



**Address to**

Western Australian Branch of Professions Australia

***“Trade Practices & The Professions –  
The ACCC’s View on the Future”***

***By***

***Commissioner John Martin***

Australian Competition and Consumer Commission

**25 October 2005  
Perth**

## 1. INTRODUCTION

I greatly welcome the invitation from Warren Kerr to participate today. I am joined from the east coast by Warwick Wilkinson who has done so much to encourage and initiate ACCC dialogue with the professions on the important role the TPA plays in your business operation.

I would like to acknowledge the critical role that Warwick has played both in relation to the professions and their link to regulatory and competition matters in this State and throughout Australia. Warwick was until recently an Associate Commissioner with the ACCC for nine years and has headed up important competition related reviews of pharmacy and medical services for the Commonwealth Government.

You will all be aware of the ACCC and the Trade Practices Act – with much of our fame resulting from the major focus created by the era of Allan Fels.

Allan changed the awareness, not just of his own role, but of the ACCC as an institution and the law that stood behind it.

- with powers of the ACCC and the reach of the TPA considerably extended over the '90s it has become well known for decisive enforcement action and willingness to publicise misdemeanours

There has been a significant change of guard within the ACCC over the past 2 years with:

- new Chairman Graeme Samuel
- new Deputy Chairperson Louise Sylvan
- a range of new Commissioners (indeed with just over 6 years in the job I am now the senior Commissioner)

There have been changes in the way we do business

- but as Graeme Samuel says they are changes of style, not changes of substance
- the Commission will still take strong enforcement action where necessary.

An important component of the “style” change is an even greater emphasis on informing and explaining to business (particularly small businesses), the obligations and protections under the TPA and working with sectors, such as professional groups, to address systemic problems they may be facing or causing.

I would like to comment on five areas that are of relevance to your associations.

- (1) how the ACCC operates;
- (2) where the professions market place fits;
- (3) the application of the TPA to the professions;
- (4) how the ACCC institutionally deals with professions matters; and
- (5) professional indemnity and the Trade Practices Act.

## 2. HOW THE ACCC WORKS

Seven fulltime Commissioners oversee an independent authority. The background of Commissioners vary with a range of legal, economic, business and technical skills

- sitting as a Commission we make all major decisions but we don't formally manage staff operating like a Board

The ACCC has over 500 staff who are decentralised in State capitals

- being on the ground in the regions ensures closer contact with business and consumers and other agencies

Consideration of issues and decision making occurs through Committee structure

- which provides a transparent and rigorous process.

Key areas of the Commission role via TPA are

- anti competitive conduct
- misleading and deceptive conduct
- safety net of unconscionable conduct

The ACCC has the capacity to agree to authorisation of “anti competitive conduct” where net public benefit outweighs the detriment.

Characteristics of the Commission's functions are

- complaints driven: proactive as patterns emerge
- strong investigation, evidence gathering and enforcement powers
- emphasis on compliance and avoidance of problems using information and education to assist avoiding problems
- importance of codes of conduct to enhance compliance framework

## 3. THE PROFESSIONS MARKET PLACE

Like any other sector of the economy, the professional sector overall, and each individual profession, has its own distinctive characteristics. The professions operate in markets, with market forces determining outcomes.

However these professions markets usually have a high degree of regulation which impacts upon competition. There are government imposed restrictions, which may be imposed by Commonwealth or State/Territory laws, and privately imposed restrictions, generally imposed through self regulatory arrangements of professional associations.

Privately imposed restrictions involve professional or ethical standards/rules/codes that practitioners must comply with if they are to practise their profession. Such rules are often backed by private disciplinary procedures, which may have some legislative

backing (for example, law societies' activities can result in a solicitor being struck-off a Court's rolls). Such restrictions often fall within the Act if they have substantive anti competitive consequences.

On the other hand, restrictions imposed by legislation fall outside the reach of the Act, and competition issues in relation to those restrictions have been reviewed by the National Competition Council (NCC). In this regard the ACCC has an advocacy role with relevant governments.

Professional services are a major and necessary input into business activity. The cost and quality of those services is important for an efficient and competitive economy. However there is generally asymmetry of information between suppliers and purchasers of professional services

Professional services, particularly medical and legal services, are often acquired by consumers of necessity or in times of emergency or urgency and may be of critical importance for the health or well-being of the consumer. Acquisition of the services may also involve large expenditure. So it is emphasised that the professionals in their dealing with the businesses and most particularly with consumers don't collide in ways that breach the TPA.

#### **4. APPLICATION OF TRADE PRACTICES TO PROFESSIONS**

With the Hilmer competition reforms and changes to the Act in 1995, all professionals became covered by competition laws. Partnerships or sole practitioners and their associations became subject to the competition provisions of the TPA and the competition codes.

