Australian Competition and Consumer Commission

Submission to the Inquiry into the impact of Part IV of the *Trade Practices Act 1974* on the retention and recruitment of medical practitioners in rural and regional Australia.

29 November 2001

Executive Summary

This submission has been prepared by the Australian Competition and Consumer Commission (the Commission) in response to a call for submissions by the Review Committee who has been asked by the Government to review the impact of Part IV of the *Trade Practices Act 1974* (the Act) on the recruitment and retention of medical practitioners in rural and regional Australia.

The Commission proposes to provide two submissions to the Review Committee – the purpose of the first is to provide background factual information and the second will examine issues.

The Commission is the independent statutory authority which among other functions is responsible for compliance with, and enforcement of the Act. The Act proscribes certain anti-competitive conduct and unconscionable, misleading, deceptive or false trading practices.

The Act has applied to those professionals, including medical practitioners, practising their professions by means of a corporate business structure since 1974. Under legislation introduced as part of National Competition Policy, the application of Part IV of the Act was extended in 1996 to non-incorporated businesses including medical practitioners operating under such arrangements.

Part IV of the Act relates to restrictive trade practices such as anti-competitive agreements, primary and secondary boycotts and price-fixing. The Act also recognises that the public interest may not always be met by the operation of competitive markets. The authorisation process in the Act (Part VII) addresses this possibility by allowing the Commission to grant immunity from the application of many of the restrictive trade practices provisions of the Act when the public benefit test is satisfied.

The Commission seeks to achieve compliance with the Act by enforcement action, but also by informing the community about the Act through compliance material, speeches and education programs to prevent future breaches of the Act.

The Commission has undertaken a major educational campaign focusing on the health sector both prior to the extension of the Act in 1996 and since that time. The Commission has given presentations at conferences, seminars and formal meetings of professional associations, published specific compliance material and organised several conferences dealing with trade practices issues for the health sector and the professions more generally.

In terms of enforcement action, the Commission has not had a particular focus on conduct of medical practitioners in rural and regional areas. Areas of complaints about the medical sector that are of concern to the Commission relate to agreements to stop bulk billing, access to hospitals, agreements on fees for service, boycotts of hospitals and difficulties by overseas

trained practitioners to practise in Australia. **The Commission has no (and never had any) concerns about genuine rosters, which do not constitute a breach of the Act.**

Since 1996 the Commission has only taken court action against medical practitioners and their associations in two instances: the Australian Society of Anaesthetists (ASA) for price fixing and anti-competitive agreements; and the Australian Medical Association (AMA) and Mayne Nickless for price fixing and other anti-competitive conduct.

The Commission has received four authorisation applications from medical practitioners and their associations since 1996 – the Commission granted authorisation in July 1998 until June 1999 to the Federal and South Australian branch of the AMA to collectively negotiate and give effect to a fee for service agreement for the remuneration of visiting medical officers treating public patients in South Australian rural public hospitals; and, on 8 October 1999 the Commission denied authorisation to the ASA who had applied for authorisation to undertake negotiations with health funds regarding rates and conditions on behalf of its members. The Commission is currently considering the application for authorisation by the Royal Australasian College of Surgeons (RACS) for a number of its processes; and, the application for authorisation by the Royal Australian College of General Practitioners (RACGP) for GPs to agree on fees within certain medical practices. The Commission is awaiting a supporting submission from the RACGP.

Following a workshop held earlier this year and attended by GP representative organisations, various government departments and the Commission, the Commission undertook to produce a Guide to the Trade Practices Act for General Practitioners and consult all workshop participants before the Guide was publicly released. The current Revised Draft was released on 30 March 2001. The guide is now finalised however the Commission has postponed the release of it until the final determination of the RACGP authorisation has been issued.

The AMA has raised concerns about the impact of the Act on GPs in rural areas and the way in which the Commission administers the Act. The AMA's concerns came about as a result of hypothetical scenarios created by the AMA for the purpose of developing a trade practices compliance program. Since the AMA raised these issues, the Commission has repeatedly asked the AMA to provide evidence of these concerns. Notwithstanding this, as recently as 22 November 2001, the AMA is still making these assertions but as yet, no evidence has been forthcoming.

1. Introduction

This submission has been prepared by the Australian Competition and Consumer Commission (the Commission) in response to a call for submissions by the Review Committee who has been asked by the Government to review the impact of Part IV of the *Trade Practices Act 1974* (the Act) on the recruitment and retention of medical practitioners in rural and regional Australia. A copy of the terms of reference is at **Attachment A**.

The Commission is keen to assist the Review Committee to clarify any misunderstanding about the implications of the Act for medical practitioners and country practices and propose solutions to ensure the Act is better understood by practitioners. The Commission's primary concern in all its activities in the professions, including the medical profession, is to ensure consumers are protected from any anti-competitive behaviour which can lead to higher prices and poorer services.

The Commission proposes to provide two submissions to the Review Committee. The purpose of the first is to provide background factual information outlining the role of the Commission, the application of the Act and the Commission's past and current work in the medical sector. The second submission will address the relevant issues raised in relation to the recruitment and retention of medical practitioners in rural and regional areas.

2. The Commission

The Commission is the independent statutory authority which among other functions is responsible for compliance with, and enforcement of, the Act. The Commission also administers the *Prices Surveillance Act 1984* and has responsibilities under other Acts.

The Commission is the only nationally operating agency dealing generally with competition matters and the only agency with responsibility for enforcement of the Act and the State/Territory Competition Codes.

The Commission's stated objectives are to:

- improve competition and efficiency in markets;
- foster adherence to fair trading practices in well-informed markets;
- promote competitive pricing wherever possible and to restrain price rises in markets where competition is less than effective;
- inform the community at large about the Trade Practices Act and the Prices Surveillance Act and their specific implications for business and consumers; and
- use resources efficiently and effectively.

For the purposes of the matters in this report, the Commission is primarily a law enforcement agency. However, enforcement ultimately takes place in the Australian court system. The Commission does not have powers to impose fines or other penalties for contravention of the law. It also does not make the law. Finally, the Commission shares its right to take legal action under the Act with private parties. For example, in the medical sector, professional

associations, practitioners, health funds, hospitals, patients and others could also take legal action under the Act.

