



Australian
Competition &
Consumer
Commission



Celebrating

40

years of making
markets work

*Trade Practices Act 1974
Competition and Consumer Act 2010*

THE TRADE PRACTICES ACT 1974 OPERATES FROM OCTOBER 1.

On October 1, 1974, the Trade Practices Act comes into effect. With it comes a new code of conduct for the business community—a charter insisting on fair trading at all levels from the manufacturer right through to the consumer. The Act regulates anti-competitive and deceptive practices. It provides new protection for consumers, manufacturers and other businessmen who are dealt with unfairly.

The consumer who is misled or deceived in a shoddy deal can now seek assistance from the Trade Practices Commission or take action himself to recover his loss. He will be entitled to seek legal aid. It is important that all people involved in commercial transactions should become aware of the provisions of the new Act. It differs significantly from the old law. It creates new rights. It carries heavy penalties.



The Attorney-General, Senator Lionel Murphy, Q.C.

Twenty of the questions all businessmen will have to ask themselves now.

1. Does the understanding I have with my major competitors amount to price fixing?
2. Will my exclusive distribution arrangement be prohibited?
3. Will the Trade Practices Commission "authorise" or give a "clearance" for the agreement I had registered under the old Act? Must I first publicly disclose that agreement?
4. Is it true that my company could be fined as much as \$250,000 for breaking the Act?
5. And that I myself could be fined as much as \$50,000 personally?
6. As a retailer, do I, as well as a manufacturer, have responsibilities under the consumer protection provisions of the Act?
7. Will there be a penalty now for resale price maintenance?
8. What can I do to stop the restrictive practices those other firms are using to throttle my business? How can I use this Act to let my business compete more effectively?
9. Is my company using its undoubted power to prevent a competitor entering our market?
10. What about the fine print my lawyer organised for my warranty? Is that now null and void?
11. Is the merger I have been negotiating for the past eight months now in jeopardy? Might my company be compelled to dispose of the shares it acquires in this company?
12. Should I change my attitude to complaints by consumers now that they can get legal aid?
13. What instructions do I now need to give to my staff?
14. Can I justify the special prices that I am giving to some of our buyers?
15. What is the situation with the volume rebates I have been offering?
16. What sort of help is the Commission prepared to offer me as a businessman? As a consumer?
17. Will my advertising agency still be able to make the claims we've been using in this season's campaign?
18. Or am I asking them to make false representations?
19. If a consumer suffers damage from one of my products not satisfying product safety or information standards, can he really recover damages from me?
20. In those areas where my company's current policy is breaking the Act, just how long have I got to get on the right side of the law?

And the four best ways to find the answers.

1. By purchasing a copy of the Act and studying it.

The Trade Practices Act 1974 can be obtained from the Australian Government Publications and Inquiry Centres in Sydney, Canberra, Melbourne, Adelaide, Perth and Hobart (operated by the Department of the Media) or the Sub-Treasury in Brisbane. Or by mail from the Australian Government Publishing Service in Canberra. Price is 65 cents plus 35 cents postage and packaging.

2. By contacting your Chamber of Manufactures, Chamber of Commerce, or Trade Association.

Business associations have studied the Act on behalf of their members and they may be able to assist you with your specific problems.

3. By contacting a lawyer.

Lawyers will be able to advise you on your legal position and they will be able to prepare any applications that may be necessary.

4. By contacting the Trade Practices Commission.

The Commission's staff are ready to help you understand how the Act will operate. From October 1 the Commission will begin to consider applications for "authorisations" and "clearances" in cases where these are available.

The headquarters of the Commission is in Canberra and there are regional offices in each capital city. The addresses are:

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ATTORNEY-GENERAL'S DEPARTMENT



ATP2.587.34

In late 1974, the Attorney-General's Department placed a series of print advertisements drawing attention to the new Trade Practices Act.



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Australian Competition and
Consumer Commission

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Director Corporate Communications
Australian Competition
and Consumer Commission,
GPO Box 3131
Canberra ACT 2601

or by email to
publishing.unit@accg.gov.au

ACCC 10/14_907

ISBN 978 1 922145 34 5

www.accc.gov.au

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Website www.accc.gov.au

Callers who are deaf or have a hearing or
speech impairment can contact the ACCC
through the National Relay Service:
relayservice.com.au

Voice-only (speak and listen) users phone:
1300 555 727 and ask for 1300 302 502

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The test of time

Whether it is labelling claims made about the honey on your toast or a takeover bid for the company that supplies your milk, the *Competition and Consumer Act 2010* influences every business-to-business and business-to-consumer transaction in Australia.

The *Trade Practices Act 1974* (TPA) was renamed the *Competition and Consumer Act 2010* (the Act) and has gone through many reviews, but the original principles of promoting efficiency and competition and protecting consumers from unfair practices remain.

The 40-year anniversary of the Act is a significant milestone, yet it comes at a time when Australia is looking to reinvigorate its pro-competition culture. While the current government review of competition policy is the main game, the anniversary provides another opportunity to reflect on the important role the Act plays in our economy.

The Act provides clear but quite wide boundaries within which we can all benefit from the power of the profit motive. A market economy requires a modest amount of appropriate regulation to be effective, and this is exactly what our competition and consumer law provides.

The rich history of the Act entwines with that of the Australian Competition and Consumer Commission (ACCC) and its forerunner the Trade Practices Commission (TPC). The current day ACCC owes its effectiveness to the results and outcomes achieved in the past. Our record means most traders do the right thing when we approach them with our concerns, and we do so with the reputation built over 40 years.

Indeed, the excellent organisation that the ACCC is today is due to the timeless and skillful work of all its employees over the years. Each group has left the organisation stronger than when they found it; and this is the essential goal of those working here today.

Feature contributions from former Chairmen and CEOs remind us that life is not always easy for regulators. Their insights reveal how the Act has developed as well as the persistent challenges in protecting and enhancing the long-term interests of consumers.

As well as looking back, current Commission members provide their views on how the Act is playing out today in making markets work. Having seen investigations unfold and regulations evolve over many years, current ACCC staff and industry experts also share their memorable moments.

A lot changes in four decades. In standing the test of time, the Act has met a changing marketplace, new business practices and growing consumer expectations. It is a fascinating story worth celebrating.

ACCC Chairman Rod Sims

*‘Given the nature of the *Competition and Consumer Act* and our regulatory system, the ACCC needs to be an active regulator, taking strong enforcement action, and to be seen as such. This has a crucial multiplier effect. We also need to explain our role, and the logic underpinning our Act, so that Australians have faith that a market economy works for them.’*

ACCC Chairman Rod Sims addressing the National Press Club in March 2013.

The ground breakers

Sir Garfield Barwick and Lionel Murphy are two political pioneers of the modern Australian competition and consumer law.



Barwick 'virtually operated as a commission of one to inquire into some of the most difficult and complex aspects of the commercial life of Australia and their effect on the community'. In 1962, Barwick presented his plan for 'a sensible and workable scheme' to control harmful restrictive practices.

'I think few, if any, will deny, that there are practices current in the community which by reason of their restrictive nature are harmful to the public interest—that interest being in the maintenance of free enterprise under which citizens are at liberty to participate in the production and distribution of the nation's wealth, thus ensuring competitive conditions which tend to initiative, resourcefulness, productive efficiency, high output and fair and reasonable prices to the consumer.'

Attorney-General Sir Garfield Barwick statement as read to the House of Representatives on 6 December 1962.

The business lobby swung into action, the politics played out, and with the support of Attorney-General Billy Snedden, the *Trade Practices Act 1965* eventually took effect in September 1967. The legislation was a pale imitation of the original that had been proposed by Barwick, but it was an important stepping-stone.



