



# ACCC *update*

Issue 13 / June 2003

## SAMUEL SET TO SUCCEED

ACCC an account  
a look at us now

consumer protection

fair trading for business

regulated industries  
+ farewell Allan Fels

# ALLAN FELS

“ After much reflection I've decided that I will not seek renewal of my position as chairman of the Commission. ”

## memories

'The highlights of my tenure here have been getting exciting results. I was really pleased with the big cases; when we broke the cartels, Mayne Nickless/TNT, building codes, vitamins, power transformers, some of the consumer protection cases including life assurance and the Aborigines and quite a few others. They were fantastic experiences with great results.

I was really pleased that we got the merger law changed in 1993 from dominance to substantial lessening of competition—that's something that will have an abiding effect on the Australian economy and competition.

Personally I was always deeply involved in the question of whether there should be parallel imports of compact discs and I was unbelievably pleased when that went through the Senate by one vote at 2am on a Sunday morning. I am pleased with the other parallel import cases although I'd like books to go further.

More generally making the Commission a very effective enforcer of the Trade Practices Act and quite an effective regulator of public utilities.

Finally I was really worried about the GST challenge and its impact on our organisation. But we handled that really well; a lot of dedicated people resolved that and the ACCC came out with an enhanced reputation.'

Allan Fels April 2003

## Allan Fels AO BEC(Hons) LLB PhD

Professor Allan Fels is probably Australia's best known regulator. With a craggy, media-friendly face, Fels speaks out regularly on behalf of the consumer, leading the organisation affectionately known as the consumer watchdog. Perhaps mistakenly, he has not always been seen as a similarly close friend of big business.

He leaves his post as chairman of the ACCC as arguably one of the most influential men in the country and certainly one of the most controversial.



'Allan Fels, in the last few years, has become a brand name, and his critics would probably say how do you replace a brand?'

Fred Brenchley,  
The Bulletin

and director at the graduate school of management from 1984–90 and was made honorary professor of the faculty of business and economics at Monash University in 1997. He will be returning to teaching in his new position at the Australia and New Zealand School of Government.

As chairman of the Prices Surveillance Authority from March 1989, Professor Fels was responsible for keeping a check on petrol prices during the Gulf War. He served as Trade Practices Commission chairman from July 1991. Major consumer protection cases included the sale of life insurance policies to indigenous Australians and the AMP life insurance case which led to refunds of more than \$50 million to consumers.

Professor Fels was appointed the first chairman of the ACCC in November 1995. From July 1999 the new tax system pricing laws were enforced by the Commission for three years. It was an enormous task. The ACCC's role was to ensure that prices reflected reductions in indirect taxes and that consumers were not exposed to unnecessary price rises. Initial work included the development and interpretation of the GST guidelines, price monitoring and some enforcement activity. There was a major campaign to educate business about its obligations and the public about their rights. In the month after implementation of the new tax the ACCC help line received 30 000 calls. A survey showed 98 per cent of price reductions had been made.



Fels 1969

'Before I retire I'd like to come back and impart some of that knowledge to a new generation and to, perhaps, future leaders in the public service.'

Allan Fels

Allan Fels was born in 1942. He studied law and economics at the University of Western Australia before gaining a PhD in economics at Duke University in North Carolina. It was while studying for his doctorate in America that he met his wife Marie-Isabel Cid, who was teaching Spanish there. Fels pursued Marie-Isabel back to Spain and the couple married with Spanish ceremony in Madrid in 1969. They have two daughters Isabella and Teresa.

Allan Fels first job was in academia as a lecturer at Melbourne University in 1972. Soon after he became senior lecturer at Monash University and then professor of administration

The ACCC could rightly claim that the organisation helped make sure that consumer exploitation and excessive profit-taking did not occur because of the new tax system.

During his tenure at the ACCC Professor Fels has sought to benefit consumers and small business, in particular, through sound enforcement of the law and associated regulatory activities.

While it is an enforcement agency, the Commission cannot directly penalise companies or individuals breaking the law but has to take them to court to prove any allegations it makes.

At present there are 80 cases before the federal court. This compares with five in the year that Professor Fels became chairman of the Trade Practices Commission in 1991.

On the international stage, Professor Fels has been deputy chairman of the OECD competition committee and since 1996 co-chairman of the trade and competition committee, an important post for an Australian to hold.

Under his guidance the ACCC has sought to make competition law and policy more effective by establishing a high profile. Professor Fels' pivotal role in keeping the issues before the public, particularly through the media, has not been achieved without criticism.

'I have sought and maintained a high media profile because I believe my statements and media interviews help build a general culture of understanding and support for competition law. Accusations from some quarters of being a media tart are a small price to pay for raising business and consumer confidence in competition law. The more people who realise their obligations and rights, the greater the degree of genuine competition within the economy.'

Allan Fels

'Allan Fels..... competition tsar and media tart.'

Terry McCrann,  
News Limited



'He is media friendly, sometimes to a fault, but the alternative is a consumer watchdog who lies sleeping on the mat.'

Greg Turnbull,  
Channel 10

After he leaves Allan Fels will for a time maintain chairmanship of the OECD trade and competition committee.

In his most recent campaign for the protection of consumers, Professor Fels advocated to the Dawson Inquiry the adoption of criminal sanctions under the Trade Practices Act for hard core business collusion, a practice already in place in the United States, Canada, Japan, South Korea, and Britain.

His recreational interests include reading, music... and physical fitness.

'He yields the same sort of power in the gym as he does out in the corporate world. He's a strong man, metaphorically and physically. He'd put a lot of 20-year-olds to shame.'

James Hatzi, gym manager



'We think the ACCC and Allan Fels are probably the best friends that consumers have. He's become something of a Robin Hood for Australia.'

Louise Sylvan  
Australian Consumer Association

## Update farewells Allan Fels

This edition of Update says goodbye to Allan Fels. He leaves as chairman of the Australian Competition and Consumer Commission (ACCC) on 30 June 2003 to become the first dean of the new Australia and New Zealand School of Government. This review of Professor Fels' achievements is not intended as a formal tribute—many of those will come later and be delivered more personally. It is a chance, though, for Update to say farewell to the chairman with best wishes for his future.

Update acknowledges the assistance of ABCtv Australian Story

“ I don't regard myself as a hero but as someone determined to do the right thing. ”



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Professor Fels leaves and Graeme Samuel arrives with the ACCC in fine shape; an ideal time for Update to take a look at the organisation that has grown so much in stature and authority since Allan Fels became the founding chairman in 1995. In a milestone edition Update takes stock on where the ACCC is now and where it's going.

This edition summarises what the organisation exactly does, tells how we achieve results, outlines the legal basis of our work, suggests the benefits that are achieved and lets you know how to become involved.

The text is designed to be useful rather than all-inclusive. Linked web sites are provided throughout the text for readers who seek more detail. For those without the internet, more information on any ACCC matter can be obtained by calling the Infocentre on 1300 302 502.

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## Graeme Samuel appointed to head the ACCC

Graeme Samuel AO will be acting chairman of the Australian Competition and Consumer Commission from 1 July 2003 for a period of 12 months. Within that period the Treasurer will write to the states and territories seeking their support for the permanent appointment of Mr Samuel as chairman and Ms Louise Sylvan as deputy chairperson of the ACCC.

