other end of the spectrum is equally crucial — where strong demand exists for the Commission to be more active in regional and rural Australia.

Additional funding has been earmarked for regional and rural programs. In July 2001 the Australian Parliament amended the merger provisions in section 50 to explicitly refer to regional markets. The Commission itself is more active in reaching regional and rural Australia and will continue to be so in coming years.

The Commission's approach

To tackle these challenges, the Commission needs to examine and alter, where necessary, its own approach to the analysis of competition. When, for example, globalisation causes greater import competition in Australia, this is taken into

account. The Commission has not rejected a merger proposal where imports have been more than 10 per cent of the market.

In some cases institutional arrangements need to change. For example, when anti-competitive behaviour crosses national boundaries, a combined international effort is required. It is vital that Australia participates to ensure its voice is heard.

If we are to have an internationally competitive economy we must apply a vigorous competition law to respond to these new market imperatives.

Proposed changes to the Trade Practices Act

To tackle such a dynamic environment, the Commission believes the Trade Practices Act should be changed. While its basic structure is sound, the Commission believes that scope exists for several amendments. The three key changes needed are:

1. The introduction of criminal sanctions for hardcore acts of collusion by big business

The Commission believes that criminal sanctions should apply to price fixing, bid rigging, market sharing, and possibly, collective exclusionary boycotts by big business. These can include the most serious, flagrant and profitable acts of collusion. These acts that infringe sections 45A and 4D are not only dishonest but they directly affect prices and seriously impair the operation of free markets. Collusion is rightly compared with fraud, insider trading and other white-collar crime. Criminal sanctions to deter and properly punish such behaviour, such as imprisonment, would bring the Trade Practices Act into line with several of our major trading partners, including Germany, USA, Canada, Japan, Korea and the UK. This change would contain the usual safeguards for businesses, such as the requirement to prove the conduct beyond reasonable doubt before a court of law, and the discretion of the judiciary to determine the most appropriate remedy.

Such a change in the law would not apply to small businesses or trade unions.

2. A revision of s. 46 regarding the misuse of market power

The Commission believes two major impediments hinder the proper functioning of section 46 which relates to the misuse of market power.

The first is the 'purpose' test that can unduly limit the range of anti-competitive behaviour covered by the Act. The Commission sees merit in adding an 'effects' test. The amended test would then determine whether the proscribed anti-competitive behaviour had the 'purpose or effect' of eliminating or damaging a competitor; preventing entry; or preventing competitive conduct in a market. The Commission (and the courts) could then examine the actual impact of the conduct as opposed to being limited to examining its intent.

The Commission is also concerned about the length of time it normally takes to deal with issues of market power. To overcome this, the Commission recommends cease and desist powers to order a temporary halt to conduct it considers a breach of section 46 (and possibly, other sections of the Act) pending court review. Expanding the Commission's investigation powers will enable it to better detect and prosecute cartels and other anti-competitive behaviour, as in New Zealand and some other jurisdictions.

3. The introduction of civil penalties into Part V of the Act

Breaches of the consumer protection provisions in Part V of the Act do not currently attract the civil penalties that apply to the restrictive trade provisions in Part IV. While criminal penalties (such as fines) are available, the Commission believes that Part V should contain the option of civil penalties.

Sometimes a breach of Part V involves a failure of compliance so serious that it requires a pecuniary penalty but not criminal action. Civil penalties will ensure that would-be offenders are deterred, victims are compensated and justice is prompt, effective and at the lowest possible cost to the taxpayer.