In relation to consumer protection, unincorporated practitioners are covered by State and Territory fair trading Acts which substantially mirror the consumer protection provisions (Part V) of the TPA. Professionals may also be liable as accessories or subject to the Act by virtue of the extended operation provisions of section 6.

- Consumer protection provisions include implied warranty provisions of s. 74 of TPA that require a professional service to be rendered with due care and skill (this warranty does not apply to architects or engineers).
- Professions not only have obligations under the TPA, the Act also protects professionals from anti-competitive conduct, and unfair trading practices of suppliers, other competing professionals and customers.

#### **Broad Competition Issues Across The Professions**

The ACCC has identified the five broad issues of concern across all professions:

- reservation of work—reserving a field of activity to particular professionals—for example, only lawyers being allowed to do conveyancing work in some states
- entry restrictions—regulating entry into the market, including the imposition of educational and competency standards, licensing and certification

requirements, and restricting entry by foreign professionals and para-professionals

- consumer protection—in particular, applying misleading and deceptive conduct provisions of the Act to professional services and issues of informed financial consent
- anti-competitive behaviour—such as price fixing and boycotts.
- other restrictions
  - regulation of prices, in particular via recommended fee schedules
  - prohibition of certain kinds of advertising or promotion
  - functional separation—separating the market into discrete professional activities, including those performed by accredited specialists
  - restrictions on ownership and business structure for professional practice
  - international dimension—in particular, recognition of qualifications, but also nationality and local presence requirements, restrictions on investments and ownership, restrictions on the exercise of professional activities

As mentioned in relation to restrictions on competition, it is important to distinguish between restrictions imposed by legislation which generally fall outside of the reach of the Trade Practices Act and privately imposed restrictions with no legislative protection which are very much within the reach of the Act.

Two sensitive areas which impact on the role of the professional associations are price negotiations and recommended fee scales.

### **Price Negotiations**

Representative organisations cannot, on behalf of their members, negotiate contracts, arrangements or understandings regarding prices unless the conduct has been authorised. Neither can they negotiate contracts, arrangements or understandings that restrict their members' dealings or affect competition. Such conduct would be at serious risk of breaching the price fixing (s. 45A) and/or anti-competitive agreement (s. 45) provisions of the Trade Practices Act.

However, such industry associations can make policy statements and advise their members on matters relating to contracting, pricing and other business arrangements. Industry associations may also provide guidance to their members on the negotiation process to ensure members are aware of all the relevant issues pertaining to contracts.

### **Recommended Fee Scales**

The ACCC has consistently taken a strong stance against 'recommended fee schedules', usually implemented by the circulation of a list of recommended fees under the auspices of a professional association.

The ACCC considers that one of the inevitable purposes of the issuing of

recommended fee scales by an association is that the association expects many of its members, if not all, to follow the recommendation. In the ACCC's experience recommended fee schedules:

- generally cover a substantial number of members who are competitors for the purposes of the Act
- if operating in local geographic areas, significantly affect prices in such areas.

The ACCC considers that recommended fee schedules are likely to result in a substantial lessening of competition, notwithstanding that:

- the fee agreement consists of 'recommended' or guideline fees only
- there is no obligation or undertaking to comply with the recommendations made
- there is no attempt to police or follow up the recommendations made
- the fees are recommended by an association, and some individual members have no direct hand in the calculation of the recommended fees
- the prices are recommended by an association on the basis of costing or other calculations by an outside party

The ACCC appreciates that association members may need help on how to set their own fees. It recommends that associations help their members to set their fees independently by publishing information and formulas that allow individual members to determine and set their own fee levels, in light of their own costs and expected level of profit from their individual practice or business.

Associations can also help the public to better understand the nature and value of the services their members provide. This would include providing information on what factors members of the public should consider when selecting an appropriate professional to provide services.

The ACCC leaflet *Setting Your Fees Straight*, provides information on fee setting which while aimed at medical practitioners, may also be useful guidance for other professions.

### **International perspectives**

Significant inquiries have been conducted in recent times in both the EU and US into the competition implications of the regulation of professions including:

- a European Community wide investigation of charging methods of professions generally
- review of the legal profession in the UK – conducted by David Clementi (former deputy governor of the Bank of England)
- review of anti-competitive conduct by law firms by the EC Competition Commission
- a joint FTC/DOJ enquiry in the United States into competition issues in the US health care market.

Professions (particularly the medical profession) have been an enforcement priority of the FTC for many years and there is an extensive body of relevant case law in the US.

## 5. HOW THE ACCC DEALS WITH PROFESSIONS

In 2001 the Commission established a dedicated Professions Unit. The dedication of Commission resources specifically to the sector recognised:

- the importance of TPA compliance in the sector
- the complicated inter-relationship of private and public regulation of the sector
- the difficulties of changing ingrained attitudes of some professionals, particularly in relation to the belief that regulation is always in the interest of the public
- the need to ensure that the Commission's activities in relation to the professions are consistent and coordinated

The unit initiated greater coordination between the Enforcement & Compliance Branches and the Adjudication Branch which is responsible for authorisation. The Commission continues to have a focus on professions, although the role is now informally spread across Commission staff and among Commissioners.