Mr Samuel has been the National Competition Council's president since 1997. From 1981 to 1986 he was executive director of Macquarie Bank. His career as a banker was preceded by 12 years as a partner of leading Melbourne law firm Phillips Fox and Masel. Graeme Samuel has held several other offices, including chair of the Melbourne and Olympic Parks Trust, commissioner of the Australian Football League, member of the Docklands Authority, a trustee of the Melbourne Cricket Ground Trust (1992-98), president of the Australian Chamber of Commerce and Industry (1995-97) and chair of the Inner and Eastern Health Care Network.

Ms Sylvan is currently chief executive officer of the Australian Consumers' Association. She has served for six years on the Prime Minister's Economic Planning Advisory Council.



# ACCC an account

■ The ACCC promotes competition and fair trade in the market place to benefit consumers, business and the community. The ACCC's primary responsibility is to ensure that individuals and businesses comply with the competition, fair trading and consumer protection laws.

■ The Trade Practices Act protects consumers by promoting competition and fair trading. The ACCC applies the Act in full, without fear or favour, protecting consumer and business rights, while reminding them of their obligations.

■ The Prices Surveillance Act promotes competitive pricing and limited price rises. To enforce the legislation, the ACCC monitors price rises, costs and profits of any organisations, goods or service when directed by the minister, assesses prices for companies placed under surveillance by the federal government as well as conducting inquiries into pricing practices. The ACCC can informally monitor prices if it is concerned about specific markets.

As an integral part of its work the ACCC:

protects consumers

encourages fair trading for business

regulates national infrastructure services

These three themes form the structure of this account that also includes examples of the ACCC's work.

## review of the trade practices act

The Dawson inquiry into the Trade Practices Act has just handed down its report. Here are some extracts: ■

'The Committee was persuaded that, in the light of submissions made to it and growing overseas experience, criminal sanctions deter serious cartel behaviour and should be introduced for such conduct. The criminal offences created should apply to such behaviour generally and not just the behaviour of large corporations.. □

However, many problems remain to be solved before criminal sanctions are introduced, not the least being the need to find a satisfactory definition of the offence and a workable means of combining it with a clear and certain leniency policy. A leniency or amnesty policy that provides clear and certain incentives is a potent means of uncovering cartel behaviour.' □ ■

The next edition of Update will feature in-depth discussions on the Dawson inquiry findings. □

# WHAT WE DO

1.

## consumer protection

prevent misleading and deceptive advertising

ensure products comply with mandatory safety standards

monitor business on the internet

stop inaccurate labelling

improve the understanding of consumers' rights

2.

## fair trading for business

prevent price fixing and market sharing

restrict the misuse of market power

protect the interests of small business

assess mergers, asset sales, joint ventures

allow anti-competitive conduct in the public interest

ensure compliance by the professions

assess certification trade marks

improve compliance through education and information

maintain information registers

3.

## regulated industries

promote competition in the network industries

electricity

gas

telecommunications

aviation and airports

rail

waterfront and shipping

post

monitor prices of selected goods and services

petrol

insurance

## WHAT WE DON'T DO

The ACCC deals with competition and consumer protection matters of national significance and therefore does not:

- ▶ pursue issues such as general pricing levels, warranties and refunds that are more effectively dealt with at local or state level
- ▶ resolve disputes between individuals and the suppliers of goods and services
- ▶ handle misleading or deceptive conduct in financial transactions
- ▶ advise whether a company is legitimate
- ▶ approve business conduct
- ▶ disclose the number or nature of complaints received about a company
- ▶ give legal advice
- ▶ settle employment disputes
- ▶ register business names
- ▶ impose penalties directly on companies or individuals.

# 1. consumer protection

Consumer rights are best preserved by a combination of vigorous competition in the marketplace and effective consumer protection laws.



### prevent misleading and deceptive advertising

Business cannot engage in any conduct that is likely to mislead or deceive the consumer. They are required to tell the truth or refrain from giving a misleading impression. Failure to disclose material information may also be in breach of the law.

- ▶ Target's television and newspaper ads corrected
- ▶ Telstra's actions over the transfer of mobile services from former One.Tel customers
- ▶ Telstra's wiring maintenance plan—refunds of \$45 million to 1.5 million customers
- ▶ 34 000 Fly Buys members credited with bonus points valued at \$700 000

- ▶ Qantas and Virgin Blue advertising inclusive flight prices
- ▶ Dell computers delivery charges
- ▶ Virgin Mobile cash price and termination clause
- ▶ country of origin of Woolworth's beef
- ▶ McDonald's grilled chicken burger

[www.accc.gov.au/consumer/fs-consumer.htm](http://www.accc.gov.au/consumer/fs-consumer.htm)

### ensure products comply with mandatory safety standards

Businesses must comply with product safety bans and mandatory consumer product standards.

#### bans:

- ▶ mini-cup jellies that can lodge in the throat because of food additive konjac
  - ▶ candles with lead in the wicks
- ▶ dart guns with small suction-cup darts
  - ▶ tinted headlight covers
- ▶ chewing tobacco and snuff
  - ▶ gas masks with asbestos
- ▶ glucomannan in tablet form

#### standards:

baby walkers, balloon-blowing kits, bean bags, bicycle helmets, bunk beds, clothing and textile products, child restraints for motor vehicles, children's nightwear having reduced fire hazard, cosmetics and toiletries, cots for household use, disposable cigarette lighters, elastic luggage straps, exercise cycles, fire extinguishers, flotation toys and swimming aids for children, jacks, motorcycle helmets, paper patterns for children's nightwear, pedal bicycles, ramps and support stands for motor vehicles, sunglasses and fashion spectacles, tobacco products, toys for children under three

[www.accc.gov.au/product\\_safety/mandatory.html](http://www.accc.gov.au/product_safety/mandatory.html)

### improve the understanding of consumers' rights

The ACCC publishes a monthly electronic newsletter, ACCC consumer express, consults with consumers and the community at the quarterly consumer consultative forum and through international cooperation, keeps up-to-date with law enforcement strategies worldwide.

In rural and regional Australia ACCC's regional network includes representatives of local government, small business and consumer associations, as well as regional outreach managers (ROMs) who organise regular seminars and local visits. There are regional ACCC offices in every state. A competing fairly forum is transmitted by satellite every six months.

[www.accc.gov.au/rural\\_regional/rural.html](http://www.accc.gov.au/rural_regional/rural.html)



## monitor business on the internet

With a rising trend in electronic business on the internet there is an increase in pyramid selling, other get-rich-quick schemes and misleading advertising for many products including miracle cures and weight loss. The ACCC's slam-a-cyberscam website is available for consumers to lodge complaints about online scams and an international online complaints service can be accessed at [www.econsumer.gov](http://www.econsumer.gov). More than 20 countries, including Australia, are involved in regular international internet sweep days.