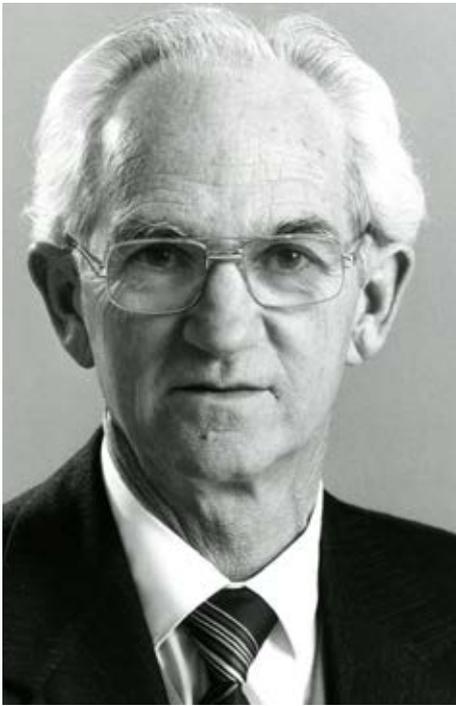
With a change of government, it was time for Attorney-General Lionel Murphy to make his mark. After a couple of false starts, Murphy presented a Trade Practices Bill bringing together 'four fundamental rights: the right to be safe, the right to know, the right to choose and the right to be heard'. In stamping out restrictive practices, Murphy argued that the law was good for the economy in dealing with inflation. He also tied competition with consumer protection declaring the days of 'buyer beware' over as consumers were no match for a new breed of trained marketing executives.

'Mr President, it will be apparent to honourable senators that the Bill is of great importance. It represents a great advance in the areas of restrictive trade practices and consumer protection and attends to a wide variety of problems. This is intended to promote efficiency and competition in business, to reduce prices and to protect all Australians against unfair practices. I commend the Bill to the Senate.'

Attorney-General Lionel Murphy concluding the second reading of the Trade Practices Bill on 30 July 1974.

Sources:

Member for Forrest, Gordon Freeth, House of Representatives Hansard, Thursday, 6 December 1962; Working Paper Business attitudes to the Australian Trade Practices Act 1965 and the Secret Register of Agreements, Kerrie Round and Martin P. Shanahan; Member for St George, Bill Morrison, House of Representatives Hansard, Wednesday, 24 July 1974; photo of Sir Garfield Barwick courtesy of Attorney-General library.



Raising the banner

Australia is fortunate to have had Ron Bannerman as the early leader in the field. Bannerman became Chairman of the Trade Practices Commission on its establishment in October 1974 and held the post until his retirement in December 1984. Previously he had been the first and only Commissioner of Trade Practices from 1966 to October 1974.

Bannerman's address to the Commercial Law Association shortly before his retirement in October 1984 captures his vision and foresight as he reflects on the first ten years of the Trade Practices Act. This is a shortened version of his speech.

The first ten years of the Act: Ron Bannerman

If we go back to 1974, we find the Trade Practices Act commencing in times of economic difficulty. Annual reports to the Parliament under the earlier law had shown how the web of anti-competitive restriction spread across industry and hampered the efficiency that the economic climate was demanding.

The earlier law had demonstrated that there was adequate constitutional power for the fundamentals of the trade practices law. It had also demonstrated that price agreements between competitors, and resale price maintenance by suppliers, were not justifiable and would have to go.

'...there were apprehensions as to how it would work out in areas previously untouched'

So by 1974 there was bi-partisan support for stronger trade practices law, and there was business acceptance of the inevitability of that, although there were apprehensions as to how it would work out in areas previously untouched.

The 1974 Act was comprehensive and direct, and it called for open administration—by contrast with the earlier secret register. The fundamental objective of the Act was to seek real consumer (i.e. community) benefit. To get that, competition would encourage increased industry efficiency, while recognising that scale economy was sometimes more important. Simultaneously, consumer protection administration would press competition into the areas of quality and price, and help consumers to exercise more effective power in the market.

'...through industry benefit comes consumer benefit'

Industry stood to benefit from all this—sometimes immediately, but

more often in the middle to longer term—and through industry benefit comes consumer benefit. To be effective, the Act needed to gain stability and maturity.

A good deal of maturity has been achieved. First, there was the base from the earlier Act, and the acceptance of the need for strong law—at least in the hard-core areas. Second, the 1977 amendments (which followed the 1975 change of government and the 1976 Swanson Review Committee report) made the Act more effective overall, and set the seal on its permanence. And third, administration has been progressively demonstrating the areas where some certainty can be felt as to the application of the law. In the course of that, direct contact with industry has been nurtured so that acceptance of the law and its administration has been continuing to develop.

'...acceptance of the law and its administration has been continuing to develop'

In the exemption (or authorisation) area, initially there were many thousands of applications to be dealt with. The authorisation work has been valuable. It allowed companies to be heard; it has brought them into

contact with the administration; it has required the Commission to state reasons for what it is doing and has subjected it to the discipline of appeal to the Trade Practices Tribunal presided over by a Federal Court judge; and it has brought a degree of clarity into areas that were contentious.

'The most contentious [legislative proposals] concern unions, small business and mergers'

While many of the legislative proposals are for 'good housekeeping' or 'closing loophole' purposes, a number are very important in principle. The most contentious concern unions, small business and mergers. In those areas, the stability of the Act and its longer-term administration await decisions by the government and parliament and any necessary settling-down period while industry adjusts to amendments.

The Commission is currently well into a new phase of its experience where it is taking a more forward-thinking and positive role in relation to the areas of its responsibilities. In all of its work, the Commission sees itself as responsible to the needs of industry efficiency on the one hand and of consumer interest on the other, with the duty to reconcile them where it can.

The TPC has absorbed the lessons from the tribunal decisions and there are now very few cases taken beyond the TPC on appeal. On the contravention side, the Federal Court cases are usually dramatic for the parties involved.

'publicity brings the lessons home to others...the court is a powerful influence on the way the law develops and is regarded.'

The publicity brings the lessons home to others affected, and thus the court is a powerful influence on the way the law develops and is regarded.

The attitudes of the business community are vital to the administration of the law, because it needs at least core acceptance from those to whom it is directed. It is widely appreciated now that, in a world economy that Australian industry has to be part of it, it cannot afford a status quo mentality and to put clogs on efficiency by trying to shield itself from market forces instead of accommodating them.

'competition is the best consumer protection'

Consumers, of course, have an interest not just in consumer protection provisions but in the whole Act. We are all consumers. We need efficient industry, because we depend on it for much of our employment and our standard of living, so consumers have a considerable stake in whatever improves the efficiency of industry. Competition is one of those things. Indeed, it is sometimes said that competition is the best consumer protection. So a well-adjusted competition law and its proper administration are matters of real consumer concern. Recently, the consumer movement has begun to express itself more on these matters, and

this may help towards the growth of constituencies for the law in the general community.

'tensions are part of free enterprise'

The factors affecting the development of trade practices law are economic, political, legal and social. There is tension at times between principles of competition and principles of equity, and between the interests of big business, small business and the organised consumer movement. Even in applying settled principles, there is usually tension inside an industry. These tensions are part of free enterprise. Trade practices law could hardly be administered if the tensions were not there or did not begin to emerge. The very role of trade practices law is to assist and accept the processes of change that come from the dynamic forces within our own economy and that are affected by other economies.

'Trade practices law is one force among many forces.'

The experience of the first ten years has taught us all the need for flexibility—and for sensitivity to changing and emerging ideas on efficiency, on industry structure and on the vital role of competition in relation to both. Trade practices law is one force among many forces.

Ron Bannerman was Chairman of the Trade Practices Commission between 1974 and 1984. He passed away in July 2013. This is an edited version of his address to the Commercial Law Association in October 1984.



‘The authorisation work has been valuable. It allowed companies to be heard; it has brought them into contact with the administration’

Bannerman chairing pre-decision conference, Benjamin Offices, Belconnen

Putting the wheels in motion

In 1974, the Trade Practices Commission issued the first Information Circulars to assist consumers and businesses understand the Act and the TPC’s role.

The first five circulars covered a range of issues

1. Authorisations of existing arrangements and conduct. Dealt with lodging authorisation applications for restraint of trade or exclusive dealing.

2. Exclusion of documents from the Public Register. Set out the criteria for dealing with confidentiality applications.

3. Recommended price agreements. Outlined the practice of denying clearance to recommended price agreements between competitors.