2.1 Professions Team

Following increased funding in the May 2001 Federal Budget, a Professions Team has been created to work full time on the professions and enhancing the application of the Act to the professions.

The Professions Team works on a broad range of compliance and adjudication issues relating to the professions. Compliance work includes enforcement, but also information and education. The focus of the Professions Team is no more on medical practitioners than other professionals. The creation of the Professions Team has meant that the Commission now has the resources to examine compliance issues in allied health professions such as dentists and physiotherapists and other non-health professions such as veterinarians, lawyers, accountants, valuers, surveyors, architects and engineers.

Prior to this increase in funding, the Commission has had a small unit of 2-3 staff since 1995 dealing with health-related issues. These officers were also involved in the Commission's role of educating and informing the medical and other health professions.

2.2 Rural and Regional Program

The Commission has established a Rural and Regional Program with additional resources also announced in the May 2001 budget. The Program's primary strategy is the development of communication and education outreach in rural and regional areas throughout Australia. The program is managed by a newly created Rural and Regional Unit.

The main initiatives of the Program are:

- establishing partnerships with agencies in rural and regional communities;
- regular visits by Commission staff to rural and regional centres;
- communicating regularly with rural and regional centres using video-conference and satellite broadcast technology (eg Competing Fairly Forums);
- placing regular advertisements and articles in the rural and regional press;
- establishing a Rural and Regional Consultative Committee with broad geographic and business representation; and
- creating publications specifically relevant to rural and regional areas.

Outreach Officers are located in Hobart, Melbourne, Sydney, Tamworth, Brisbane, Townsville, Darwin, Adelaide and Perth. The Director, Rural and Regional Services, is located in Canberra.

3. Application of the Act to medical practitioners

Since 1974 the restrictive trade practices provisions (sometimes also known as "the competitive conduct rules") in Part IV of the Act have applied to those professionals, including medical practitioners, practising their professions by means of a corporate business structure in Australia. In particular, "services" has always been defined in the Act to expressly include "work of a professional nature"[1].

Commonwealth Constitutional limitations excluded from reach of Part IV of the Act medical practitioners practising in partnerships of natural persons or other unincorporated structures. This had meant that practitioners who did not incorporate their practices and who practised on an intra State basis were not subject to the provisions in Part IV of the Act. Exceptions to that exclusion were practitioners whose conduct was in, or in relation to, trade or commerce between Australia and other countries; or across Australian State or Territory boundaries or within Australian Territories; or the supply of services to the Commonwealth or its authorities and instrumentalities.

A variety of Australian State and Territory legislation or regulation had also exempted certain conduct by some professions from reach of the Act by specifically approving or authorising such conduct. For example, advertising restrictions and fee setting regulations.

In 1991 the Council of Australian Governments (COAG) established an Independent Committee of Inquiry to consider and advise COAG on the need for a National Competition Policy. The Committee was chaired by Professor Fred Hilmer.

The "Hilmer" report observed that:

> "Whatever significance is attributed to the professions generally, it is important to emphasise that their partial exclusion from the Act is primarily due to a constitutional limitation which is unrelated to the status of professions. The scope of the exception depends largely on the legal form of the business, which varies widely across professions…The overall result is patchy and difficult to justify on public policy grounds."[2]

COAG agreed in April 1995 to implement a National Competition Policy and, as part of this agreement, to extend the application of Part IV of the Act to all unincorporated businesses.

In 1995 each of the Australian State and Territory Parliaments passed legislation known as *Competition Policy Reform Acts*, which achieved the goal of extending Part IV of the Act to unincorporated businesses. This was done by including as a schedule to that State's or

[1] See s.4 of the Act.

[2] *National Competition Policy* Report by the Independent Committee of Inquiry, August 1993, Australian Government Publishing Service, at p.135.

Territory's *Competition Policy Reform Act* a "Competition Code" which mirrored the provisions in Part IV of the Act but changed the reference in those provisions from "a corporation" to "a person". The legislation took effect on 21 July 1996.

Therefore, since 1974 the Act has covered incorporated medical practitioners' businesses, as well as unincorporated medical practitioners' businesses in the Territories. Since 1996 medical practitioners operating via a partnership of natural persons or as a sole practitioner and their associations have been subject to the competition provisions of the Act and the Competition Codes.

It should be noted that with regard to consumer protection, unincorporated medical practitioners' businesses are covered by the State and Territory Fair Trading Acts, which apply to corporations and natural persons, and substantially mirror the consumer protection provisions of the Act (Part V).

4. Relevant provisions of the Act

The broad objective of the Act is to enhance the welfare of Australians through the promotion of competition and fair trading and by providing for consumer protection. The Act proscribes certain anti-competitive conduct and unconscionable, misleading, deceptive or false trading practices.

The following sections describe the provisions of the Act relevant to the Review.

4.1 Competitive Conduct Rules

Broadly speaking Part IV of the Act, containing the competitive conduct rules or restrictive trade practices, prohibits the following anti-competitive practices:

- anti-competitive agreements and exclusionary provisions, including primary or secondary boycotts and price fixing (ss 45–45EA);
- misuse of market power (s. 46);
- exclusive dealing (s. 47);
- resale price maintenance (ss 48, 96–100); and
- mergers which would have the effect, or likely effect, of substantially lessening competition in a substantial market (ss 50, 50A).

In some situations the prohibition is absolute (per se), that is, the conduct is deemed to substantially lessen competition. In others, a test as to the effect on competition is applied. Most conduct can be protected from legal proceedings for breaches of the Act by processes of authorisation or notification (see below at 4.2).

Anti-competitive agreements (ss 45–45EA)

Section 45 deals with a variety of contracts, arrangements or understandings (agreements) between businesses or professionals. Entering into, or giving effect to, the following types of agreements is prohibited.

- Agreements that have the purpose or effect (or likely effect) of substantially lessening competition in a market (s.45). This is the general catch-all provision dealing with anti-competitive behaviour by businesses. It catches behaviour such as competitors agreeing to share a market between them.

- Agreements that contain an exclusionary provision (ss 45 and 4D). Sometimes referred to as a **primary boycott**, these are agreements between persons in competition with each other which have the **purpose of preventing, restricting or limiting the supply of goods or services to, or the acquisition of goods or services from, particular persons or classes of persons**. Such agreements are deemed to substantially lessen competition (i.e. no assessment as to the effect on competition is required in respect of this type of conduct).