- Purple harmony plates cure-all made of anodised aluminium
- Transformations 2012 selling products claimed to assist in treating AIDS, cancer, hepatitis, multiple sclerosis, chronic fatigue syndrome and other illnesses

- Bikes Direct selling imported bicycles which did not comply with Australian product safety standards

[www.accc.gov.au/docs/news/internet.htm](http://www.accc.gov.au/docs/news/internet.htm)  
[www.accc.gov.au/ecommerce/access1b.htm](http://www.accc.gov.au/ecommerce/access1b.htm)

## stop inaccurate labelling

It is illegal to make false claims about the standard, quality, value, grade, composition, style or model of goods or services.

- banana mango and apple kiwi flavoured cordial which may not contain those fruits

- genetically modified foods

[www.accc.gov.au/docs/4buis/](http://www.accc.gov.au/docs/4buis/)

## HOW WE DO IT

### prevent misleading and deceptive advertising

#### Target

In June 2000 Kerry Bergh, from Secret Harbour in Western Australia, responded to a Target newspaper advertisement offering '25-40% off every stitch of clothing' by shopping for clothes for herself and her husband. At the checkout she was upset to find that some of her purchases were not discounted.

Mrs Bergh had not noticed the ad's fine print qualification excluding underwear, socks and hosiery from the sale. She found other items such as ties and belts, classified by Target as accessories not clothing, were also excluded from the sale. That afternoon she faxed a complaint to the ACCC Perth office.

The Trade Practices Act specifically prohibits false and misleading claims about the price of goods. Any qualification of an offer that is needed to make it accurate cannot be hidden in fine print, but must be as bold, precise and compelling as the rest of the advertisement.

ACCC staff soon established that Target was running nationally linked television and newspaper advertisements for the discount clothing sale. They later became aware of another promotion for '15-40% off housewares' that excluded towels, sheets and pillow cases.

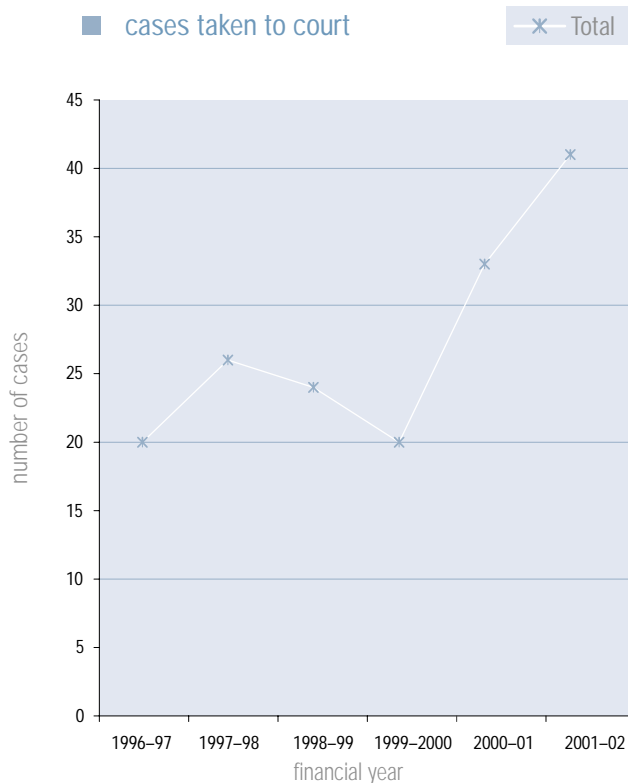
The ACCC initially wrote to Target raising concerns about the clothing sale and suggested that the matter could be resolved by court enforceable undertakings. Target declined to give such undertakings and ongoing investigations eventually led to proceedings being instituted in the Federal Court after negotiations reached an impasse.

In July 2001 Justice Malcolm Lee signed consent orders declaring Target's advertising to be misleading and deceptive and issued injunctions restraining Target from advertising in the same way. Target was also ordered to place, at its expense, corrective advertising in the 36 newspapers and on the 88 television stations that carried the original promotion, to upgrade its trade practices compliance program, and to pay the ACCC agreed costs of \$65 000.

This was the first time the Federal Court had ordered a business to broadcast television advertisements correcting a false and misleading promotion.

'I am fed up with companies not doing the right thing and getting away with it.'

Kerry Bergh, Perth consumer, West Australian, 9 July 2001



'A business must make sure that the qualifying statements are clear and prominent so that consumers know what the real offer is. This is especially important on television where an advertisement may only run for 15 seconds. The voice-over should clearly state any qualifications.'

Allan Fels

### requirements of part V Trade Practices Actee

- ▶ Businesses should not engage in conduct which will, or is likely to, mislead or deceive.
- ▶ Intention or whether anyone was actually misled is not an issue.
- ▶ The whole truth must be revealed.
- ▶ Any conditions attached need to be clearly identified; the real terms and conditions cannot be obscured in fine print.
- ▶ Asterisks and use of fine print should be prominent enough to form part of the customer's overall impression.
- ▶ Disclaimers should be specific, clear and highly visible and have equal prominence as the main message.

'I have always accepted that if you enforce the law properly you're going to lose friends.'

Allan Fels

## THE LAW

## parts of the Trade Practices Act that protect consumers:

V unfair practices, misleading or deceptive conduct, prizes, pyramid selling, unsolicited goods and services including credit cards, product safety and information, labeling, dangerous goods, product recalls, country of origin, conditions and warranties, consumer rights, defective goods

VA consumer rights and manufacturers' obligations for defective goods including compensation

VC criminal consequences of breaking the unfair practices and product safety provisions

## enforcement

State legislation mirrors the consumer protection provisions of the Trade Practices Act. The ACCC advocates mediation as the first and best option to settle disputes, but once the ACCC pursues legal action mediation becomes less likely. To enforce the consumer protection provisions of the Trade Practices Act the ACCC has many options including:

- court enforcement of written undertakings
- adverse publicity orders
- injunctions to stop certain business conduct
- obtaining damages and compensation
- corrective advertising
- powers to obtain evidence, documents and information.

For breaches of the Act that protect consumers, penalties can be invoked of up to \$1.1 million for companies and \$220 000 for individuals.

## WHAT TO READ

## ACCC publications for consumers

- consumer express
- Fair call

## the law

- Summary of the Trade Practices Act
- ACCC role and functions
- ACCC update magazine
- The ACCC and its use of penalties
- Information-gathering powers of the ACCC in relation to its enforcement function
- Warranties and refunds

## business on the internet

- Fair.com—advertising and promoting internet access
- Internet auctions—what you should know before you bid or sell

## debt collection

- Are you being harassed about debts?

## product safety guides

- balloon-blowing kits
- bean bags
- children's nightwear
- elastic luggage straps
- exercise cycles
- paper patterns for children's nightwear
- cosmetics and toiletries—ingredient labeling
- pedal bicycles

## 2. fair trading for business

In Australia credit can be attributed to competition policy and law in generating a substantial boost to both productivity and household incomes.





### prevent price fixing and market sharing

Businesses must not lessen competition by agreeing to share markets, restrict the supply of goods or actual prices. Suppliers, manufacturers and wholesalers cannot specify a minimum price below which goods and services cannot be resold.