4. Consumer protection—representations that goods have accessories they do not have. Provided advice about advertising goods (such as a BBQ) and their related accessories (such as a gas bottle).

5. Consumer protection—Conditions and warranties. Explained the strengthened position of consumers under the Act and emphasised that consumer rights cannot be defeated by exclusion clauses in a manufacturer’s express warranty.

Source: Trade Practices Commission First Annual Report 30 June 1975



The great survivors

By Hank Spier

Does anyone remember the market situation before 1974? It was full of cartels, resale price maintenance (RPM), third line forcing and boycotts and the then legislation totally lacked any transparency.

The early Trade Practices Commission (TPC) days were formative yet dangerous. The political support was tenuous.

However, the 1965 Trade Practices Act helped to get business ready for improved competition law and built up some critical expertise in the Commonwealth Public Service. That allowed the TPC to get moving fast. Although not always successfully.

Each new chair acts as if little had happened before their appointment. Yet each chair has to be given full credit for the development of the agency and the law. Its strength is in the tradition and expertise that each chair inherits.

What happened in 1973-74?

The law squeaked in by one vote in the Senate.

The then Government published large cartoon advertisements in national papers promoting the new law and agency.

The states boycotted the TPC.

The TPC was flooded with consumer complaints, most of which it could not resolve but staff vainly tried to.

The TPC offered interim authorisation for anyone who lodged by end February 1975. About 29 000 applications flooded in. A major workload for many years.

'Lawyers loved it. A trade practices mafia of lawyers and economists evolved.'

The TPC flung itself into authorisation process with regular public hearings and in many cases appeals to the Tribunal. Lawyers loved it. A trade practices mafia of lawyers and economists evolved.

The Commission launched a number of second generation

competition cases but lost or messed up most. Consumer protection cases were largely successful.

'This lean and mean culture stayed with the agency for decades'

The first Chair, Ron Bannerman, was a very frugal man and took the agency down the same path. Many a TPC officer lay low in their Commonwealth car at airports as the car sped past Bannerman who was walking to the bus stop carrying his suitcase. This lean and mean culture stayed with the agency for decades.

What was achieved?

Competition law became accepted and grew into competition policy and an integral part of the economic landscape.

Practices that had built barriers into the economy such as RPM, third line forcing and solo trading were largely eliminated. Those who advocate a competition test for some of the per se conduct need to look back in history and look at the possible counterfactual.

The breaking down of RPM saw retail discounting develop, the

breaking of third line forcing saw kick back commissions eliminated and freedom to consumers to shop around for say credit when buying a car. Primary boycotts being eliminated opened up many markets to new entrants. Cartels were harder to eliminate and still are.

The TPC made the consumer protection provisions work and these were later mirrored by the States and Territories and eventually became the Australian Consumer Law.

‘...the first enforcement body to take proactive compliance seriously’

The TPC was the first enforcement body to take proactive compliance seriously and issued many guidelines. There was a general culture of business dialogue.

A free informal merger review regime emerged and has been fine-tuned over the years and is a feature of the TPC/ACCC merger review regime.

Court enforceable undertakings were introduced and used extensively to get quick and low cost outcomes. Query whether they became a too easy option to both the agency and those in breach?

There was no obvious political interference in TPC/ACCC operations and any political appointments were appropriate appointments. Nor did the agency become captive in any way.

A wide range of functions were given to the agency, notably access rules and GST policing. Universal application of the law was readily accepted in the late 1990s, after fierce opposition in the past.

Committed and professional staff, many recruited in 1973-4, stayed until retirement.

The agency is largely transparent subject to commercial considerations to protect third party information.



Changing of the guard, CEO Hank Spier (right) attends his final Commission meeting in June 2000 alongside incoming CEO Brian Cassidy (left)



Senior Trade Practices Commission staff circa 1976: Standing left to right: R Cramond (Regional Director SA), R C Davey (First Assistant Commissioner), W Coad (First Assistant Commissioner). Seated left to right: D Campbell (Regional Director NSW), D McDermott (Regional Director Tas), G Jones (Regional Director Vic), A Dodd (Regional Director QLD), S Malouf (Secretary TPC), J V McKeown (First Assistant Commissioner)

Unlike some enforcement agencies there was never any Royal Commission or major inquiry into the failings of the agency. Two politically motivated reviews (Swanson and Dawson) back fired and actually strengthened the law and the agency.

Hopefully, another 40 more successful years ahead and, if

similar agencies overseas are any guide, that is likely although no doubt some institutional change will occur.

Hank Spier was General Manager (later re-named CEO) of the TPC and the ACCC between 1991 and 2000. He joined the Office of the Commissioner for Trade Practices in 1969 and is a veteran of the 1974 TPC.



That's entertainment

During the past forty years, changes in technology have been revolutionary. The TPC and the ACCC have played a part in ensuring consumers and businesses can confidently make the most of emerging technology and entertainment.

In the **70s**, the TPC issued guidelines in response to concerns about the inconsistent promotion of television screen sizes. As new colour TVs had wide masking at the edges of the picture tube, the guide stated that promotions should clearly indicate the diagonal measurement of the viewable picture area in centimetres.

In the **80s**, the TPC was alerted to concerns about AM/FM 'stereo' claims. Some consumers expected their new radio set to transmit in stereo both on the FM and AM band, when stereo was only available on the FM dial. An industry led consumer education program was the response.

In the **90s**, when the internet was still in its infancy, the ACCC was concerned about the accuracy of advertising by the Internet Service Providers. The ACCC issued a warning that customers who had bad experiences in the early days 'such as unexpectedly large bills' may never return.

In the **2000s**, the ACCC stepped-in to ensure Sony PlayStation users could enjoy games legitimately bought overseas, as well as authorised backup copies, by legally having their consoles chipped.

In **2003**, following ACCC action, the Full Federal Court found Warner Music and Universal Music had engaged in exclusive dealing to prevent record shops selling parallel imports of CDs.

Around **2009**, the ACCC worked to ensure mobile phone retailers provided consumers who had a faulty handset with a reasonable remedy for the entire life of their contract.

In **2012**, the ACCC took Apple Pty Ltd to court for misleading advertising in relation to its 'iPad with WiFi + 4G'. The 'iPad with WiFi + 4G' could not connect to any networks which have been promoted in Australia as 4G networks.

In **2014**, the ACCC instituted court proceedings against Valve Corporation, the owner and operator of an online computer game distribution platform known as Steam. The ACCC alleges the company made false or misleading representations about the application of the consumer guarantees under the Australian Consumer Law.

High Court chronology

There are winners and losers, but High Court decisions define the law and set the legal precedent. This is a summary of High Court decisions covering the *Trade Practices Act 1974* and *Competition and Consumer Act 2010*.

1979

Trade Practices Commission v Tooth & Co Ltd [1979] HCA 47

The TPC's first High Court case. The High Court held that the challenged part of section 47(9) of the TPA was valid, as argued by the TPC and Attorney-General.

1982

Pioneer Concrete (Vic) Pty Ltd v Trade Practices Commission [1982] HCA 65

This case provided clarity on the TPC's power to issue notices under section 155 of the TPA during court proceedings to which the Commission is not a party. The High Court held that the TPC could issue section 155 notices when proceedings are pending in the Federal Court in respect of the very conduct to which the notice refers and if the TPC is not a party to those proceedings.

Rochfort v Trade Practices Commission [1982] HCA 66

This case affirmed what types of documents are considered to be in an employee's custody, control or possession. The TPC served subpoenas duces tecum to the officers of particular companies, requiring them to produce a number of documents relating to meetings of certain organisations to which the companies belonged, including the National Freight Forwarders Association (NFFA). The High Court held that Mr Rochfort was obliged to produce the NFFA's documents that were in his custody, control and possession. The High Court reasoned that as Mr Rochfort was not an employee of the NFFA, he could not rely on the English Eccles principle, which inhibited the production by an employee of his employer's documents where to do so would violate his duty to the employer, in relation to those NFFA documents which were in his custody, control or possession.