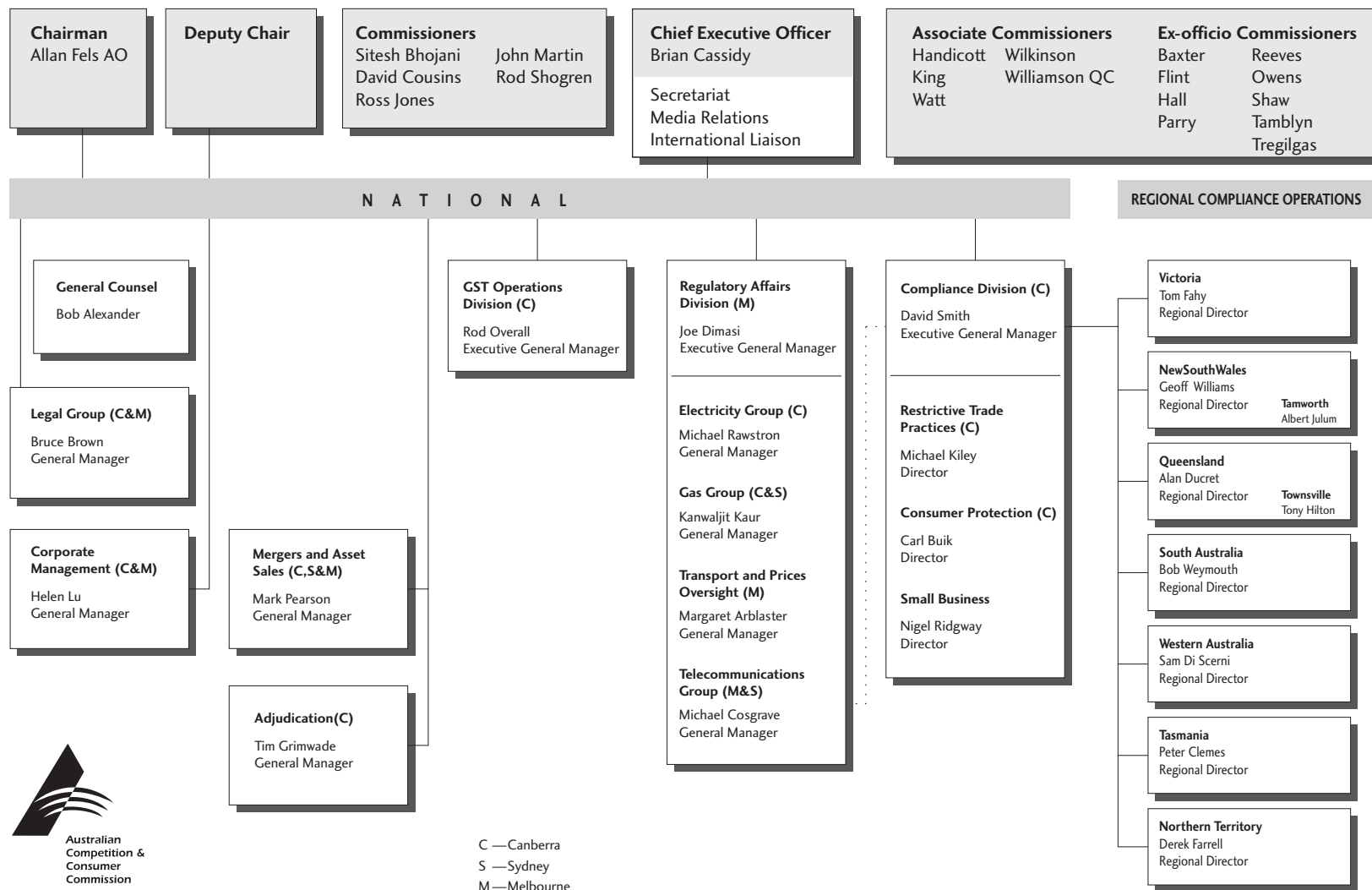
These changes will further deter big businesses from engaging in anti-competitive behaviour and increase compliance with the Trade Practices Act to the benefit of Australian consumers.

The Commission has recorded strong results this past year in fighting anti-competitive conduct and ensuring a fairer marketplace. This would not have been possible without dedicated and highly competent staff. I would like to thank the Commission staff as well as my fellow Commissioners for their creativity, professionalism and tireless work over the past year in tackling the challenges presented.

Professor Allan Fels AO

Chairman

AUSTRALIAN COMPETITION AND CONSUMER COMMISSION ORGANISATION



Chapter 1 Overview of the ACCC

The Commission is an independent statutory authority which has the role of administering the *Trade Practices Act 1974*, State and Territory Application Acts and the *Prices Surveillance Act 1983*.

The Commission seeks 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.