- Agreements between persons in competition with each other that have the purpose, effect or likely effect of fixing, controlling or maintaining prices (s. 45A). Agreements between competitors under this provision are also deemed to substantially lessen competition. This provision also catches agreements which purport only to recommend prices but which in reality have the purpose or effect of fixing or controlling prices between competitors.

- **Secondary boycotts** (ss 45D-EA). The Act prohibits conduct by one person in concert with a second person (where a 'person' can be an individual, corporation or trade union) which hinders or prevents a third person from:

  - supplying goods or services to a business;

  - acquiring goods or services from a business; or

  - engaging in trade or commerce involving the movement of goods between Australia and places outside Australia;

  if the action has the purpose and effect (or likely effect) of causing substantial loss or damage to the business or causing a substantial lessening of competition.

Misuse of market power (s. 46)

A person with a substantial degree of power in a market is prohibited from taking advantage of that power for the purpose of:

- eliminating or substantially damaging a competitor;

- preventing the entry of a person into any market; or

- deterring or preventing a person from engaging in competitive conduct in any market.

In determining whether a person has a substantial degree of market power, a court will take into account the extent to which the activities of the person are constrained by the conduct of actual or potential competitors or by the behaviour of its suppliers or customers. A court may, in the absence of direct evidence of purpose, infer a purpose from surrounding circumstances.

Exclusive dealing (s.47)

Section 47 prohibits anti-competitive exclusive dealing. Broadly speaking, exclusive dealing involves one person who trades with another imposing restrictions on the other's freedom to choose with whom, or in what, it deals.

For example, it is a breach of s.47 to supply goods or services on condition that the purchaser:

- will not acquire, or will limit the acquisition of, goods or services from a competitor of the supplier; or

- will not resupply, or will resupply only to a limited extent, goods or services to a particular person, class of person or particular place(s);

if the conduct has the purpose or effect of substantially lessening competition.

One form of exclusive dealing prohibited outright by the Act is 'third line forcing', which involves the supply of goods or services on condition that the purchaser acquire goods or services from a particular third party or a refusal to supply because the purchaser will not agree to that condition.

Resale price maintenance (ss 48, 96–100)

Suppliers, manufacturers and wholesalers are prohibited from specifying a minimum price below which goods or services may not be resold or advertised for resale. A supplier may recommend a resale price for goods or services, provided that the document setting out the suggested price makes it clear that it is a recommended price only and the supplier takes no action to influence the reseller not to sell or resupply below that price.

Mergers or acquisitions (s. 50)

Section 50 generally prohibits mergers or acquisitions which would have the effect or likely effect of substantially lessening competition in a substantial market for goods or services.

Penalties and remedies

Breaches of Part IV of the Act can lead to civil proceedings but not to criminal prosecution. The following penalties and remedies may be imposed by the Federal Court for breaches of Part IV of the Act:

- monetary penalties of up to $10 million per breach for companies and up to $500 000 per breach for individuals;

- injunctions, damages, divestiture of illegally acquired shares or assets and ancillary court orders.

The Commission may seek monetary penalties, injunctions or divestiture. Other persons may, through a private action, seek injunctions (except in the case of a merger), divestiture, damages or other ancillary court orders.

4.2 Authorisations and Notifications

The Act recognises that the public interest may not always be met by the operation of competitive markets. The authorisation and notification processes in the Act (Part VII) address this possibility by allowing the Commission to grant immunity from the application of many of the restrictive trade practices provisions of the Act in certain circumstances.

While the authorisation and notification processes both provide a means for exempting anti-competitive conduct from prosecution under the Act, they are different processes and have a different scope of application.

Authorisation (ss 88-91) is available for all breaches of the competition provisions of the Act except misuse of market power. The Commission can grant immunity from the application of the competitive conduct rules if the conduct results in a benefit to the public which outweighs the detriment to the public constituted by any lessening of competition resulting from the conduct. The Act allows authorisations to be granted for a specified period of time. The Commission's practice is to make use of this provision so as to provide it with an opportunity to review the authorisation in the light of any changed circumstances.

The authorisation test

The applicant must satisfy the Commission that the public benefit test is satisfied. While the Act contains three minor variations of the authorisation or public benefit test, the Commission adopts the view taken by the Trade Practices Tribunal (now the Australian Competition Tribunal) that in practice the tests are essentially the same.[3]

[3] *Re Media Council of Australia (No. 2)(1987) ATPR 40–774 at 48,419.*

Essentially, the Commission must be satisfied that in all the circumstances the conduct would, or would be likely to, result in a benefit to the public which outweighs the detriment to the public constituted by any lessening of competition resulting from the conduct.

Public benefit

The Act does not define public benefit. The Tribunal has stated that a public benefit is:

> *anything of value to the community generally, any contribution to the aims pursued by the society including as one of its principal elements (in the context of trade practices legislation) the achievement of the economic goals of efficiency and progress.*[4]

Clearly, both economic and social public benefits are included. Over the years, the Commission and the Tribunal have recognised a range of public benefits of an economic nature. However, the Commission and the Tribunal has also accepted a range of non-economic benefits such as improvement in health and safety, avoiding conflicts of interest and provision of equitable dealing. In a sense, such benefits are less tangible than economic benefits and seem less easily demonstrated. Nevertheless, they are real benefits and, in the appropriate circumstances are no less important in the authorisation process than economic benefits.