State Superannuation Board v Trade Practices Commission [1982] HCA 72

This case provides clarity on the application of the TPA to the Crown in right of the States/Territories of Australia. The High Court held that the State Superannuation Board cannot be described as the Crown in right of the State of Victoria. The High Court reasoned that the State Superannuation Board was a financial corporation within the meaning of section 51(xx) of the Constitution and thus was subject to the provisions of the TPA.

1983

Pyneboard Pty Ltd v Trade Practices Commission [1983] HCA 9

This case provides significant points on the application of the privilege against self-incrimination in the context of responding to a notice served by the TPC pursuant to section 155. Interestingly, the High Court framed the privilege against self-incrimination in terms of a human right. Although the majority was not prepared to hold that penalty privilege cannot apply in non-judicial proceedings, the High Court ultimately considered that the words in section 155 impose an obligation that would not permit exceptions from complying with the notice on the ground that the information, documents or evidence may tend to incriminate the person.

A dual perspective



By Roger Featherston

Having worked in the competition law area since 1975, both for the Commission (1975–79, and again since 2012) and in private practice (1980–2012), I have had the opportunity to observe the development of the area over the last four decades from both sides of the ‘fence’. I can say ‘the dark side’ is always the other side.

The Trade Practices Act 1974 has had an enormous impact in protecting consumers and making markets in Australia more competitive.

The Commission got off to a solid start, but its resources were stretched for a few years by the huge volume of applications lodged at the commencement of the Act for pre-existing conduct.

In addition to various Tribunal matters flowing from that authorisation work, the Commission was active in those early years in pursuing other litigation under Parts IV and V.

The early penalty against Sharp of a total of \$100 000 for breaches of section 53 was a massive penalty in its day, shocking the business community and giving the Commission a real boost.

‘Section 52 has been the stand out success story’.

Section 52 has been the stand out success story of the 1974 Act. That simple section, prohibiting misleading or deceptive conduct, was quickly relied upon successfully by the Commission in relation to scams and other consumer protection issues, and then was also adopted enthusiastically by private litigants, including by competitors challenging a rival’s advertising.

Unfortunately, the enforcement of Part IV was slower to develop and the Commission and private litigants suffered a number of early setbacks. However, merger clearance work and successes in a number of price fixing and other cases (including a couple of merger cases) retained the interest of the business community.

Businesses generally wish to comply with the law, but their willingness to take legal risks does depend on how active and effective the Commission is, and is also affected by the size of corporate penalties and the potential for personal penalties.

Hence, the increase in corporate penalties from \$250 000 to \$10 million was important, particularly when the Court promptly adopted multi-million dollar penalties against TNT and Mayne Nickless, as was the later introduction of imprisonment for cartel conduct.

‘it was the Hilmer inquiry that struck a chord with the business community’

The past 40 years have been peppered with inquiries into the Act, but it was the Hilmer inquiry that struck a chord with the business community on the importance of competition policy.

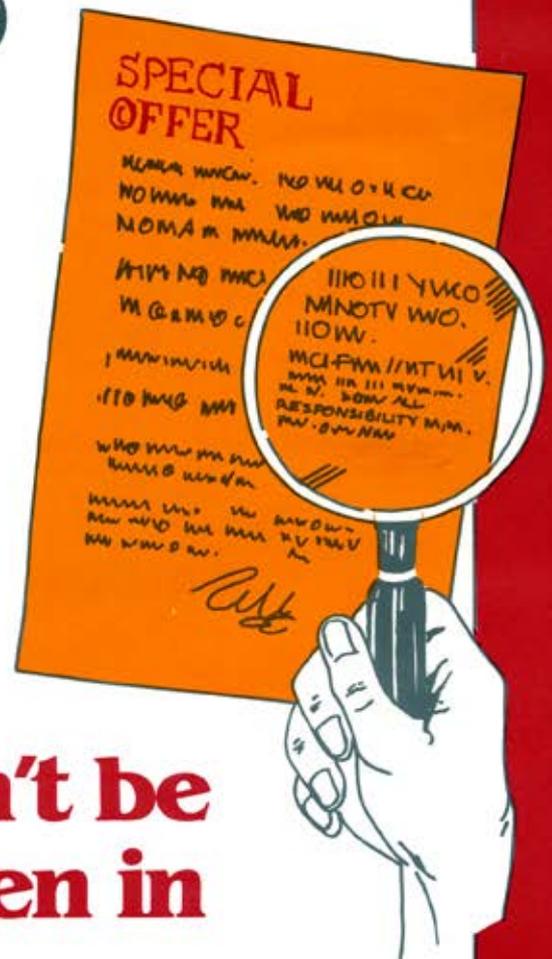
As a result of the work and integrity of staff of the Commission, and a greater appreciation of the value of competition policy, the Commission and the Act are generally held in high regard by the business community, notwithstanding the many frustrated and self-interested comments and submissions from time to time to the contrary!

Roger Featherston is a Commissioner of the Australian Competition and Consumer Commission.

Getting a fair go

Watch out for

- high pressure sales
- fine print
- take-it-or-leave-it contracts



Don't be taken in

If you are, ask the Trade Practices Commission or Consumer Affairs about your rights

Ask the Trade Practices Commission for its leaflet 'A fair go for consumers'

Trade
Practices
Commission



Watchdog profile:

Alan Ducret



Alan Ducret joined the Trade Practices Commission in October 1974, as the first provisions of the Trade Practices Act were becoming operational. Alan is the ACCC's Queensland Regional Director.

What were the hot issues in 1974?

Alan Ducret: There were so many of them. In the first nine months of operation the TPC received just short of 22 000 authorisation and clearance applications, and while their registration and processing was not necessarily the most interesting work, it took a huge amount of time and effort to handle them. I remember taking witness statements for the Hammersmith Storage Module case which we ultimately won, and working on the Vaponordic case which we didn't.

It was a fantastic time in which the organisation and its officers had to learn the trade. The TPC was not without experience, but I was, and I really enjoyed learning how to investigate and litigate. The Federal Court of Australia was not created until 1976, so in the early days we litigated in the Industrial Court.

What has been the biggest change within the agency?

AD: While new senior executives and amendments to the law have all had big impacts, the relentless development of technology has created the most significant changes to the workplace. When I started I used a telex to communicate urgent messages. There were no computers or email. Indeed, it was a few years before the first facsimile machines arrived. There were no mobile telephones. We did not even have an office car. I had to travel by bus and train to see witnesses. Most of my written communication was by way of letter and memo, which was typed up in a typing pool after I wrote it by hand. Does anyone remember typing pools? We obtained our first computers around 1985, and I had to learn to type. I am still learning.

What is the most interesting matter you've worked on? why?

AD: The Aboriginal insurance cases of the early 1990s were certainly among the most interesting and challenging. Various insurance companies had engaged in deplorable selling practices involving

misrepresentations and unconscionable conduct in remote Aboriginal communities across Queensland and the Northern Territory. The logistical problems of getting to these remote communities and conducting investigations with witnesses who needed support from community councils to make the process bearable and understandable, were major obstacles that had to be mastered. It was not only interesting to learn about life on these communities, but it was a huge challenge to do the job well.

What has been the most satisfying outcome?

AD: The satisfaction of breaking major cartels and stopping conmen from fleecing innocent people should not be discounted, but in my case I received huge satisfaction in another way. When I first joined the TPC I told my father I had found this wonderful job that was going to change the world and improve people's lives. I explained that I would be protecting consumers. Ever the cynic, he told me that he would believe me when we took on the big international motor vehicle manufacturers. I recall later showing him the Court judgment in my first case—Ducret v Nissan Motor Company (1979). He didn't say much, but he took the judgment to work to show all his mates.

Any moments you would prefer to forget?

AD: This work is not for the fainthearted. During the MUA dispute in 1998 another officer and I visited Hamilton Wharf in Brisbane to observe the picket line first-hand. The purpose was simply to observe whether the 'blockade' was really stopping trade on the wharf, and if so, how. Within seconds we were surrounded by a milling crowd of about 100 (it seemed like 1000) angry protesters hurling abuse at us and calling for our blood. To be honest, I could have done without that.