In seeking to prevent or limit anti-competitive conduct and to ensure adherence to fair trading principles the Commission:

- takes action through compliance education programs, investigations, litigation or enforceable undertakings if necessary to overcome market problems;
- adjudicates on business practices (including merger proposals);
- considers access issues concerning essential facilities;
- enforces product safety standards;
- has functions under provisions of the Trade Practices Act which impose a liability on manufacturers for damage caused by defective goods;
- undertakes certain functions relating to prices surveillance, public inquiries and monitoring of goods and services under the Prices Surveillance Act;
- administers the prohibition on price exploitation in relation to the New Tax System;
- maintains close liaison with Federal, State and Territory Governments, and regulatory authorities on economic structural reform; and

- provides guidance to business and consumers about the Trade Practices Act and the Prices Surveillance Act.

Legislation

Trade Practices Act

The object of the Trade Practices Act is to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection.

Prices Surveillance Act

The Prices Surveillance Act enables the Commission to examine the prices of selected goods and services. The objective is to promote competitive pricing wherever possible and to restrain price rises in markets where competition is less than effective.

Related legislation

The Commission has responsibilities under other legislation as follows.

Airports Act 1996 — to perform quality of service monitoring and reporting, to facilitate access to airport services of national significance, and to receive accounts and reports which facilitate its prices oversight role.

Australian Postal Corporation Act 1989 — to inquire into disputes as to the amount of postal rate reduction given by Australia Post to bulk mailers interconnecting or attempting to interconnect to the Australian Postal System.

Broadcasting Services Act 1992 — to report, in terms of the merger and authorisation provisions in the Trade Practices Act, on the allocation of subscription television broadcasting licences to applicants. To monitor, in conjunction with the Australian Broadcasting Authority, the cross-media ownership of the holders of subscription television broadcasting licences.

Gas Pipelines Access (Commonwealth) Act 1998 — gives effect to the Commission's role as regulator of third party access to natural gas pipeline systems under the National Third Party Access Code for Natural Gas Pipeline Systems. This role includes arbitration of disputes over

spare capacity, and regulation of increases in capacity and the terms and conditions upon which haulage services are provided.

Moomba-Sydney Pipeline System Sale Act 1994 — arbitration of disputes over the existence of spare capacity, the interconnection of a pipeline to the Moomba-Sydney pipeline, increases in capacity, and terms and conditions of provisions of haulage service.

Telecommunications Act 1997 — the Commission's main functions under the Act relate to telecommunications competition matters. Various provisions give the Commission a role wider than it has under the Trade Practices Act.

Trade Marks Act 1995 — responsibilities in relation to the approval of Certification Trade Marks.

Exceptions under Commonwealth, State and Territory legislation

Some Commonwealth, State and Territory Acts permit conduct that would normally be an offence under the Trade Practices Act. Section 51(1) of the Trade Practices Act provides that such conduct may be permitted if it is specifically authorised under those other Acts.

Below is a list of legislation that allows such conduct.

Commonwealth	<p>Australian Postal Corporation Act 1989</p> <p>Trade Practices Amendment (Country of Origin Representations) Act 1998 Item 1, Schedule 3</p> <p>Wheat Marketing Legislation Amendment Act 1998</p> <p>Year 2000 Information Disclosure Act 1999</p>
New South Wales	<p>Sydney Organising Committee for the Olympic Games Amendment Act 1996</p> <p>Farm Produce (Repeal) Act 1996</p> <p>Totalizator Legislation Amendment Act 1997 No. 151</p> <p>Marketing of Primary Products Amendment (Wine Grapes Marketing Board) Act 1997</p> <p>Liquor and Registered Clubs Legislation Amendment (Community Partnership) Act 1998</p> <p>Marketing of Primary Products Amendment (Rice Marketing Board) Act 1998</p> <p>Dairy Industry Amendment (Trade Practices Exemption) Act 1998</p> <p>Competition Policy Reform (NSW) Amendment (Waste) Regulation 1998</p> <p>Competition Policy Reform (NSW) Amendment (Grain Marketing) Regulation 1998</p> <p>Competition Policy Reform (NSW) Amendment (SOCOG and SPOC) Regulation 1998</p> <p>Olympic Roads and Transport Authority Act 1998</p> <p>Liquor and Registered Clubs Legislation Further Amendment Act 1999</p> <p>Competition Policy Reform (NSW) Amendment Regulation 2000</p>
Queensland	<p>Primary Industries Legislation Amendment Act 1999, amending the Chicken Meat Industry Committee Act 1976</p> <p>Competition Policy Reform (Queensland — Dairy Produce Exemptions) Regulations 1997 (as amended)</p> <p>Sugar Industry Act 1999</p> <p>Competition Policy Reform (Queensland) Public Passenger Service Authorisations Regulation 2000</p>
Victoria	<p>Electricity Industry Act 1993</p> <p>Gas Industry Act 1994</p>
Tasmania	<p>Electricity Supply Industry Act 1995</p> <p>Electricity Supply Industry Restructuring (Savings and Transitional Provisions) Act 1995</p>
Western Australia	<p>North West Gas Development (Woodside) Agreement Amendment Act 1996</p>
South Australia	<p>Dairy Industry Act 1992</p> <p>Authorised Betting Operations Act 2000</p>
Australian Capital Territory	<p>Milk Authority (Amendment) Act 1999 (No. 2 of 1999)</p>
Northern Territory	<p>2000 Information Disclosure Act 1999</p>