Examples of such non-economic public benefits, include:

- encouraging the provision of information on formula feeding from public health professionals that is accurate and balanced and not undermining the decision of women to breastfeed (these public benefits were found to outweigh the detriment from restricting advertising and other promotional activities in relation to infant formula);[5]

- promoting public safety by, for example, ensuring the safe use of farm chemicals and national uniformity in the storage of farm chemicals[6] and only allowing scuba gear to be hired to certified divers;[7] and

- maintaining the viability of efficient firms. For example, the Commission recognised in a recent determination that efficient private hospitals can provide benefits to the communities in which they operate. Such benefits include: the choice and convenience provided to local patients; employment opportunities for medical, nursing and support staff; the provision of infrastructure necessary to attract specialists; and other wider regional benefits such as the positive effect that purchasing local services can have on employment in the local community;[8]

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[4] *Victorian Newsagency (1994) ATPR 41–357 at 42,677.*
[5] *Abbott Australia* (1992) ATPR (Com) 50-123.
[6] *Agsafe* (1994) ATPR (Com) 50-150.
[7] *Federation of Australian Underwater Instructors* (1983) ATPR (Com) 50-055.
[8] *NSW Inter-Hospital Agreement*, final determination, 15 August 2001 (although in this case, insufficient information was provided by applicants to sustain this particular public benefit argument. However, the Commission granted authorisation based on other public benefit arguments).

- maintaining ethical standards. For example, the Commission has granted authorisation in relation to an "ethical" ruling by the ACT Law Society that prevented solicitors, except in certain circumstances, acting for both vendor and purchaser in matters concerning the sale of land, due to a potential for conflict of interest.[9]

This list is not exhaustive. The Commission is willing to consider any public benefit claimed by applicants.

The authorisation process is a public, transparent, consultative process (details of the process are provided at **Attachment B**).

Revocation of authorisations

The Commission may only revoke an authorisation if it is satisfied that:

- the authorisation was granted on the basis of evidence or information that was false or misleading in a material particular;

- a condition applying to the authorisation has not been complied with; or

- there has been a material change of circumstances since the authorisation was granted.

Before revoking an authorisation, the Commission must seek submissions from interested parties. If any interested party objects to the revocation, even if one of the above conditions is satisfied, the Commission may only revoke the authorisation if it is satisfied that the public detriment from the conduct given immunity by the authorisation outweighs the public benefit.

Notification (ss 93-93A) is only available in relation to exclusive dealing. It provides applicants with immunity from the Act from the time a notification seeking exemption is lodged with the Commission with the requisite information accompanied by the prescribed fee (or soon after in the case of third line forcing). However, a notification may be revoked by the Commission where there is a substantial lessening of competition and the public benefit test is not satisfied (the former criterion does not apply to third line forcing). Given the more limited application of the notification process, it is not discussed further in this submission.

5. Enforcement Objectives and Priorities

Commitment to active enforcement of the competition and consumer protection provisions of the Act is fundamental to the achievement of the Commission's broad objectives. It is obviously not possible to pursue all perceived breaches of the Act. The effective use of resources in the public's best interest requires the Commission to have clear priorities in its selection of matters for enforcement and that it chooses the enforcement method most appropriate to the circumstances.

[9]ACT Law Society C95; A75; 14/04/1977 – (1977) ATPR (Com) p.16 615.

The Commission must give priority to action that is likely to have the greatest positive influence on compliance generally and, where possible, will achieve redress or compensation for interests adversely affected.

The Commission does not take litigation action unless it believes there is a breach of the law or likely breach appropriate for pursuance by a public agency.

On enforcement, when it has discretion on whether or not to act, the Commission gives priority to matters where:

- there appears to be blatant disregard for the law;
- the matter particularly affects disadvantaged consumers;
- there appears to be substantial damage to competition;
- there is significant public detriment;
- successful enforcement, by litigation or other means, would have a significant deterrent or educational effect; or
- an important new issue is involved, e.g. one arising from economic or technological change.

In addition, the Commission also applies specific priorities and selection criteria to anti-competitive conduct, consumer protection and small business issues, among other things.

When undertaking enforcement action, the objectives of the Commission include:

- establishing the unlawful conduct;
- stopping the unlawful conduct;
- obtaining compensation/restitution for the victim;
- undoing the effects of the contravention;
- deterring/preventing future unlawful conduct (either repetition by the same person or first contravention by another who might be tempted to breach); and
- punishing the wrongdoer.

The professions constitute a priority area for the Commission. The Commission has identified six broad competition issues of concern across all professions:

- *Anti-competitive behaviour* – such as price-fixing and boycotts. That is, conduct not supported by statute, mainly per se breaches.

- *Reservation of work* – reserves entire field of activities to a particular group of professionals which limits competition with other professionals.

- *Entry Restrictions* - the regulation of entry into the market, specifically by the imposition of educational and competency standards, licensing and certification requirements, and restrictions on entry by foreign professionals or para-professionals. For example, the Commission has been concerned that the conduct of certain specialist medical colleges and affiliated associations in determining the number of advanced training positions, which restrict entry into the profession, is anti-competitive and may breach the Act.

- *Other restrictions*

    - regulation of prices, in particular via recommended fee schedules.

    - prohibition on certain kinds of advertising or promotion.

    - functional separation of the market into discrete professional activities, including those performed by accredited specialists such as insolvency practitioners, barristers and medical specialists.

    - restrictions on ownership and business structure for professional practice, such as prohibition on multi-disciplinary practices and Bar Associations' sole practice rules.

- *International dimension* – includes access to the market by international practitioners.

- *Consumer Protection matters* – improving the level of consumer information to consumers regarding misleading or deceptive advertising and promotion of professional services.

Naturally, the Commission has a direct role in those competition issues which may constitute a breach of the Act. However, the Commission considers it also has an advocacy role in relation to those competition issues outside the reach of the Act.

6. Application of the Act to rural medical practice

The Commission has not had a particular focus on the conduct of medical practitioners in rural and regional areas. The Commission is keen to assist medical practitioners in rural and regional Australia better understand how the Act applies to their practice.

Benefits of Act for Medical Practitioners

It needs to be kept in mind that the Act is there to protect the rights of businesses such as medical practitioners.

The Act protects medical practitioners from having their ability to practise restricted, prevented or damaged by other practitioners for anti-competitive reasons. It allows medical practitioners to make their own choices about their practice without fear of boycott from colleagues. The Act also protects a medical practitioner's right to have access to facilities on their own merit, such as access to hospitals. Independent practitioners are also protected by the Act in their dealing with stronger parties.

Rosters

Genuine rosters do not breach the Act because the purpose of a genuine roster is to ensure the supply and availability of medical services after hours and/or on weekends or to provide appropriate breaks for practitioners. It is not to prevent, restrict or limit a doctor who is a party to the roster arrangement from providing medical services. This is opposite to the purpose behind a genuine roster.