- ▶ Warner and Universal Music withdrawing music CDs from parallel importers—penalties set at more than \$1 million
    - ▶ vitamin companies agreeing to put up costs—fined \$26 million
  - ▶ electrical transformer cartel rigging contracts—penalties of \$16 million
  - ▶ Colgate toothpaste, Palmolive detergent and Ajax cleaner prices restricted at cut price outlets—penalties set at \$500 000
  - ▶ Pioneer, CSR Concrete—penalties exceeding \$20 million
- [www.accc.gov.au/fs\\_compliance.html](http://www.accc.gov.au/fs_compliance.html)

### restrict the misuse of market power

An organisation cannot use a substantial degree of market power to eliminate or damage a competitor, prevent entry into the market or deter competitive conduct. The acquisition or possession of substantial market power is not legally prohibited.

- ▶ Sony PlayStation restricted games
  - ▶ Commonwealth Bank, Westpac, Australian and New Zealand Banking Group cash processing
  - ▶ Westfield shopping centre's initial lease negotiations
  - ▶ Maritime Union of Australia harassment and secondary boycotts—penalties and costs totalling \$210 000
  - ▶ TNT, Ansett Transport, Mayne Nickless freight transport—penalties exceeding \$16 million
- [www.accc.gov.au/fs\\_compliance.html](http://www.accc.gov.au/fs_compliance.html)

### protect the interests of small business

Bigger businesses cannot use their power to take unfair advantage of smaller or less powerful business. This is called unconscionable conduct. The ACCC small business program provides specialised information and guidance for small business about their rights and obligations in areas such as franchising and helps them identify unconscionable conduct. The Best and Fairest compliance manual was published to assist small business.

- ▶ Cheap as Chips franchise—\$82 000 paid in compensation to franchisees
  - ▶ Simply No-Knead judged as conducting unreasonable and unfair behaviour against five franchisees
- [www.accc.gov.au/smallbus/smallbus.htm](http://www.accc.gov.au/smallbus/smallbus.htm)

'We stress for small business their rights in protecting themselves against oppressive competitive behaviour by big business.'

Allan Fels

## assess mergers, asset sales, joint ventures

Businesses cannot accumulate market power that could lead to anti-competitive conduct, but mergers are the inevitable result of a properly functioning market economy. The ACCC opposes only about 5 per cent of proposed mergers.

- ▶ BHP and Billiton
- ▶ Woolworths and Franklins
- ▶ Compaq and Hewlett Packard
- ▶ Foxtel and Optus pay television
- ▶ Suncorp Metway and GIO
- ▶ Gillette and Wilkinson
- ▶ Australian Pharmaceutical Industries and Sigma\*

[www.accc.gov.au/merger/mergbac3.htm](http://www.accc.gov.au/merger/mergbac3.htm)

## allow anti-competitive conduct in the public interest

Competition may not always be in the public interest. The law allows the ACCC to authorise anti-competitive conduct if it is satisfied that the public benefit outweighs any detriment. This authorisation protects people or businesses from legal action for breaches of many of the competition provisions of the Trade Practices Act.

- ▶ Royal Australasian College of Surgeons surgical training program and role in determining whether overseas-trained surgeons may practise in Australia
- ▶ banks agreement to remove fees they charge each other as part of the EFTPOS system

[www.accc.gov.au/adjudication/newadjud1.htm](http://www.accc.gov.au/adjudication/newadjud1.htm)

## ensure compliance by the professions

The Trade Practices Act now covers anti-competitive actions by professionals such as doctors, lawyers and accountants.

- ▶ price fixing and primary boycott breaches by Australian Medical Association (Western Australia branch) and two officers—penalties and costs of \$285 000
- ▶ Rockhampton obstetricians' boycott of 'no gap' billing \$97 000 repaid to patients
- ▶ Berwick Springs doctor attempts to induce boycott of bulk billing and after-hours medical services at medical centre

[www.accc.gov.au/speeches/fs-speeches.htm](http://www.accc.gov.au/speeches/fs-speeches.htm)

## improve compliance through education and information

Material produced to reduce the need for enforcement includes sector guides for small business, franchising, health, rural producers, travel and tourism, telecommunications standards as well as guides on exports, access, country of origin, advertising and selling, warranties and refunds.

[www.accc.gov.au/pubs/frontpage.htm](http://www.accc.gov.au/pubs/frontpage.htm)

\* merger opposed



## assess certification trade marks

Certification trade marks certify that goods or services are of a particular standard; for example that a good is of a particular quality, made in a particular place or of a particular material. IP Australia (intellectual property) first assesses certification trade marks to ensure that they do not conflict with existing trade marks. If IP Australia approves an application, the ACCC then assesses whether the certification trade mark might restrict competition or deceive consumers.

[www.accc.gov.au/adjudication/certification/certification.html](http://www.accc.gov.au/adjudication/certification/certification.html)

## maintain information registers

Registers available to business include: anti-competitive conduct, prices surveillance, trade marks, undertakings, authorisations, notifications, mergers and acquisitions, investigations, access to services, consumer protection, product safety, telecommunications.

[www.accc.gov.au/pubreg/pubreg/htm](http://www.accc.gov.au/pubreg/pubreg/htm)

## HOW WE DO IT

### prevent price fixing and market sharing

#### vitamins

The ACCC's investigation into the cartel arrangements of Roche Vitamins Australia, BASF Australia and Aventis Animal Nutrition vitamin manufacturers followed the announcement by the US Department of Justice of similar proceedings taking place in the United States. Under the US leniency policy no action was taken against Aventis (then known as Rhone-Poulenc Animal Nutrition) after the company admitted involvement in the cartel. The other two companies were heavily fined for their part in sharing the market and fixing the prices for the supply of animal vitamins A and E.

In Australia, Aventis approached the ACCC with a similar admission of involvement. Collusion of the companies had involved meetings and telephone conversations during which agreements were reached on prices for the vitamins. No other Australian vitamin company was involved.

The three companies, who shared 90 per cent of the market, cooperated with the ACCC's investigation over a period of 18 months

which led to court proceedings before Justice Lindgren in the Federal Court. The cooperation of the companies avoided a long and costly trial.

The ACCC and the companies reached agreement on penalties to be recommended to the court of \$15 million for Roche, \$7.5 million for BASF, and \$3.5 million for Aventis. Both the \$15 million penalty against Roche and the combined \$26 million penalties are the highest ever in the history of trade practices proceedings in Australia.

Since the successful conclusion of this case the ACCC pursued its investigation of the global price fixing of vitamin C. The ACCC has obtained leave of the Federal Court to serve proceedings on F Hoffman–La Roche, BASF AG, and Roche Hong Kong located in Switzerland, Germany and Hong Kong.

'One of the things big business hates and fears most is publicity it doesn't control. All large companies spend millions each year ensuring that everything said and written about them is controlled and nice.'

Alan Kohler, Australian Financial Review

### electrical transformers

The ACCC received an email from an anonymous source dubbed the 'dibber-dobber' who, when contacted, named another person working in the electric transformer industry willing to give full details of cartel arrangements operating within the industry. Confronted with insider information, the five companies involved, ABB Power Transformers, Schneider Electric (Australia), Wilson Transformer Company, Alstom Australia and AW Tyree Transformers, agreed to cooperate with the ACCC and provided full reports of their involvement.