Outputs and performance indicators for 2000–01

The Commission has one outcome that defines its role in delivering Government competition and consumer policy: that is, to enhance the social and economic welfare of the Australian community by fostering competitive, efficient, fair and informed Australian markets.

The Commission's outputs and performance indicators, as published in the Portfolio Budget Statements in 2000–01, are:

Output 1.1.1 — The proper administration and enforcement of the Trade Practices Act 1974, the Prices Surveillance Act 1983 and related laws

Performance indicators

- Responded to complaints and inquiries.
- Appropriate enforcement action taken and goals achieved, i.e. stopped unlawful conduct, compensation gained for loss or damage, compliance with the Act, pecuniary penalty.
- Merger proposals likely to have an anti-competitive effect opposed or authorised where there is sufficient public benefit.
- Appropriate action taken to ensure no business takes unfair advantage of A New Tax System.
- Granted statutory immunity from legal proceedings where there is sufficient public benefit concerning some anti-competitive practices (as prescribed by the Trade Practices Act).
- Access to essential services including postal services and airport regulation is made on reasonable terms and conditions.
- Regulated gas market as required by the National Third Party Access Code for National Gas Pipeline Systems.
- Regulated electricity market as required by the National Electricity Market Code.
- Regulated telecommunications market.
- Publication of new and amended provisions of the Trade Practices Act and the new ACCC procedures.

- Promoted competitive pricing where possible and restrained price rises in markets where competition is less than effective.

Output 1.1.2 — Performance of actions that promote competition and fair trading and enable well functioning markets

Performance indicators

- ACCC policy and positions formulated — discussion documents and guidelines on competition initiatives and regulatory mechanisms be prepared, disseminated and discussions take place with Government, industry and consumers.
- Consulted with Federal and State Governments on competition issues arising from regulatory reforms.
- Responded to Government inquiries on competition and consumer protection issues including references under s. 28 of the Trade Practices Act relating to dissemination of information, law reform and research.
- Actively participated in the development of effective competition and consumer protection laws internationally.

Structure of the Commission

During the reporting period the Commission comprised seven full-time commissioners, reducing to six on 6 November 2000 when the appointment of deputy chairman Allan Asher ended.

The remaining six full-time commissioners were: Chairman Professor Allan Fels, Commissioners Sitesh Bhojani, Dr David Cousins, Ross Jones, John Martin and Rod Shogren.

Five part-time associate commissioners served during the reporting period: Teresa Handicott, Yasmin King, Warwick Wilkinson AM, Don Watt and Professor Douglas Williamson QC.

The nine ex-officio members are: Paul Baxter, Professor David Flint AM, John Hall, Dr Thomas Parry, Andrew Reeves, Alan Tregilgas, Tony Shaw, Dr John Tamblyn and Lew Owens. Graham Scott's appointment ended on 1 April 2001 and he was replaced by Lew Owens from 29 June 2001.