If you could sum up the Act in a word?

AD: Vital.



Unprecedented change

At the end of his three-year term in 1988, the ‘poacher turned gamekeeper’, Bob McComas said he had served as Chairman of the Trade Practices Commission during a time of unprecedented economic change.

In a paper presented to the Centre for Independent Studies in February 1988, McComas exits the stage leaving no doubts on where he sees the role of competition law in the marketplace. This is an extract of his address.

Australian Competition Law: W R McComas

When Adam Smith spoke of the discipline exerted by the ‘invisible hand’ of the marketplace, he made a basic assumption that the marketplace was competitive.

When some modern economists speak of a deregulated or free market, they too make the same assumption.

History and experience have shown that, given total freedom from formal regulation, it is rarely the case that the marketplace has been free in the sense of being wholly competitive.

I take a wholly competitive market to be where each participant relies upon his own skill, the quality of his product and the excellence of his service to attract

custom, leaving it to the forces of supply and demand to determine prices.

Absent formal regulation, the freedom of the marketplace has more often than not been curtailed by what I might describe as self-regulation.

Individual firms or groups of firms have found it convenient to even out the more difficult or more forceful elements of competition to create what has somewhat euphemistically been described as ‘an orderly market’.

‘rules are reasonably necessary’

Given that it is a universally accepted principle that maintenance and preservation of competition is an economic good, and recognition that if a wholly free marketplace will not ensure that state of affairs, rules are reasonably necessary to achieve the desired objective.

This must always be qualified by the proviso that rules are suitably adapted to the market they are intended to regulate, and are not simply imported from another country.

A further proviso is that they are capable of being, and are in

practice administered, in step with the commercial realities of the marketplace.

A sophisticated piece of legislation

1975 saw the [full] introduction of the present Act—a sophisticated piece of legislation, which borrowed from the United States and European jurisdictions.

Over the [first] 13 years of its application, competition law has developed with some relative speed when one compares it with progress in the United States. Their anti-trust laws have existed for most of this century. I suggest that it does not yet have a settled meaning in areas other than those represented by per se offences.

Development in Australia has not described a smooth and consistently rising curve. This cannot be regarded as surprising given the need to apply the provisions of the law to dynamic business situations and given the dearth of lawyers and others who are comfortable with the concepts of the law and their application.

There is, however, a nucleus of informed persons, and the appointment of appropriately qualified persons to judicial and regulatory positions will see it grow.

'businessmen, by and large, have come to respect and abide by the proscriptions of the Act'

There has been a growth in understanding of the law by businessmen. There is an earnestness there in that, while understandably reluctant to accept any constraints upon their freedom, businessmen, by and large, have come to respect and abide by the proscriptions of the Act.

The myopic mewing of certain special interest groups which affect a concern about the Act and its administration demonstrate that they do not appreciate the significance of that fact.

They fail to appreciate that an industry which is efficient and competitive is one which

is beneficial to society, to the consumer if you like.

Too frequently they choose to overlook, if they ever appreciated it, the significance of the point made by the then Attorney-General when he said in the Senate in November 1973:

'[Restrictive Trade Practices] cause prices to be maintained at artificially high levels. They enable particular enterprises or groups of enterprises to attain positions of economic dominance which are then susceptible to abuse; they interfere with the interplay of competitive forces which are the foundation of any market economy.' Senate Hansard, 15 November 1973 p. 1872

The interests of consumers are best served by a competitive marketplace, and anti-competitive practices are just as unfair as the more specific types of undesirable business practices (Part V—consumer protection).

'The interests of consumers are best served by a competitive marketplace'

A unique experience

I have had a unique experience in heading the Trade Practices Commission throughout an unprecedented level of economic change. Unprecedented not so much in the frequency of events, but in their magnitude and impact.

My term has not been without controversy, which I believe in a dynamic area such as the competition law of this country is not only to be expected but, insofar as it is constructive, is healthy and welcome.

W R McComas was Chairman of the Trade Practices Commission between 1985 and 1988. He passed away in July 2005. This is an edited extract of his address to the Centre for Independent Studies in February 1988.



Launch of the Trade Practices Act Teaching Package in July 1987 (from left to right) Don Morrison TAFE Advisory Council, Jeni Murphy, Bob McComas, Colin Arkley-Smith and Bill Coad

Watchdog profile:



Steve Bray



Steve Bray joined the Trade Practices Commission as a summer clerk in January 1984. He quickly moved from mail duties to an investigation role in the 'CP Operations' branch. 30 years on, Steve is an Enforcement Director in the ACCC's Canberra office.

What were the hot issues in 1984?

Steve Bray: We were still receiving lots of authorisations and notifications. The TPC v Mobil Oil judgment was handed down. The TPC took on orange juice manufacturers for adulteration and even back then petrol prices were an issue. I also bought my first car, a 1972 brown HQ Holden for \$500, the equivalent of six weeks wages at the time.

What has been the biggest change within the agency?

SB: Without doubt the impact of technology on the workplace. The fax machine was not in use so if you wanted to get a letter off as fast as possible we sent it 'express mail' through the post. We had one photocopier, which was the size of a large car. Another big change is the number of ACCC employees and our role has certainly broadened.

'there is never a dull moment...one minute I am at a factory...the next I am talking to a farmer'

What is the most interesting matter you've worked on? Why?

SB: One of the real attractions of working for the ACCC is the diversity of matters we encounter—there is never a dull moment. One minute I am at a factory that manufactures spun reinforced concrete

pipes talking about predatory conduct, and the next I am talking to a farmer in the Atherton tablelands West of Cairns about fertiliser supplies. I have worked in a number of the ACCC offices including Townsville, Perth, Darwin, Sydney, Canberra and the little known former Wollongong office. In each of these placements, I encountered matters that required me to get into the detail of a company, industry or practice—I just love learning how things work.

'the refund process was very satisfying'

What has been the most satisfying outcome?

SB: I worked on the TPC's Aboriginal insurance cases in 1992 with Alan Ducret. Insurance agents from at least three different insurers targeted people in remote outback communities with superannuation and investment policies. They made all sorts of wild promises such as a refund on their money within two years or telling customers they had to get a policy as it was the law. The agents signed up uneducated stockmen and other rural workers and arranged monthly payments by bulk billing through their pay offices, in some cases fraudulently applying signatures to obtain illegal access to welfare payments. As part of the settlement with Colonial Mutual Life Assurance Society Ltd, \$1.5 million was returned to about 2000 policyholders in 22 remote communities. Bringing the agents and companies to justice for such appalling unconscionable behaviour against a disadvantaged group and then personally being at the communities during the refund process was very satisfying.

If you could sum up the Act in a word?

SB: Fairness



A professional study

In the early 90s, the TPC's study of major professional markets, was the most comprehensive of its kind to be undertaken in Australia. It examined the impact on the economy of the various regulations of professional services, including legal. The study reviewed both government and self-regulatory arrangements to assess the reasons for restrictions, their impact on competition, the private and public benefits that flow from them and the cost to the consumer. The study unfolded over many years making recommendations about both the structure and the regulations within each profession.

Source: Trade Practices Commission Annual Report 1991-1992



Taking a harder line

Bob Baxt reflects on his time as head of the Trade Practices Commission (TPC). He provides his thoughts and insights on dealing with merger reviews, taking the tough cases, and pursuing changes to the Act.

...on the role

Bob Baxt: My three and a quarter years as head of the TPC were certainly challenging and enjoyable despite a number of frustrations. I was delighted to be able to succeed two quite different but highly respected chairmen in Ron Bannerman and Bob McComas. Whilst I disagreed with the approach Bob McComas took to dealing with mergers, the TPC continued to attract strong support from the community in a range of matters.

...on the merger moments

BB: The TPC had negotiated a number of deals with merging parties, allowing high-profile mergers to be pursued, which were quite problematic. We faced criticism from Bob McComas and certain sections of the community for taking a more hard line attitude in the clearance of mergers.