Secret meetings had apparently taken place between senior executives in hotel rooms, airport lounges and even one of their homes to rig the outcomes of multi-million dollar contracts. Allegedly they colluded in competing for tenders, exchanging detailed pricing information and agreeing to fix prices and share customers. The companies agreed which would submit the lowest bid for particular tenders.

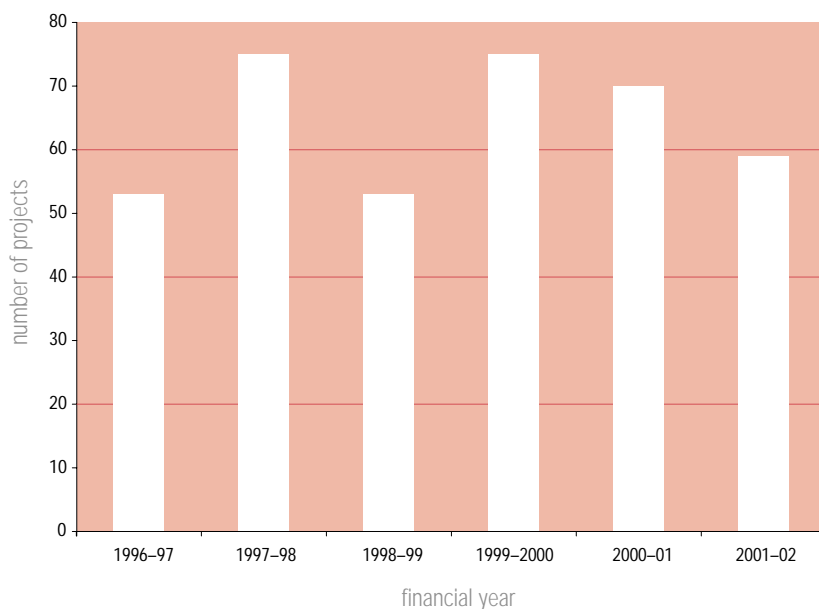
The case involved both power and distribution transformers. The annual value of these transformers is about \$160 million. The unlawful conduct by the companies directly disadvantaged efficient small businesses, producers, businesses and eventually families in regional areas.

After lengthy negotiations with the ACCC one company accepted liability and agreed the penalty to be put to the court. All the others except ABB agreed liability but did not agree penalties.

Justice Finkelstein heard the case in the Federal Court in Melbourne. The judge declared the companies' actions unlawful and awarded penalties totalling about \$20 million and penalties of up to \$150 000 against individuals for their participation. The court indicated that the penalties would have been much higher were it not for the cooperation of the companies during the ACCC investigation. The case with ABB is still proceeding.

The penalties ordered by the court for the companies' managing directors are the highest individual penalties imposed by the court in the history of trade practices proceedings in Australia.

### investigations into cartels



'There is a great danger of allowing too great an emphasis to be placed on the respectability of the offender and insufficient attention being given to the character of the offence. It is easy to forget that these individuals have a clear option whether or not to engage in unlawful activity, and have made the choice to do so.'

Justice Finkelstein

### THE LAW

#### parts of the Trade Practices Act relevant to the rights and obligations of business

IV anti-competitive agreements, price fixing, boycotts, misuse of market power, exclusive dealing, restriction of trade, resale price maintenance that specifies a minimum price below which goods may not be resold, mergers or acquisitions that substantially lessen competition, exemptions, penalties and remedies

IVA taking unfair advantage in commercial and consumer transactions

IVB industry codes of practice

VII authorisation and notification, granting of immunity

anti-competitive conduct is illegal for all businesses in Australia

### enforcement

Restrictive trade practices are not dealt with by the states but only by the ACCC. The ACCC supports industry self regulation, codes of conduct and standards. It also conducts merger and acquisition analysis. If mediation is unsuccessful then to enforce the restrictive trade practices provisions of the Trade Practices Act the ACCC can instigate:

- › injunction orders
- › enforceable undertakings
- › divesting shares or assets of merged businesses
- › damages
- › variation to contracts
- › corrective advertising
- › community service orders

Breaches of anti-competitive conduct can be penalised by fines of up to \$10 million for companies and \$500 000 for individuals.

'Australian companies are all talk and little action when it comes to ensuring compliance with the laws regulating how they treat their customers, employees and competitors.'

Australian Financial Review 28 October 2002 commenting on Ernst and Young national compliance survey

## WHAT TO READ

### ACCC publications for business

#### the law

- › Trade Practices Act for: primary producers, retailers, service industries, real estate industry
- › Small business and the Trade Practices Act: a practical guide for small business
- › The Trade Practices Act and the ACCC—a small business overview
- › Advertising, selling and the Trade Practices Act
- › Country of origin claims and the Trade Practices Act
- › Textile, clothing and footwear industries—country of origin guides
- › Fair treatment: guide to the Trade Practices Act for the advertising or promotion of medical and health services
- › Cooperation policy for enforcement matters
- › Intervention in private proceedings
- › ICPEN brochure—protecting consumers worldwide
- › Straight talking—advertising, selling and the Trade Practices Act. (video)

#### misleading, deceptive, unconscionable conduct

- › Competing fairly forum video and brochures
- › Fair game or fair go—unconscionable conduct in business
- › Guaranteed a loan for someone? Lost your house?
- › Are you happy with your retail tenancy lease?
- › Do you supply goods or services to major retail chains?

#### small business

- › Storecharter: a service charter for stores serving remote and Indigenous communities
- › Best and fairest: compliance training package
- › Refusal to deal
- › ACCC briefing
- › News for business—unconscionable conduct

#### franchising

- › The franchisee's guide to the franchising code of conduct
- › Franchising code of conduct compliance manual
- › Bought a franchise without enough information?

## 3. regulated industries

The principal barrier to competition in network industries is their reliance on facilities with monopoly characteristics.

The task is to remove the monopoly element of prices for the benefit of users, who are often businesses.



promote competition in the network industries: electricity, gas, telecommunications, aviation and airports, waterfront and shipping, rail, and post.

monitor prices of selected goods and services

[www.accc.gov.au/utipubreg/pubreg.htm](http://www.accc.gov.au/utipubreg/pubreg.htm)

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#### electricity

ensure access to wire networks

set revenue caps for the transmission network service providers

authorise changes to the national electricity code

The high voltage wire networks along which electricity is transmitted are subject to regulation by the ACCC which sets the maximum income the network can earn, while ensuring that the power stations that generate electricity at one end and consumers who use electricity at the other end have access to the network.

[www.accc.gov.au/electric/fs-elec.htm](http://www.accc.gov.au/electric/fs-elec.htm)

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#### gas

implement the national gas code

determine conditions of access to gas transmission pipelines

arbitrate access disputes

Certain designated pipelines along which gas is transmitted from gas production fields to gas retailers are subject to access regulation by the ACCC. The ACCC determines the conditions of access, including the access price, and arbitrates any disputes that arise.