Biographies and photographs can be found in appendix 5.

Table 1.1. Financial and staffing resources 2000–01

Reporting by outcome	Outcome 1		Total	
	Budget \$'000	Actual \$'000	Budget \$'000	Actual \$'000
Total net administered expenses	-	101	-	101
Add: Net cost of entity outputs	70 643	67 894	70 643	67 894
Net cost to budget outcome	70 643	67 995	70 643	67 995
Outcome specific assets deployed as at 30 June 2001	-	-	-	-
Assets that are not outcome specific deployed as at 30 June 2001	-	-	7 462	13 180

Major agency revenues and expenses by outcome	Outcome 1			Total	
	Output 1.1	Output 1.2	Total Outcome 1		
	Actual \$'000	Actual \$'000	Actual \$'000	Budget \$'000	Actual \$'000
Operating revenues					
Revenue from government	65 349	10 338	75 687	75 627	75 687
Sale of goods and services	799	246	1 045	468	1 045
Other non-taxation revenues	229	18	247	55	247
Total operating revenues	66 377	10 602	76 979	76 150	76 979
Operating expenses					
Employees	27 323	2 383	29 706	28 804	29 706
Suppliers	35 065	2 281	37 346	41 533	37 346
Other	2 024	110	2 134	829	2 134
Total operating expenses	64 412	4 774	69 186	71 166	69 186

Major administered revenues and expenses by outcome	Outcome 1		Total	
	Budget \$'000	Actual \$'000	Budget \$'000	Actual \$'000
Operating revenues				
Taxation				
Fines and costs	9 975	42 807	9 975	42 807
Authorisation fees	-	432	-	432
Other	25	6	25	6
Total taxation	10 000	43 245	10 000	43 245
Total operating revenues	10 000	43 245	10 000	43 245
Operating expenses				
Net write-down of assets	-	101	-	101
Total operating expenses	-	101	-	101

Staff years	2000–01 438	1999–2000 382
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Social justice

Social justice and equity themes are implicit in both the Trade Practices Act and the Prices Surveillance Act and are strongly reflected throughout this annual report. In the Trade Practices Act the themes are most obvious in the parts dealing directly with fair trading and consumer protection — the basic rights of people in their everyday consumer transactions:

- Part IVA — which prohibits unconscionable conduct in both consumer and business-to-business transactions;
- Part V — which is built on a general prohibition of misleading and deceptive conduct, reinforced by a range of specific proscriptions of such behaviour and includes provisions dealing with product safety, information standards and statutory warranties;
- Part VA — which imposes a liability of manufacturers for damages caused by defective goods; and
- Part VB — which prohibits the exploitation of consumers or excessive profit-taking resulting from the implementation of the New Tax System.

Other documents

The Commission has a very active publications program dealing with the specifics and rationale of its work. Discussed in chapter 7 and appendix 7, this includes a regular journal of developments and issues, and a wide range of booklets, guidelines and discussion papers aimed at promoting better understanding of the legislation for which the Commission is responsible, its work and procedures. Many of these publications and documents are available to the public at the Commission's Internet websites — <<http://www.accc.gov.au>> and <<http://gst.accc.gov.au>>.

External scrutiny

During the year the financial operations of the Commission were audited by the Auditor-General. The audit of the financial statements was satisfactory and an unqualified audit report was issued. The Commission appeared before the Senate Legislation Committee (Economics) three times; and the Standing Committee on Economics, Finance and Public Administration (Review of annual report 1999–2000) twice.

Freedom of information

The Commission received 21 formal freedom of information requests during 2000–01. The requests were for access to a wide range of documents relating to investigations and complaints involving the Commission.

In nine cases access was granted in part. Access was granted in full in two cases and refused in two. Four requests were not proceeded with and in respect of one the Commission had no relevant documents. Three requests had not been finalised by the end of the year. It is Commission policy to provide information wherever possible. However, it seeks to protect information provided to it in the course of its investigations and inquiries, and treats that information as confidential both to protect the sources and to ensure the flow of information vital to the Commission's functions.

Two requests to have processing charges waived were granted. Both were on the grounds of public interest.

There were no requests for internal review and no applications were made to the AAT for review during 2000–01.