On the enforcement and compliance side, the Commission responds to complaints, pro-actively examines conduct in certain priority areas, (eg. recommended fee scales) and engages in liaison and advocacy activities (eg participation in a various working groups and making submissions to relevant government inquiries).

### Commission Priorities

Commission activity regarding professions has focused on the following priority areas where **significant consumer detriment** may arise:

- price fixing or boycott conduct agreed between practitioners, including recommended fee schedules
- other restrictions (including advertising restrictions) imposed by private parties and supported by disciplinary mechanisms
- blatant misleading advertising by professionals
- entry restrictions imposed by private parties such as medical colleges.

### Adjudication

The Adjudication branch deals with applications for authorisation in the professions and plays an important complementary role to enforcement activities in these situations professions such as surgeons or architects have successfully sought authorisation of arrangements which while having potential anti competitive detriments provide public benefit which are to be shown to outweigh the detriment.

Most recently a Health and Medical Compliance Liaison Section was established within the ACCC to implement the recommendations of the Wilkinson Review. The

section is working with The ACCC Health Services Advisory Committee (HSAC) to develop mechanisms to improve understanding of, and compliance with the TPA by the health and medical professions, particularly in rural and regional areas.

- This has included developing material that could be adapted as templates to apply more generally to other professions.

## **6. PROFESSIONAL INDEMNITY ISSUES AND THE TPA**

A major issue for many professional groups in recent years has been the difficulty that some professionals have experienced in obtaining professional indemnity and public liability insurance.

In recent years the cost of professional indemnity and public liability insurance increased at a rate that many professionals consider to be unsustainable. Some professionals have found it impossible to even obtain insurance at any price for some of their activities.

In response, State and Territory governments implemented a series of changes to the common law, including the capping of compensation pay-outs and the imposition of minimum claims thresholds as well as amendments to the TPA that limit both the amount of damages that can be awarded for personal injury or death under certain provisions of the TPA, and the time period in which actions for personal injury damages may be commenced.

To help ensure the full benefits of these various reforms are passed on to business, the ACCC has also been given responsibility for monitoring their impact.

The Commission's most recent report found that for the 12 months to 31 December 2004 average professional indemnity premiums decreased by four per cent last year, while the average size of claims for professional indemnity insurance rose by 60 per cent due to a small number of high cost claims in that year. There was little change in the underwriting financial performance from writing professional indemnity insurance.

The report found that most insurers believed that tort reforms had either no or minimal impact on the number and size of professional indemnity claims in 2004. Insurers said that competition was the main driver of the fall in premiums.

It should be noted there is considerable difficulty in making an assessment of the relationship between insurance premiums and the effect of tort reforms. Tort reforms are expected to lower the costs of claims for insurers. However, the pricing of public liability and professional indemnity insurance is more complicated than for most products, since the actual cost of providing insurance and the level of investment returns earned by insurers only become known many years after the product is sold.

The data provided by APRA indicates that there were a large number of insurers active in both classes of insurance in Australia during 2004, and that neither sector is highly concentrated.



The ACCC therefore expects any savings arising from tort reforms to feed through to lower premiums, as the basic principle of competition that applies to any business operating in a market supplied by a large number of firms would appear to equally apply to insurers. That is, if a company consistently prices above a competitive rate and the insurer will lose sales to rivals; consistently price below that rate and revenues will not provide sufficient return to maintain equity in that line of business.

However it should also be noted that most of the reforms implemented by State and Territory governments have, so far, been directed at personal injury claims which represent only a small proportion of the claims absorbed by professional indemnity insurers, with the exception of course of medical indemnity insurers.

To tackle the particular problems faced by professionals and their insuring, Commonwealth, State and Territory governments are to implement uniform professional standards legislation. Under this approach professional bodies are developing self-regulation schemes that require members to adopt insurance and risk management schemes that will be approved and monitored under the legislation.

In return, the legislation provides for the capping of liability. It is intended that these caps are high enough to protect most consumers and corporations in their claims for economic loss, whilst limiting the possibility of extraordinary claims.

## **7. CONCLUSION**

The dedication and technical competence of most professions in the Australian economy are of a high standard on any basis of international comparison.

In the modern competitive economy governments are less prepared to provide “public” regulation of the professions so there tends to be greater reliance on “private” rules. The interaction between competition laws and private rules or restrictions applying to individual professions can produce tensions but if dealt with logically and transparently can produce “win-win” outcomes for suppliers of professional services and their clients.

My participation in talking to you today is not just meant to be a “one way street” so I look forward to responding to your questions and feedback.