[www.accc.gov.au/gas/fs-gas.htm](http://www.accc.gov.au/gas/fs-gas.htm)

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#### telecommunications

maintain competitive and consumer safeguards across the industry

determine which telecommunications services should be regulated

arbitrate disputes between industry members

The ACCC monitors and ensures competition and safeguards consumer rights within the telecommunications industry. It also determines which telecommunications services should be regulated and, when necessary, arbitrates disputes between industry members over access to each others telecommunications network.

- ▶ Telstra drops its wholesale price for high speed data services by 25 per cent

- ▶ Foxtel-Optus pay TV deal approved  
[www.accc.gov.au/telco/fs-telecom.htm](http://www.accc.gov.au/telco/fs-telecom.htm)

## aviation and airports

assess proposals for price increases for air traffic control services by Airservices Australia

monitor prices, quality of services and administer financial reporting requirements for major private airports

ACCC monitors operators' charges to ensure market power is not being exercised unfairly.

- ▶ Virgin Blue's access to common-user terminals at Sydney, Brisbane and Melbourne airports

- ▶ annual airline costs at Perth Airport reduced by 5.5 per cent  
[www.accc.gov.au/airport/fs-air.htm](http://www.accc.gov.au/airport/fs-air.htm)

## waterfront and shipping

assess stevedoring prices and administer liner shipping arrangements

[www.accc.gov.au/fs-transport.htm](http://www.accc.gov.au/fs-transport.htm)

## rail

ensure access to interstate rail track

cap freight rail prices

The ACCC administers the terms and conditions of access to rail tracks owned or leased by Australian Rail Track Corporation.

[www.accc.gov.au/fs-rail.htm](http://www.accc.gov.au/fs-rail.htm)

## post

approve changes to charges of postal services operated exclusively by Australia Post

Australia Post has an exclusive right to deliver letters within Australia and issue postage stamps. Other courier services can be used for letters weighing more than 250g or costing four times the basic postage rate of 50 cents.

[www.accc.gov.au/fs-transport.htm](http://www.accc.gov.au/fs-transport.htm)

## petrol

monitor the prices of petrol, diesel and liquefied petroleum gas

The ACCC monitors petrol, diesel and liquefied petroleum gas prices in the eight capital cities and around 110 country towns as well as collecting data on petrol price cycles in Sydney, Melbourne, Brisbane, Adelaide and Perth. Information is available on the internet on what affects petrol prices in metropolitan and country areas.

[www.accc.gov.au/petrol/petrol\\_price\\_cycles.htm](http://www.accc.gov.au/petrol/petrol_price_cycles.htm)

## insurance

check costs and premiums in the public liability and professional indemnity sectors of the insurance market

The ACCC reports on the impact on insurance premiums of measures taken by governments to reduce and contain legal and claim costs and to improve the data for insurers to evaluate and price risk.

[www.accc.gov.au/fs-insurance.htm](http://www.accc.gov.au/fs-insurance.htm)



## HOW WE DO IT

**electricity**

Before restructuring, each state government generally owned and operated the infrastructure that generated and sold electrical power within the state. Now in most states, selling electricity to consumers is deregulated and subject to market forces. This has resulted in improved investment, lower electricity prices, increased reliability and gains in productivity. As a result of deregulation there is now a wholesale market for generation which is competitive.

**gas**

When Australian governments agreed to develop a national and competitive gas market, gas basins were opened to new exploration, free trade between states was allowed and governments sold or corporatised the transmission, distribution and retail segments of the industry. Gas exploration and production has always been undertaken by industry.

Under the national gas code, the ACCC regulates access to gas transmission pipelines in all states and territories except Western Australia. This involves approving access arrangements, which set out terms and conditions including price for access to pipelines and arbitrating any disputes.

**telecommunications**

The customer access network directly connects 10 million lines to the nearest Telstra exchange. This infrastructure of copper wires is owned by Telstra. Telephone calls inevitably start and finish on those wires but the connecting transmission can be switched to other carriers who are allowed access to Telstra's network on competitive terms. The ACCC ensures access to the network is reasonable.

**aviation and airports**

Many airports, once government-owned, are now operated privately. The ACCC monitors the prices, costs and profits for the supply of aeronautical services (like runways, taxiways, aprons, departure lounges, refuelling) and related services (like car parking, taxi ranks) at Adelaide, Brisbane, Canberra, Darwin, Melbourne, Perth and Sydney airports; as well as monitoring service quality at these and Alice Springs, Coolangatta, Hobart, Launceston and Townsville airports.

**rail**

The railway tracks owned or leased by the Australian Rail Track Corporation are part of the interstate mainline standard gauge track linking Kalgoorlie in Western Australia, Adelaide, Wolseley and Crystal Brook in South Australia, Broken Hill in New South Wales and Melbourne and Wodonga in Victoria. The use of the national rail network is promoted by having a single point of access for rail freight services.

**post**

The ACCC reviews prices of Australia Post reserved services. For example the ACCC did not object to Australia Post's recent request to increase the price of the basic postage stamp from 45 cents to 50 cents; the first rise since 1992. Australia Post has to apply to the ACCC to increase the cost of various postal services.

The decision was taken to ensure the most appropriate balance between the interests of mail users and the sustainability of Australia Post's postal services. The price rise will help Australia Post meet its obligations in rural and remote areas. The ACCC opposed price rises for bulk mail and large letters.



## THE LAW

## parts of the Trade Practices Act that deal with regulated industries

IIA access to national infrastructure facilities, such as electricity grids and natural gas pipelines

X international liner cargo shipping

XIB anti-competitive conduct in telecommunications

XIC access to services for telecommunications

## regulation

Regulatory functions of the ACCC include compliance with price caps, revenue and pricing arrangements, access to natural gas transmission pipelines, services in telecommunications and airports, arbitration, audits and direct monitoring of prices.

## additional legislation affecting the work of the ACCC includes

- ▶ **Airports Act** focusing on access, prices and the quality of service at Australia's privatised airports
- ▶ **Australian Postal Corporation Act** defining access to the postal network
- ▶ **Broadcasting Services Act** covering the payment of TV licences
- ▶ **Gas Pipeline Access Act** regulating gas transmission pipelines
- ▶ **Telecommunications Act** detailing the telecommunications provisions of the Trade Practices Act
- ▶ **Trade Marks Act** governing the approval of a trade mark that certifies that goods or services are of a particular standard of quality, origin, material or mode of manufacture
- ▶ **Financial Sector Reform Act** maintaining competition in the financial services sector especially in the areas of foreign exchange contracts and credit. The ACCC administers competition matters within the sector and consumer protection involving health insurance.