Fee setting

The choice of practice structure has implications for fee setting. Doctors who are in competition with one another cannot set their fees collectively. Doctors who are directors or employees of a corporation or are partners (not individually incorporated) or employees of a partnership can set their fees collectively within their practice as the legal entity is the corporation or the partnership. By contrast, doctors who practise together as associates are competitors under the Act and cannot agree on the fee they charge their patients. However, the Commission has granted interim authorisation to general practitioners operating within specified business structures to agree on the fees they charge patients (see section 8.2: "RACGP application for authorisation").

Negotiations with hospitals

Competing practitioners cannot get together and agree on the price they will charge hospitals for their services. Negotiations regarding fees or allowances by groups of competing practitioners and/or their representative organisations with hospitals would be at risk of breaching the Act.

A hospital can consult or hold discussions with groups of practitioners and their representative organisations, and then choose to make its own independent decision about the terms and conditions for contracting practitioners. However, the group of practitioners with whom the hospital is consulting or holding discussions must ensure that they do not reach a collective agreement with each other on matters which may be anti-competitive such as the fees for the services they provide.

Access to hospitals

Agreements among medical practitioners at a hospital not to permit other practitioners access to hospitals for anti-competitive reasons raises serious concerns under the Act. In particular, if that group of competing medical practitioners enforces their rejection by threatening to boycott the particular hospital if the applicant is given access, this would very likely constitute a breach of the Act.

Withdrawing services from hospitals

Agreements among competing medical practitioners not to provide services at a particular hospital or agreements to withdraw services from a hospital would constitute a primary boycott in breach of the Act. However, independent doctors are always free to decide whether or not to provide or withdraw services from hospitals.

Agreements to stop bulk billing

While independent doctors are free to individually decide whether or not to bulk bill, they could be breaching the Act if they got together to agree about it. That is, independent doctors who collectively agree not to bulk bill all or certain categories of patients are likely to be in breach of the primary boycott provisions of the Act. This is because the agreement between the doctors has the purpose of preventing the supply of medical services in circumstances where the fees for the services would be processed by bulk billing. That is, but for the agreement, patients might have been bulk billed.

It should be noted that an agreement between practitioners to bulk bill all patients would constitute a technical breach of the price fixing provisions of the Act, however, the Commission would exercise its discretion not to take action in such a matter, unless it could be demonstrated that a consumer detriment exists, or that it would be in the public interest to take enforcement action. The reason for this is because an agreement to bulk bill would arguably result in lower prices for consumers, whereas an agreement to set a common fee between competitors, or an agreement not to bulk bill, would be likely to result in increased prices for consumers.

7. Commission's involvement in Medical Sector

The Commission seeks to achieve compliance with the Act by enforcement action, but also by informing the community about the Act through compliance material, speeches and education programs to prevent future breaches of the Act.

7.1 Information and education

The Commission has been particularly active in the health sector in providing information and education to health practitioners and their associations. Prior to the extension of the Act and commencement of the State and Territory Competition Codes, which became effective on 21 July 1996, the Commission undertook a major educational campaign focusing on the

health sector to highlight to those who would be covered by the Act for the first time their obligations and responsibilities under the Act.

For example, the Commission wrote to each of the medical colleges with an offer of assistance. The aim was to assist those colleges with possible changes that may have been necessary to the Constitution, rules or by-laws of such college **if** they contained anti-competitive restrictions.

The Commission initiatives generally included contacting relevant associations to inform them of the need for their articles, codes, and/or by-laws to be amended to comply with the Act; presenting addresses at health sector forums; and meeting with representatives of health sector participants to discuss issues particular to their members. In November 1995, the Commission published a *Guide to the Trade Practices Act for the health sector*, which was widely distributed.

The culmination of the Commission's initial educational campaign was the presentation of health sector workshops in all capital cities except Darwin. One of the primary aims of the workshops was for those attending to gain a better understanding of their own and their association's rights and obligations under the Act.

Since July 1996 the Commission has continued to inform and assist medical and health sector professionals and their associations to understand their rights and obligations under the competition laws. The Commission has given a large number of presentations at various conferences, seminars and formal meetings of professional associations.

As well as a number of general guidelines on competition law matters and the workings of the Act, the Commission has also published specific compliance material for, and in cooperation with, the health sector.

- *Revised Draft Guide: General Practitioners – A Guide to the Trade Practices Act March 2001*

  The Commission has produced this guide in order to assist GPs better understand the impact of the Act on their practices (see below at 8.2)

- *Senate Reports – Report to the Australian Senate on anti-competitive and other practices by health funds and providers in relation to private health insurance.* April 2000, November 2000 and August 2001

  The Commission has issued three reports in compliance with an order agreed to by the Australian Senate on 25 March 1999. The Senate order requires the Commission to provide a report of "any anti-competitive practices by health funds or providers, which reduce the extent of health cover for consumers and increase their out of pocket medical and other expenses".

- *A guide to the Trade Practices Act for the health sector*

Published in November 1995, the guide aimed to help professionals in the health sector identify their rights and obligations under the provisions of the Act, following the enactment of the *Competition Policy Reform Act 1995*.

- *Guide to the Trade Practices Act for the promotion of private health insurance*

  This guide was developed by the Commission and the Private Health Insurance Ombudsman (then the Private Health Insurance Complaints Commissioner), with input from major health funds to help the industry and individual companies to develop strategies which will improve compliance with the Act and reduce the need for regulator intervention.

- *Fair treatment? Guide to the Trade Practices Act for the promotion of medical and health services*

  In July 2000 the Commission and the NSW Health Care Complaints Commission (HCCC) released a guide to the Act for the promotion of medical and health services. A brochure was also released summarising, for providers of medical and health services, the information in the guide. It includes, for consumers, a brief discussion of relevant issues and a checklist.

The Commission has also organised several conferences dealing with trade practices issues for the health sector and the professions more generally.

- The Commission jointly sponsored and organised, with the University of Western Australia, Murdoch University and University of Notre Dame, a conference on competition law and the professions, *Can the professions survive a national competition policy?*, held in Perth on 11 April 1997.

- On 24 June 1999 the Commission, in conjunction with the AMA (WA branch), organised a conference in Perth entitled, *Caring and Competition*, which dealt with issues concerning the Act and competition policy generally.