I was confronted very early in my term as Chairman by Bob McComas acting for Arnotts Biscuits in its attempted takeover of Nabisco Biscuits. The TPC fought a long and expensive case (over 10 months) and had to seek additional funding but scored an impressive victory in the Federal Court and on appeal to the Full Federal Court in that merger case—based on the dominance test.

...on the tough cases

BB: Regrettably the more problematic ‘failures’ were illustrated by the unwillingness of the TPC to take on hard cases such as the Queensland Wire

case. But, it did challenge the Australian Meat Holdings merger and I was pleased to share the glory of a successful challenge notwithstanding the need to satisfy the dominance test.

One of my first tasks was to see if the TPC could intervene in the High Court appeal in the Queensland Wire case under section 46 of the Act. I was delighted when the High Court allowed Alan Goldberg QC (as he then was) and David Shavin, as instructed by a fine General Counsel in Bob Alexander, to argue the case we believed was quite clear on the facts. Even though the TPC’s intervention was rejected in law, the arguments so ably put forward were embraced by the appellant company which was successful.

‘People tend to forget the important role the Commission has played over its 16 years of existence in developing guidelines for an easier shift from a previously highly regulated economy to one which is now being asked to remove those shackles of protection and to operate in an environment free from too many restrictions’

Professor Bob Baxt addressing the Australian Institute of Company Directors in September 1990.



First meeting of the Commission's consultative committee held in July 1989

'The High Court decision in this case remains the high water mark'

The High Court decision in this case remains the high water mark in the interpretation of the section, which is very much under scrutiny in the current Harper Review. It will be a mistake for the so-called small business solution being pursued by some to come at the expense of undermining the principles underpinning the section as interpreted by the High Court in Queensland Wire.

...on the testing times and guiding studies

BB: We needed to test the parameters of the law and we brought many cases which were seen by some as being on the periphery. Despite criticisms we tackled problems under a range of provisions.

'a study of the professions ... became instrumental'

We also published a number of guides on controversial areas of the legislation (e.g. a guide on section 46 among others). We worked closely with members of the legal and economic

community to produce these studies. We also initiated a study of the professions which became instrumental in later authorisation applications/reviews.

...on pursuing changes to the Act

BB: One of the important suggestions I made to government was to amend the Act to allow parties to seek authorisation of complex mergers direct from the then Trade Practices Tribunal. This suggestion was eventually adopted (in slightly different form) by the Dawson Committee, enacted in 2007 and used successfully in the recent AGL/Macquarie Generation matter.

I also pursued the push to have the legislation and the regulator brought under the Treasury portfolio.

'the maximum penalty for a breach of the law was a mere \$250 000, a tickle under the chin'

Each year we asked for more resources and for an increase in penalties which were ridiculously low. We brought a number of

cases including section 46 cases but the TPC faced a significant disincentive because the maximum penalty for a breach of the law was a mere \$250 000, a 'tickle' under the chin, so to speak.

...on improving the agency

BB: During my chairmanship, I encouraged staff exchanges with our Canadian and New Zealand counterparts, created staff scholarships and generally involved myself in ensuring the most talented members of the TPC were appropriately rewarded.

I insisted on travelling to overseas regulatory meetings, such as the OECD, to ensure the Australian authority was 'in the loop'. The TPC participated in the Trade Practices Workshops I had initiated whilst I was Dean/Professor at Monash Law School and encouraged full engagement by senior staff in the work of the Law Council of Australia.

Professor Bob Baxt was Chairman of the Trade Practices Commission between 1988 and 1991.

The roadmap on unconscionable conduct



By Sarah Court

The law of unconscionable conduct has undergone rapid development in the 40 years of the Commonwealth consumer laws.

While the equitable concept of unconscionability dates back many decades—what we might call ‘statutory unconscionability’ has a relatively recent past, with the first section to prohibit conduct that is ‘unconscionable in all the circumstances’ being introduced in 1986 (originally section 52A, later section 51AB). This was followed by section 51AA in 1992 and section 51AC in 1998.

Section 51AB provided protection specifically for consumers, and section 51AC then extended the prohibition against unconscionable conduct to specifically protect small business. The latest amendments to the prohibition, in the Australian Consumer Law, collapsed sections 51AB and 51AC into a single provision to protect both consumers and small business.

‘broad protection to consumers and small businesses’

The content of these provisions indicated a clear intention by the Parliament to give broad protection to consumers and small businesses involved in activities with a corporation in trade or commerce. The sections not only prohibit engaging in ‘conduct that is, in all the circumstances, unconscionable’ by reference to a non-exclusive broad list of factors, but also ‘conduct that is unconscionable within the meaning of the unwritten law, from time to time’ (section 51AA).

The statutory provisions were intended by the Parliament to extend the common law doctrine of unconscionability to introduce additional statutory protections to consumers and small business. In particular, the sections were not limited to the common law need to establish ‘special disadvantage’ or ‘special disability’ in the sense described in earlier equity cases.

The ACCC has sought to enforce the protection offered by these provisions by taking a number of cases in both the consumer and

small business areas over many years, and successfully arguing that these laws extend common law protections.

The early Full Federal Court case of *ACCC v Samton Holdings Pty Ltd* established that the word ‘unconscionable’ is not a term of art but that it bears its ordinary meaning of ‘showing no regard for conscience, irreconcilable with what is right or reasonable’.

Since that time the case law regarding statutory unconscionability has developed, culminating in the significant 2013 Full Federal Court decision of *ACCC v Lux Distributors* where the Court, when contemplating the meaning of ‘unconscionability’, observed:

Notions of moral tainting have been said to be relevant, as often they no doubt are, as long as one recognises that it is conduct against conscience by reference to the norms of society that is in question. The statutory norm is one which must be understood and applied in the context in which the circumstances arise. The context here is consumer protection directed at the requirements of honest and fair conduct free of deception, Notions of justice and fairness are central, as are vulnerability, advantage and honesty.

The ACCC welcomed this judicial recognition of the relevance of current societal and statutory norms as fundamental to the assessment of whether conduct is unconscionable.

Sarah Court is a Commissioner of the Australian Competition and Consumer Commission.

The first drive

In July 1988, the TPC instituted proceedings to restrain a Perth car dealer, Biro Holdings, from engaging in misleading and unconscionable conduct. This was the first use by the TPC of the Act’s unconscionable conduct provisions in court proceedings. The matter was settled by consent in August 1988, with Biro agreeing that there had never been a contract between Biro and the customer for purchase of a car and agreeing to refund the customer’s holding deposit.

Source: Trade Practices Commission Annual Report 1987–88 p. 39



Lifting the intensity

By Allan Fels

From 1991 until 2003 there was a major intensification and extension of the Commission's enforcement activities; ongoing merger operations; some significant institutional developments; and a rise in the public profile of the Commission.

Intensification and extension of enforcement activities

There was much litigation with a caseload of 50 cases per year becoming the norm. These covered nearly all areas of the Act. There were early memorable cartel cases. The first concerned the TNT/ Mayne Nickless freight express cartel with fines of about \$13 million—a sharp increase from the previous maximum of

about \$250 000. Soon after in the building products cartel case involving CSR, Boral and Pioneer, fines totalled some \$21 million. During this time there were of course many other cartel cases including the even larger dollar fines in the power transformers and the vitamins cases.

There was in addition much litigation under virtually all other parts of Part IV and Part V. This included some challenging cases involving contested economics issues. There was an important successful case against Woolworths/Safeway under section 46 and another against the record companies for exclusive dealing. We also lost the Boral case in the High Court but as time passed our capacity to conduct successful litigation in complex cases, often involving contentious economic issues, greatly improved.

**'the first time that anyone
had secured an injunction
against the powerful MUA'**

An especially difficult case occurred when we took action against the Maritime Union of Australia (MUA) during the waterfront dispute in 1998. I believe this was the first time that anyone had secured an injunction against the powerful MUA as well as securing damages payments for harm that MUA conduct had done to small business.