## WHAT TO READ

## ACCC publications on regulated industries

## utility regulators forum

- ▶ Network (joint newsletter of the utilities regulators forum)
- ▶ National regulatory reporting for electricity distribution and retailing businesses
- ▶ Comparison of building blocks and index-based approaches to regulation of monopoly prices
- ▶ Quality of service monitoring
- ▶ Information gathering for ring fencing and other regulatory purposes
- ▶ Best practice utility regulation discussion paper
- ▶ Incentive regulation, benchmarking and utility performance

## electricity and gas

- ▶ National regulatory reporting for electricity distribution and retailing businesses
- ▶ Draft greenfields guideline for natural gas transmission pipelines
- ▶ Post-tax revenue handbook
- ▶ Infrastructure industries: energy (gas and electricity)

## telecommunications

- ▶ Telecommunications infrastructures in Australia 2001—a BIS Schrapnel report
- ▶ Changes in the prices paid for telecommunications services in Australia: annual report
- ▶ Telecommunications competitive safeguards: annual report
- ▶ Inquiries into the declaration and revocation of services and exemptions
- ▶ Telstra's compliance with the price control arrangements: annual report
- ▶ Fair call advertising guide



### shipping and waterfront

- ▶ Trade facilitation agreement for northbound trades to SE Asia
- ▶ Container stevedoring monitoring reports

### aviation and airports

- ▶ Phase II airports
- ▶ Regulatory reports: Brisbane, Melbourne, Perth, Sydney
- ▶ Infrastructure industries: aviation.

### health insurance

- ▶ Reports to the Australian Senate on anti-competitive and other practices by health funds and providers in relation to private health insurance

## utility regulators forum ■ ■ ■ ■ ■ ■ ■ ■ ■ ■

The ACCC, with state and territory regulatory agencies, set up a public utility regulators forum to share information and develop understanding of the activities of various regulators and industries as they implement reform. The forum was formed when public utilities in many industries were experiencing competition for the first time. All regulators are involved in encouraging efficient price setting principles, ensuring access to essential facilities, and minimising inefficiencies of inter-state trade. The forum publishes a newsletter with updates on regulatory activities as well as articles on common challenges. ■ ■ ■ ■ ■ ■ ■ ■ ■ ■ ■ ■ ■ ■ ■ ■

**WHY WE DO IT.** It is the stated aim of the ACCC to bring about greater competitiveness in every sector of the economy working on the fundamental principal that competition benefits consumers, business and the wider community.

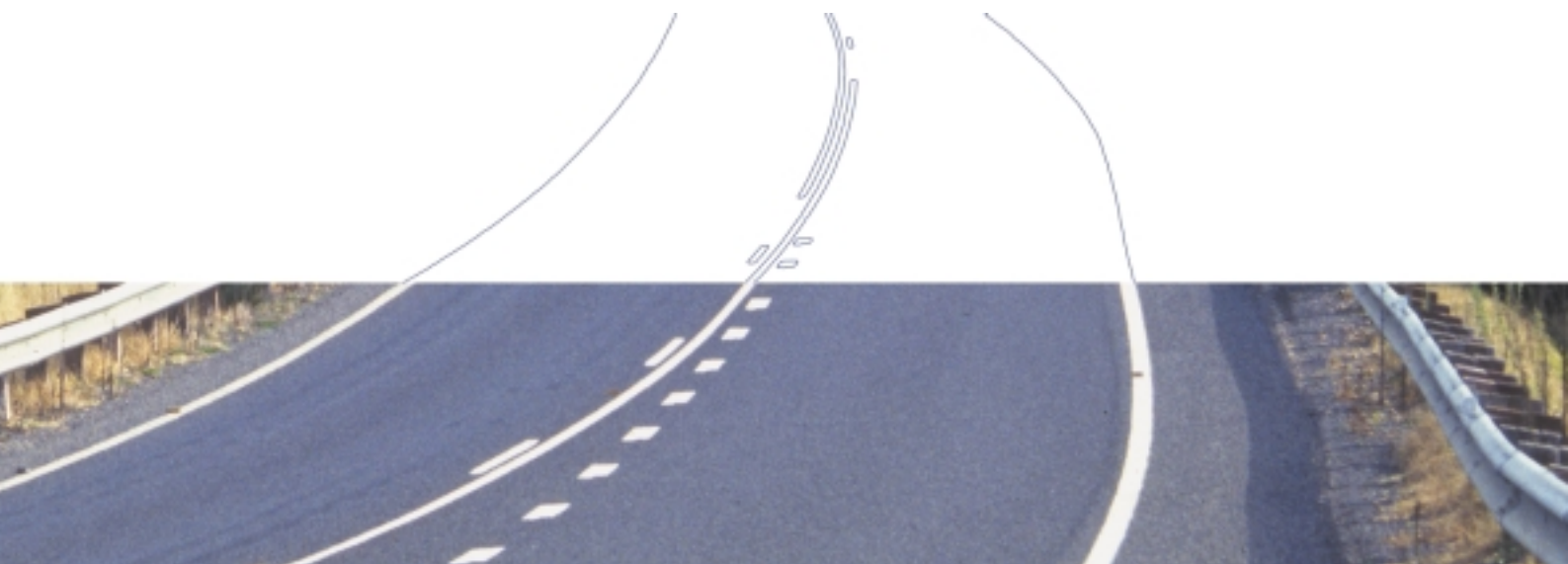
For consumers, the advantages of competition are more obvious. An efficient market allows them to choose products and services from a large range at competitive prices. With results on the board the ACCC is often portrayed as a pro-consumer body that confronts big business. It is widely known as the consumer watchdog, keeping an eye out for exploitation of the little guy. There can be little doubt that to protect consumers, the ACCC's most effective activity is not to selectively target faulty goods or misleading conduct after the deed is done but to ensure, right at the beginning, that businesses compete fairly.

Admittedly it may not be so clear cut that enforcing fair trading laws works to the real benefit of the business community. But on closer scrutiny competition does energise companies. Those with good ideas can more readily enter a market where there is an incentive for innovation and new product design. To most it makes sense that on a level playing field powerful competitors may need to be persuaded not to use their market power unfairly, or indeed illegally.

'The job of the ACCC is to make sure we have the best possible consumer environment for people to do business in; to get the balance right between what's best for businesses while making sure consumer rights are protected.' David Bell CEO Australian Banking Association

In a recent survey, small businesses in New South Wales indicated that they appreciated protection. Almost two in three of those surveyed thought big business misused their power and believed the ACCC should be given more power to halt anti-competitive conduct.

The opposite view was given in an Australian Chamber of Commerce and Industry survey that showed many large companies thought the ACCC didn't understand commercial realities. Many of these organisations reasonably want to become even larger if necessary through mergers. Some feel that it would be acceptable for them to dominate the domestic market to such an extent that the high profits earned at home could subsidise their overseas expansion.





But reports suggest that few firms with virtually unrivalled domestic positions are internationally competitive. Research shows that tough competition at home is the basis for a business to gain and then sustain competitive advantage internationally.<sup>1</sup> In the absence of merger law, Australian firms facing competitive firms would be handicapped. How competitive would Australian exporters be if they had to source finance from a monopoly bank, purchase their energy from a monopoly supply and use a monopoly transport provider?

The ACCC is not, as some would suggest, blinkered or biased against the benefits of size. It rejects only about 5 per cent of proposed mergers. Mergers allow organisations to grow to a size that gives them access to more capital and better technology, which is fine in a competitive world as long as less competition isn't the catalyst for higher prices and less innovation.

In addition Australia is one of the few countries in which businesses have the legal option of seeking authorisation from the ACCC for an anti-competitive merger on the grounds of public benefit.