- On 14 October 1999 the Commission jointly hosted a conference with the NSW Health Care Complaints Commission (HCCC), *Advertising medical services — In whose interest?*, dealing with advertising and promotion of medical services. The conference brought together specialist speakers from a variety of relevant fields to allow conference participants to gain an insight and understanding into a range of important issues arising from the advertising and promotion of medical services.

7.2 Enforcement work

Complaints

Table 1 below outlines the number of complaints relating to Part IV of the Act and the health sector compared with the other Parts of the Act for the period of 1996-2001 (calendar years).

Table 2 below breaks down those complaints into the types of complaints within the Health sector.

Table 1: Commission complaints in the health sector — 1996 to 2001

	1996	**1997**	**1998**	**1999**	**2000**	**2001***
Anti-competitive conduct (Part IV)	117	138	178	158	155	112
Unconscionable conduct (Part IVA)	6	0	10	12	4	4
Consumer protection (Part V)	81	83	107	147	273	145
GST	-	-	-	-	612	24
Other	30	22	50	92	142	67
Total complaints	**230**	**243**	**338**	**399**	**1186**	**352**

*****for the period 1 January 2001-30 June 2001.

Table 2: Health sector Part IV complaints — 1996 to 2001

	1996	**1997**	**1998**	**1999**	**2000**	**2001***
Health insurance	21	11	34	33	29	20
Hospitals	9	4	10	17	13	10
General practice medical services	**17**	**26**	**34**	**20**	**31**	**18**
Specialist medical services	**15**	**23**	**45**	**36**	**32**	**15**
Dental services	7	15	8	13	3	2
Pathology services	5	3	3	0	5	2
Optometry and optical dispensing	5	8	6	4	8	11
Ambulance services	2	0	3	3	2	2
Physiotherapy and chiropractic services	14	13	17	12	4	7
Other health services	22	35	18	20	28	25
Total	**117**	**138**	**178**	**158**	**155**	**112**

*for the period 1 January 2001 to 30 June 2001.

As can be seen from the Table 2 above, complaints relating to Part IV issues in the general practice medical services are quite low with only 31 in the year 2000. Specialist medical services is similarly low with 32 complaints in 2000.

Major areas of Part IV complaints in relation to medical practitioners include the following:

- Allegations of agreements among independent medical practitioners to stop bulk billing;
- Allegations that hospitals and/or groups of medical practitioners are denying other medical practitioners access to hospitals;
- Allegations of agreements among competing medical practitioners about the fee for their services and/or boycotts of hospitals (or threat of) if demands are not met;
- Allegations by overseas trained practitioners that they had been denied recognition and unable to practice in Australia.

Diagram 1: Resolution of complaints using enforcement tools

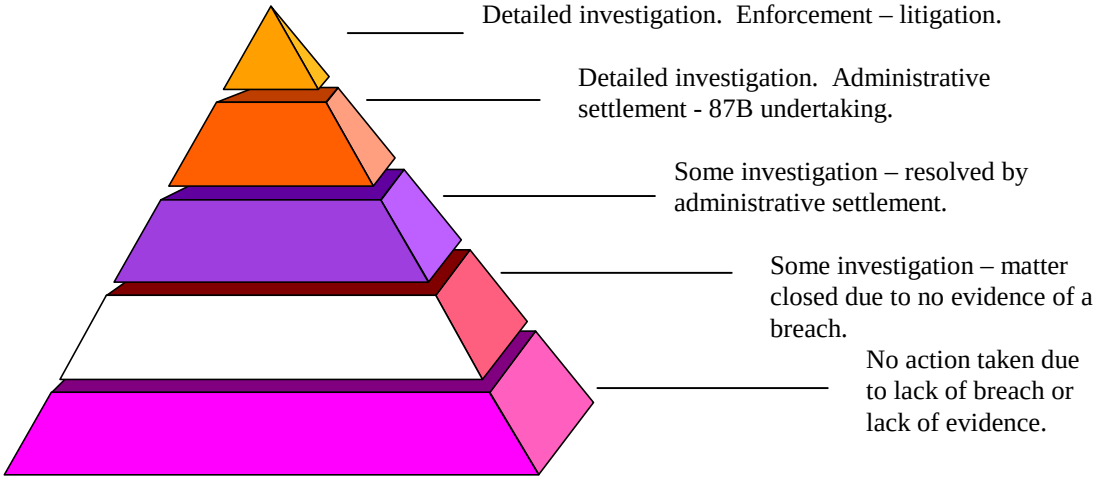

Diagram 1 demonstrates the Commission's approach to complaints made to it and the use of the enforcement tools.

The Commission receives thousands of complaints each year about a wide variety of matters. In the 1999-2000 financial year, the Commission received over 20 000 non-GST inquiries and complaints. Of these, the Commission pursued[10] 4000 complaints. In recent years, the Commission has been in litigation in about 45-55 matters. So approximately 99% of the matters it pursued were resolved by means other than litigation. Alternate dispute resolution (or additional dispute resolution) is an important and integral part of the Commission's

[10] Pursued complaints include all matters where additional information was sought to establish whether a possible contravention was involved and whether Commission action was appropriate. Of these, some were concluded after initial inquiries and others were investigated in depth.

activities. The Commission takes the view that its enforcement matters should be selected according to circumstances that may render them of particular public interest.

Complaints not pursued include matters where detailed advice was given to the inquirers about rights, obligations and remedies and also include matters more appropriate for private action. In other instances, the Commission will conduct some investigation into the complaint and resolve the matter with an administrative settlement such as accepting assurances that the conduct will cease or be modified. In other cases, the Commission will conduct a detailed investigation and resolve the matter via a court-enforceable undertaking under s.87B[11] of the Act. As stated above, in approximately 1% of cases, the Commission will conduct a detailed investigation which leads to litigation.

Cases

The Commission has only taken action against medical practitioners and/or their associations on two occasions.

Australian Society of Anaesthetists

On 17 December 1998 the Commission settled injunction proceedings it had instituted in the Federal Court of Australia against the Australian Society of Anaesthetists (ASA) and four individual anaesthetists from the State of New South Wales. This was the Commission's first enforcement action against medical professionals following the competition policy reforms.