During this period the Commission was given the new role of enforcing the unconscionable conduct provisions of the Act, both in relation to consumers and in relation to small business. And it succeeded in winning some but not all of its unconscionable conduct cases. There was also the Commission's role in regard to Codes of Conduct. Generally speaking therefore, the Commission became involved in some of the most contentious issues of dispute between big business and small business.



News flash

'A politician once said that he'd do a deal with the devil to get the kind of media profile that Allan Fels had but he'd better not do a deal with the devil because Allan Fels would call it a collusive agreement,' Former Treasurer Peter Costello's farewell message in the ACCC's 2002-03 Annual Report.

'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 under the Act, the greater degree of genuine competition within the economy.'

Professor Allan Fels writes in a BRW column in March 2003.



Another important area concerned the professions. Following the National Competition Review (the Hilmer Report) the Commission took action in areas that were previously not covered by the former Trades Practices Act, most notably in relation to the medical profession.

During this time fines and sanctions increased. In 1993 the Parliament increased the maximum fine to \$10 million per offence. Experience eventually suggested that monetary penalties were still not a fully effective deterrent. The Commission campaigned heavily and successfully in 2002 for the introduction of criminal sanctions in relation to hard-core cartel behaviour. The Dawson Review of 2003 and the Coalition Government agreed at the time with this proposal and eventually the Labor government gave effect to the new law some six or so years later.

There was a hive of activity under Part V, covering numerous sectors of the economy and many parts of Part V. For me perhaps the most memorable cases were early ones concerning the sale of life insurance policies to aboriginal people followed by a general study of life insurance products which showed that many were not good products. These two matters had profound effects on industry behaviour and on customer perception of the industry.

The Part V cases brought consumer protection alive and also established the reputation of the Commission as the consumer's friend.

Another important area concerned intellectual property. The Prices Surveillance Authority and then the ACCC continually advocated the removal of import restrictions. The advocacy

campaign was successful except in regard to books where a compromise was adopted. Interestingly the Commission later conducted a successful enforcement case against some CD companies. When parallel import restrictions were lifted on CDs some of the record companies tried to use their power to cut off supply to dealers who were importing CDs under the new law.

'about one billion prices would be affected'

The most far-reaching enforcement activities arose when the Howard Government introduced the Goods and Services tax in July 2000. The Commission guesstimated that about one billion prices would be affected. Backed by a strong law, additional resources, and government and community support, the Commission ran a very high profile and effective campaign in ensuring that price rises did not exceed the amount of the tax. Following this the Commission was allowed to keep the additional resources given to it for GST purposes, even after the GST pricing laws expired.

A strengthened approach to mergers

From 1991 to 1993 the Commission campaigned heavily for the merger law to be changed from a prohibition of mergers that gave rise to dominance to a prohibition of mergers that substantially lessened competition. Despite fierce opposition from big business, this important change to the law was adopted and over time has made a difference to the structure of the Australian economy.

'much time and effort was devoted to perfecting the Commission's approach'

As always, mergers were a major activity of the Commission during this period and much time and effort was devoted to perfecting the Commission's approach, including through the publication of new guidelines. Also in 1993 section 87B, with its provision concerning undertakings, was introduced with far-reaching effects on merger administration.

Significant institutional developments

In 1995 the Trade Practices Commission and the Prices Surveillance Authority were merged to form the new Australian Competition and Consumer Commission. One reason for this was that it was thought that we could cut back on prices surveillance activities and divert many of the inherited Prices Surveillance Authority staff to Part IV and Part V enforcement matters. This happened. But it was not the end of price regulation because at the same time we inherited much pricing work as a result of the introduction of the access regime.

At around the same time the ACCC became responsible for the economic regulation of the telecommunications industry, taking over much of the role of the former Telecommunications Regulator (AUSTEL). Later the Commission began to have a significant role in the regulation of electricity and gas. Today of course the Commission has a yet more significant role in relation to the regulation of electricity and gas and it is closely linked with the activities of the Australian Energy Regulator. In broad terms then Australia has moved to a

position where utility regulation is largely done or overseen by the ACCC with the Australian Energy Regulator (AER) playing a closely related role. This experiment in combining competition law enforcement with public utility regulation is unusual and almost unique by international standards although some countries are copying this successful innovation.

When I started at the TPC in 1991 I inherited an organisation that was in good shape and with a good culture thanks to the efforts of my predecessors. I saw my task as being to do more, much more of the same, and to let the public know about it.

In the period of 1991 to 2003 there was also a very large expansion of the Commission staff from around 200 to around 550 and it has of course expanded greatly since that time.

'Hard working, dedicated, skilled and always prepared to go the extra distance'

I greatly enjoyed my time at the ACCC, TPC and PSA. Commissioners and staff were hard working, dedicated, skilled and always prepared to go the extra distance in terms of their work effort to help get results, and to make the ACCC a great organisation. I was in the happy position of constantly being

able to announce to the public the outstanding results of their efforts!

Finally, the Commission's public profile lifted. It is now a household name in Australia and generally being seen as an agency which contributes to the welfare of consumers. Long may this continue.

Professor Allan Fels was Chairman of the Australian Competition and Consumer Commission between 1995 and 2003. He was Chairman of the Trade Practices Commission from 1991 until the merger with the Price Surveillance Authority in 1995. Professor Fels was Chairman of the PSA between 1989 and 1992.



Cheers to the chairmen. Maureen Brunt with Bob Baxt, Bob McComas, Ron Bannerman and Allan Fels (left to right)

Express freight cartel

The freight cartel case involving TNT Australia, Ansett Industries and Mayne Nickless Ltd is regarded 'as a watershed in the history of trade practices law' (TPC Bulletin September 1994). In five meetings between 1987 and 1990, agreements were reached to allocate customers and share the market. The conduct included agreements between the companies not to poach each other's customers. When customers moved from one provider to another, the companies balanced their accounts of customers lost and gained, and paid or received compensation. The companies also agreed to 'burn' switching customers by deliberately providing poor service in order to compel them to return to a supplier. The practices were believed to have been in place for 20 years. In 1995, penalties and costs totalling \$14 million were imposed. The outcome was a resounding affirmation of the court's willingness to deal severely with breaches of the Act. (TPC Annual Report 1994-95 p. 11)

TOP 5 REDRESS OUTCOMES

-
- 1** Refunds totalling more than **\$50 million** to customers
(1994–95)

Australian Mutual Provident Society (AMP)—misleading and deceptive conduct

The TPC expressed concerns to AMP that it had engaged in misleading and deceptive conduct in marketing its ‘80/20’ policy. The TPC was concerned that AMP had begun to apply a ‘withdrawal fee’ after two years despite the fact that the prospectus and policy document prominently stated that no withdrawal fee would be charged after two years. The amounts of the withdrawal fee usually amounted to thousands of dollars. AMP provided a court-enforceable undertaking, under which it agreed to deliver more than \$50 million to most of the 286 000 consumers with an ‘80/20’ investment account.

 - 2** Refunds totalling up to **\$45 million** to customers
(September 1996)

Telstra—misleading and deceptive conduct

The ACCC expressed concerns to Telstra that it had engaged in misleading and deceptive conduct in breach of the TPA by not properly informing customers of the terms and conditions of Telstra’s ServiceNet Wiring Maintenance plan and Telstra’s action in moving customers to the plan in 1989. Telstra agreed to provide refunds totalling up to \$45 million to approximately 1.5 million telephone customers.

 - 3** Over **\$5 million** to small businesses
(June 2000)

Patrick Stevedores as part of the Waterfront Dispute—involvement in boycott activity

The ACCC commenced legal action against the Maritime Union of Australia and others for alleged boycott activity during the Waterfront Dispute in 1998. Ultimately, the ACCC established the Stevedoring Industry Reform Small Business Compensation Fund to compensate small businesses whose cargo was held up by conduct at a number of Australian and overseas ports. Patrick Stevedores agreed to pay more than \$5 million into the compensation fund.