There is ongoing evidence that competition is good for productivity, the economy and employment. The Australian economy was one of only three to experience strong economic acceleration during the 1990s. OECD research showed Australia's annual rate of growth, at constant prices, averaged 3.6 per cent, compared to 3.2 per cent in the United States, 2.3 in the United Kingdom and 1.9 per cent in both Germany and France.<sup>2</sup> The same study showed that anti-competitive market restrictions reduced the employment rate by three percentage points from the average.

Such international economic statistics don't always convince consumers that competition really is in their own best interest. More persuasive evidence is provided by money in their pocket; cheaper domestic prices for essential services. In the last five years real prices in Australia for electricity, national rail freight, international, long distance and mobile telephone calls have all become cheaper.

Deregulation of the telecommunications market has resulted in prices for telephone services dropping on average by more than 21 per cent, international calls were 53 per cent cheaper, long distance calls 23.5 per cent and mobile calls 19 per cent.<sup>3</sup> These price reductions can be directly traced back to increased competition. In the same time period the number of licensed telecommunications carriers increased from 14 to 90 and, at last count, there were 13 mobile telephone providers.

It is a basic tenet of the ACCC's work that in the long run the rights of both consumers and business can only be protected by a combination of vigorous competition in the market place and effective consumer protection and fair trading laws applied by an independent regulator. To define the precise role of the regulator is the subject of an ongoing debate.

There is always more that could be done right now but the future directions of the ACCC may well be set by the findings of the inquiry, chaired by Justice Sir Daryl Dawson, into the competition provisions of the Trade Practices Act. The review, recently released, covers matters such as criminal penalties against major cartels, the abuse of market power and change to the mergers clearance and authorisation processes.

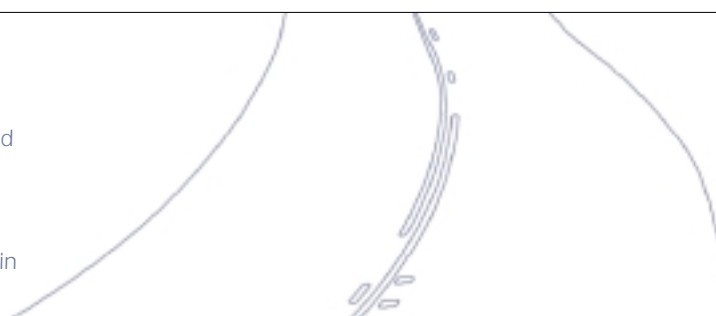
In the meantime the ACCC will continue to rigorously promote competition and fair trade, in the belief that by doing so, even indirectly, it is helping you.

this article is based on recent speeches made by commissioners of the ACCC.  
[www.accc.gov.au/speeches/](http://www.accc.gov.au/speeches/)

\* 1.Porter, ME, *The Competitive Advantage of Nations*, Macmillan, London 1990 p.117

2.Organisation for Economic Co-operation and Development: *Product and labour markets interactions in OECD countries*, OECD Working Paper 12 September 2001 p. 11

3.ACCC, *ACCC telecommunications reports 2000–01*, Report 2: *Changes in prices paid for telecommunications services in Australia* p. 72





{1} the commission

WHO WE ARE

{2} regional directors

chairman  
Professor Allan Fels AO

commissioners:

Sitesh Bhojani  
enforcement, professions, health

Ross Jones  
mergers and acquisitions, aviation,  
petroleum, media and broadcasting

John Martin  
small business, transport, rural and regional

Jennifer McNeill  
enforcement, consumer protection, adjudication

Ed Willett  
energy, enforcement

New South Wales  
Rose Webb  
phone 02 9230 9133

Victoria  
Tom Fahy  
phone 03 9290 1800

Queensland  
Alan Ducret  
phone 07 3835 4666

Townsville  
Tony Hilton  
phone 07 4729 2666

Northern Territory  
Derek Farrell  
phone 08 8946 9666

South Australia  
Bob Weymouth  
phone 08 8213 3444

Western Australia  
Sam Di Scerni  
phone 08 9325 3622

Tasmania  
Peter Clemes  
phone 03 6215 9333

450 staff

### introducing Ed Willett

The ACCC's newest commissioner is Ed Willett who was appointed in January 2003 for a five-year term. Ed Willett specialises in energy matters. Until being appointed to the ACCC this year, he was the inaugural executive director of the National Competition Council for seven years. Before that he worked as an assistant commissioner with the Industry Commission, helped develop the Commonwealth Department of Industry, Science and Technology's role in business law and regulation, spent three years as deputy head of the Commonwealth Office of Regulation Review, and was involved in other Industry Commission inquiry work and research. He also spent three years with the New Zealand Ministry of External Relations and Trade as an advisor on international economics and trade and eight years as an economist with the Department of Defence.

Ed Willett has degrees in law and economics and a post-graduate diploma in international law.

The ACCC Chairman and full-time commissioners are appointed by the Governor-General for terms of up to five years after a majority of state and territory governments have supported the selection. The Commission's decisions are made at a meeting of the commissioners held once a week. The Commission is held accountable for its enforcement activities through the courts, tribunals, Parliament and the Commonwealth Ombudsman.



### {3} the infocentre

The infocentre is the primary contact point of the ACCC. The staff of the centre receive more than **250 telephone calls a day** and up to **200 emails** a week. If appropriate, information received is passed on to investigators who may pursue the matter.

Many callers to the infocentre are provided with **information** on their **rights** and **responsibilities** as businesses or consumers.

### {4} publications

Many ACCC publications are free and available on the ACCC website [www.accc.gov.au](http://www.accc.gov.au). Some have associated charges and need to be ordered.

A full list of publications is available on the website [www.accc.gov.au](http://www.accc.gov.au)

corporate publications include:

- ▶ ACCC journal: (\$100 annual subscription)
- ▶ ACCC update: quarterly newsletter (free)
- ▶ ACCC consumer express— free monthly newsletter about recent ACCC activities
- ▶ Keeping good company— insight into the ACCC (video) (\$10)

#### Infocentre

for all business and consumer inquiries.

ACCC Infoline: **1300 302 502**

email: [infocentre@acc.gov.au](mailto:infocentre@acc.gov.au)

#### ACCC national office

phone: (02) 6243 1111

internet: [www.accc.gov.au](http://www.accc.gov.au)

### *Geoffrey Robertson hypothetical*

On Thursday 10 April Geoffrey Robertson conducted a hypothetical session in Melbourne that was filmed for the competing fairly forum video series. Those taking part included Professor Allan Fels, Dick Smith, Senator George Brandis, Justice Murray Wilcox and Alan Griffin, the opposition spokesman on consumer affairs.

extracts from, 'delivering the goods':

Geoffrey Robertson: Allan Fels, you are, I suppose, the law in the jungle. How do you see yourself, as a sort of lion king keeping the predators in order or a sort of hyena keeping the place relatively clean?

Senator George Brandis: I think the government funds the ACCC sufficiently. And with the resources available to it I think the ACCC does a particularly good job.

Justice Murray Wilcox: As a general observation, I think that some of the amounts that have been agreed between the ACCC and offenders have been too low.

If you would like to see and hear the complete video presentation delivering the goods, contact ACCC publishing on (02) 6243 1143. The cost is \$10.