In its proceedings instituted in October 1997 the Commission alleged that unlawful agreements were reached by anaesthetists at three private hospitals to charge $25 per hour for 'on-call' services which ensured an anaesthetist, although not on site, was available for emergency and after hours anaesthetic services at the hospitals.

The Commission also alleged that on 3 April 1996 certain anaesthetists reached an unlawful agreement to tell the administrators at one of the private hospitals that unless the hospital agreed to pay for the supply of on-call services from 1 May 1996 those anaesthetists would not supply such services (a boycott agreement).

The Commission alleged that in late 1994, the ASA (NSW section) formed a sub-committee to formulate guidelines for the provision of on-call services in private hospitals. A sub-committee report was circulated to members in 1995. It said the ASA should 'recommend and set an appropriate on-call fee to be paid by private hospitals to on-call anaesthetists' and that this fee should be $25 per hour.

It was alleged that the sub-committee's recommendations were endorsed by the ASA (NSW) Committee of Management in September 1995 and further endorsed at the annual general meeting of the NSW ASA in March 1996.

[11] Section 87B of the Act provides for enforcement in written undertakings accepted by the Commission in the exercise of its powers.

It was alleged that the anaesthetists, through their medical practice companies, arrived at agreements with other anaesthetists to charge a $25 per hour on-call services fee. The Commission also alleged that the ASA and its NSW Chairman induced or attempted to induce and were knowingly concerned in, or a party to, one or more of the agreements.

The anaesthetists and the ASA gave undertakings to the Federal Court that they would not engage in fixing, controlling or maintaining prices offered or charged by them for the supply of on-call services, and that they would not enter into agreements having the purpose, effect or likely effect of substantially preventing, hindering or lessening competition in the market for the supply of on-call services.

The ASA also undertook to the Federal Court to develop and implement, at its own expense, a program of compliance with the Act. The Federal Court ordered that the respondents pay $60 000 toward the Commission's costs.

In this case, the Commission did not seek penalties as it was the first enforcement action against medical professionals following the competition policy reforms. However, a breach of the undertakings to the court would put the specialists or their association at risk of contempt of court.

Australian Medical Association & Mayne Nickless Ltd and ors

On 21 July 2000 the Commission instituted proceedings in the Federal Court, Perth, against the Western Australian branch of the Australian Medical Association (the AMA(WA)) and Mayne Nickless Ltd (MNL) alleging price fixing and other anti-competitive conduct in breach of s.45 of the Act.

Details of the alleged conduct were formalised in the Joondalup Health Campus (JHC) Visiting Medical Practitioner Agreement signed by the AMA (WA) and MNL on 19 February 1997.

The Commission also alleged that the AMA(WA) executive director, Mr Paul Boyatzis, and former president, Dr David Roberts, were knowingly concerned in the contraventions, and that former general manager (Western Australia and Asia) of Health Care of Australia (a division of MNL), Mr Martin Day, and former JHC chief executive, Mr Ian MacDonald, were knowingly concerned in the contraventions by MNL.

On 19 October 2001, after considering joint submissions from the Commission and the AMA(WA), the Court stated that it was satisfied that the AMA(WA), on the basis of its admissions and the agreed statement of facts, had engaged in price fixing and primary boycott conduct in breach of the Act in respect of the supply of medical services by visiting medical practitioners to MNL for the care of public patients at the JHC. The Court indicated that, subject to some agreement between the parties as to drafting amendments to the orders which refine the scope of those orders, it would impose a pecuniary penalty of $240 000. It also stated that it was satisfied that Mr Boyatzis, in his capacity as Executive Director, and Dr Roberts, in his former capacity as President of the AMA(WA), were each knowingly

concerned in the AMA(WA)'s contraventions and will make orders for each to pay a pecuniary penalty of $10 000.

The court also indicated that it will make interlocutory orders restraining the AMA(WA), Mr Boyatzis and Dr Roberts from engaging in similar conduct and orders that the AMA(WA) institute and maintain a trade practices compliance program and make a contribution of $25,000 towards the Commission's legal costs.

The Commission's proceedings against the remaining Respondents to the action, the Mayne Nickless group of respondents, continue.

7.3 Adjudication

Since 1996, the Commission has received four applications for authorisation from medical practitioners. Two have been finalised and two are currently being considered.

Federal and South Australian Branch, Australian Medical Association

On 31 July 1998 the Commission granted authorisation until 30 June 1999 to the South Australian and Federal Australian Medical Associations who had applied to collectively negotiate and give effect to a fee for service agreement for the remuneration of visiting medical officers treating public patients in South Australian rural public hospitals.

The Commission concluded that the proposed fee for service agreement would result in a public detriment because it would act as a price floor for all hospitals in South Australia. Hospitals in regions that have little trouble attracting doctors would have to pay the same rate for medical services as those in regions that have difficulty.

On the other hand, the Commission noted the history of collective negotiation between the AMA and the South Australian Health Commission (SAHC) – which supported the application – and that the parties could not, in practice, quickly change the existing system. Moreover, they had indicated that when the existing agreements expired in June 1999, a new system would be introduced that would not raise trade practices concerns. The Commission therefore concluded that there was a public benefit in allowing the industry time to adjust to the need to comply with the Act. The Commission further concluded that this public benefit outweighed the identified public detriment. Consequently, the Commission granted authorisation until 30 June 1999. The final determination is at **Attachment C**.

Australian Society of Anaesthetists

On 8 October 1999 the Commission denied an application for authorisation lodged by the Australian Society of Anaesthetists (ASA) to undertake negotiations with health funds regarding rates and conditions on behalf of its members. After the Commission issued a Draft Determination proposing to deny authorisation, the ASA amended its application to propose state-by-state, rather than national, negotiations.

The Commission concluded that the proposed arrangement would be likely to result in a public detriment because it would, in practice, establish a floor price for anaesthetists'

services. The proposal to have negotiations conducted at a State level did not significantly address the Commission's concerns on this point. The major public benefit claimed by the ASA was that the proposed conduct would lead to the development of "no gap" and "known gap" insurance products. However, the Commission concluded that while the development of these products would represent a public benefit, it was not satisfied that the proposal would achieve this outcome primarily because a solution addressing all specialist groups would be necessary before this could happen. The Commission also noted that the ASA could provide guidance to its members on issues that needed to be addressed in their negotiations without actually conducting centralised negotiations. This would enable some of the concerns expressed about the possible introduction of US style managed care to be mitigated.

Overall, the Commission concluded that the public detriment resulting from the ASA's proposal outweighed the public benefit and denied authorisation.

Royal Australasian College of Surgeons (RACS)

The Commission has received an application for authorisation from the RACS in relation to its processes for:

- selecting, training and examining surgical trainees;
- assessing the qualifications and experience of overseas trained practitioners; and
- accrediting hospitals and hospitals posts for surgical training.

Generally, the RACS is claiming that the anti-competitive detriment, if any, flowing from these processes is outweighed by the public benefit of ensuring that surgeons practising in Australia are safe and competent.

The RACS did not lodge a supporting submission until 30 March 2001, at which time the authorisation process proper was able to commence. The Commission has granted interim authorisation to RACS until it issues a draft determination at which time the need for interim authorisation will be reviewed.

The Commission has delayed releasing a draft determination until after the Australian Medical Council (AMC) releases its report on whether to grant accreditation to RACS to provide surgical training (given the significant overlap between the Commission and AMC inquiries). It has also experienced delays in receiving comments from key interested parties. The Commission expects to be able to release a draft determination in early 2002.

Royal Australian College of General Practitioners (RACGP)

(see below at 8.2: "RACGP application for authorisation")

8. Current work with general practitioners

8.1 Origin of general practitioners' issue.

In late 2000, the AMA raised concerns with the Minister for Health and Aged Care about the impact of the Act on general practitioners (GPs), in particular in rural areas. These issues came about as a result of hypothetical scenarios created by the AMA for the purpose of developing a trade practices compliance program. The AMA did not approach the Commission about developing this program, but received legal advice from Blake Dawson Waldron that roster arrangements were likely to breach the primary boycott provisions of the Act. The Commission does not agree with this advice because it states that an anti-competitive purpose is not a relevant element in s.4D. In fact, the need to show an anti-competitive purpose (i.e. of preventing restricting or limiting the supply of service) is central to the conduct prohibited by s.4D.

Since the AMA raised these concerns about the impact of the Act and, in particular, the way in which the Commission administers the Act, the Commission has repeatedly asked the AMA to provide evidence of these concerns. Notwithstanding this, as recently as 22 November 2001[12], the AMA is still making these assertions but as yet, no evidence has been forthcoming.

Following a workshop convened by the Australian Divisions of General Practice (ADGP) on 12 February 2001 and attended by representatives from the Department of Health and Aged Care (DHAC), AMA, RACGP, Rural Doctors Association of Australia (RDAA), Prime Minister and Cabinet, independent practitioners and the Commission, the Commission undertook to produce a Guide to the Trade Practices Act for General Practitioners and consult all workshop participants before the Guide was publicly released.

8.2 General Practitioners – A Guide to the Trade Practices Act

As a result, the Commission produced a draft guide for general practitioners to correct misleading and alarmist public comments about the implications of the Act for GPs and the Commission's priorities, as well as responding to requests from GPs for information and assistance to better understand the impact of the Act on their practices. The Commission released a Draft Guide on 6 March 2001 for limited consultation until 19 March 2001. The Commission received many constructive comments, but also numerous requests for more consultation and time to respond. The Commission therefore decided to release a Revised Draft Guide on 30 March 2001 reflecting some of the initial feedback received and enabling a broader consultation process to take place.

The Revised Draft called for further submissions to be lodged with the Commission by 18 May 2001. As part of the consultation process representatives of the Commission and the DHAC have travelled throughout Australia workshopping the Revised Draft and meeting with general practitioners and their representative groups. Those representatives met with general practitioners in the following areas:

[12] AMA Media Release, "AMA urges country groups and individuals to make submissions to *Trade Practices Act* Review", 22 November 2001.

- Griffith, Nerrandera, Hay, Hillston, Leeton, Coleambally (western NSW);
- Melbourne, Dunkeld, Ballarat, Bendigo (VIC);
- Sydney, Coffs Harbour, Newcastle (NSW);
- Kalgoorlie, Geraldton, Albany, Perth (WA).

Although the Commission has concluded the consultation process, the release of the final guide has been postponed due to the application for authorisation by the RACGP which is currently before the Commission (see below). As stated above, an interim authorisation has been granted and it would be prudent for the Commission to release the final guide once the final determination has been issued. This would provide GPs with more certainty than if the guide was released prior to the authorisation application being finalised.

It is anticipated that the final guide will be distributed to all GPs throughout Australia. The Commission also intends to distribute the guide to practice managers and GP advisers. The Commission will also develop a summary of the guide and a small pamphlet, to be widely distributed as well. A copy of the Revised Draft Guide (30 March 2001) is at **Attachment D** and the Commission's press releases regarding the GP Guide are at **Attachment E.**

RACGP application for authorisation

As part of the consultation process, there was extensive consultation between the Commission, GPs and their representative organisations regarding the draft version of the GP Guide and, in particular, about the application of fee setting within medical practice.

These discussions led to the RACGP lodging an application for authorisation on 31 August 2001 to allow general practitioners to agree on the fees they charge patients where the general practice is:

- incorporated as an Australian company and the GPs are engaged by the company as independent contractors or employees;
- a unit trust where the GPs are engaged by the corporate trustee as independent contractors or employees;
- a partnership of two or more GPs, regardless of whether any of the partners are incorporated; or
- an associateship where two or more GPs are co-located and via a written agreement, agree that they will treat any patient of the practice and will maintain a common reception, common fee collection, common bank account, common trading name, common medical records and common accreditation.

The application also seeks immunity for locums engaged by any of the general practices listed above as employees or independent contractors, to set fees with other GPs in the practice or to be directed by other GPs in the practice on what patients are to be charged.

On 25 September 2001, the Commission granted the RACGP interim authorisation until the Commission issues a draft determination. The Commission is currently awaiting a supporting submission from the RACGP. A copy of the RACGP's application for authorisation is at **Attachment F** and a copy of the Commission's press release regarding the interim authorisation is at **Attachment G**.