 - 4** **\$3 million** in damages to franchisees
(April 2010)

Allphones—unconscionable, misleading and deceptive conduct and contravention of the Franchising Code of Conduct

The Federal Court held that by withholding stock and income from franchisees and making misrepresentations to potential franchisees about their ability to share profits, Allphones and the executive individuals had engaged in unconscionable conduct, misleading and deceptive conduct, and contravened the Franchising Code of Conduct. The Federal Court ordered that Allphones pay \$3 million in damages to 55 Allphones franchisees for money that had been withheld.

 - 5** Refunds totalling approximately **\$1.9 million**
(November 2001)

Domaine Homes—misleading and deceptive conduct

The ACCC commenced legal proceedings against Domaine Homes (NSW) Pty Ltd (Domaine Homes) for misrepresentations about its ‘Guaranteed Fixed Price’ contracts in 1999 and the subsequent charging of additional GST payments on those contracts. Domaine Homes provided an undertaking to the Federal Court, without admission of liability, to provide a refund to 260 new home buyers totalling approximately \$1.9 million of GST payments plus interest.

Watchdog profile:



**Derek
Farrell**



Darwin office staff with the 'Your rights mob' banner, Jane Black, Yvonne Dunn and Derek Farrell (left to right).

Six months before the Trade Practices Commission became the Australian Competition and Consumer Commission, Derek Farrell joined the Darwin office. The year was 1995 and it was time to establish a more effective presence in the Northern Territory.

What were the hot issues in 1995?

Derek Farrell: They were heady days. The Trade Practices Commission was in the midst of a merger with the Prices Surveillance Authority. We were also flexing our enforcement muscle in the cartel arena with penalties of over \$11 million in the long-running, hard-fought case against TNT, Ansett Transport Industries, Mayne Nickless and others in the freight industry. I think this case helped entrench a reputation for the Commission as a focused, tenacious and formidable enforcement authority.

'a focused, tenacious and formidable enforcement authority'

The first cartel investigation in the NT was launched involving car-rental companies fixing the price of rentals to Uluru. This resulted in penalties of \$1.5 million and refunds to the backpackers and other tourists who were overcharged. I still enjoy the thought of affected European backpackers getting a cheque for the \$300 that they were overcharged.

What has been the biggest change within the agency?

DF: We have become more confident and more effective in delivering outcomes. While we have grown, we remain passionately committed to prioritising our resources to those matters that best serve the public interest.

What is the most interesting matter you've worked on? Why?

DF: The Peter Foster/Chaste matter. We chased all the respondents down to different parts of the country (and the Pacific nations), achieved record penalties for resale price maintenance and successfully sued a barrister and professor who gave their professional legitimacy to the scheme. We also achieved an order that 'banned' Mr Foster from involvement in health related industries in the future.

'greater confidence in Indigenous consumers in exercising their rights'

What has been the most satisfying outcome?

DF: Reforming our compliance and enforcement approach to ensure Indigenous Australians enjoy the same rights under the Australian Consumer Law as non-Indigenous Australians. The ACCC has given us creative license to develop innovative use of social media and more colloquial and humorous forms of communication to Indigenous Australians. We have dramatically reduced the time between contraventions and enforcement action, we have stopped conduct, obtained refunds and developed greater confidence in Indigenous consumers in exercising their rights.

Any moments you would prefer to forget?

DF: When investigating the Alice Springs car rental cartel we were instructed to both 'wear suits' and 'fly under the radar!' Walking through the Alice Springs Mall in the required suits in 40 degree plus temperatures pulling trolleys loaded with documents it took about two seconds for locals to realise the regulators were in town.

If you could sum up the Act in a word?

DF: Empowering.

No one likes to be misled



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1986

Castlemaine Tooheys Ltd v Williams & Hodgson Transport Pty Ltd [1986] HCA 72

This case emphasised the conditions that must be met for exclusive dealing claims. The High Court held that the provisions of section 47(6) were not satisfied because there was no condition of supply by the brewer that the respective licensees should acquire any services from a third party, and there was no acquisition of services by the respective licensees from the third party. The High Court explained that there was no contract or arrangement between a person acquiring goods supplied by a corporation and a third person.

1989

Queensland Wire Industries Pty Ltd v Broken Hill Pty Co Ltd [1989] HCA 6

This is the first landmark High Court decision on misuse of market power. It is significant because it set the threshold for what constitutes 'taking advantage' of market power within the meaning of section 46 of the TPA. The High Court held that Broken Hill had contravened section 46 by refusing to supply Queensland Wire Industries with the Y-bar steel products necessary to make star picket fencing, thereby preventing Queensland Wire Industries from making the star picket fences. The High Court held that Broken Hill had substantial market power in the market for the supply of the Y-bar products and leveraged it into the downstream market for the supply of rural fencing, which included star picket fence posts. Relevantly, the High Court explained that 'taking advantage' of market power within the meaning of section 46 involved 'use' of that power, and did not require any sinister or morally reprehensible purpose.

2001

Melway Publishing Pty Ltd v Robert Hicks Pty Ltd [2001] HCA 13

The second landmark High Court decision concerning misuse of market power. The High Court held that Melway had not contravened section 46 of the TPA because the creation and maintenance of an exclusive distribution system by Melway was not necessarily an exercise of its market power. The High Court held that section 46 requires a causal relationship between the market power, conduct and proscribed purpose, such that the firm can be said to be taking advantage of its power.

2002

Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission [2002] HCA 49

This case affirmed the applicability of legal professional privilege in responding to notices served pursuant to section 155 of the TPA. The High Court held that section 155 did not authorise the ACCC to require production of documents to which legal professional privilege attaches.

2003

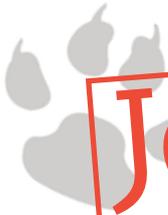
Boral Besser Masonry Ltd v Australian Competition and Consumer Commission [2003] HCA 5

The third landmark High Court decision concerning misuse of market power. Importantly, it emphasised the distinction between misuse of market power and rational business decisions. The High Court held that Boral Besser Masonry did not have substantial market power and, even if it did, it had not taken advantage of that power for the purposes of section 46. The High Court noted that pricing products below the avoidable cost of production could be a rational business decision, and is not necessarily consistent only with taking advantage of market power for the purpose of 'predatory pricing'.

Australian Competition and Consumer Commission v CG Berbatis Holdings Pty Ltd [2003] HCA 18

This case importantly clarified the extent to which individuals are under a 'special disadvantage' for unconscionable conduct claims under section 51AA of the TPA. The majority of the High Court agreed with the Full Federal Court that the individuals who were the subject of the conduct in this case were not specially disadvantaged. The majority emphasised the difference between a 'special disadvantage or disability' and a 'hard bargain'. The High Court ultimately held that the individuals were at a distinct commercial advantage which was not 'special' because it did not impair their ability to make judgments in their own interest.

Watchdog profile:



**Joanne
Palisi**

In the early 1990s computers were first rolled out to Trade Practices Commission staff, which included a very young Joanne Palisi. Her computer has since been upgraded and Joanne has moved up the ranks to be a Director in the Merger and Authorisation Review Division of the ACCC.

What were the hot issues in 1990?

Joanne Palisi: Some of the major matters at the time included the opposition to Arnotts proposed acquisition of Nabisco; the start of a major review of old authorisations that were granted without time limits such as those relating to newsagency distribution arrangements and media accreditation schemes; and the 'freight case'. It was a few years before the Hilmer review so there was also a lot of lamenting about the limited coverage of the Act.

What has been the biggest change within the agency?

JP: The growth in staff and functions. At the time the Trade Practices Commission had a staff of about 200 and you knew or had spoken to almost everyone in the agency.

What is the most interesting matter you've worked on? Why?

JP: I can't think of any in particular. I have worked in many different areas at the TPC/ACCC and I have found them all interesting or I wouldn't have stayed here so long.

What has been the most satisfying outcome?

JP: Working on the many Tribunal and Court cases. At the time, the workload seems enormous and you can't see how everything will get done—but at the end of the hearing it's satisfying to look back in an exhausted state and know nothing more can be done. Of course, it's an added bonus when the decision goes your way.

If you could sum up the Act in a word?

JP: Essential



What goes around, comes around



By Jill Walker

As well as being the 40th anniversary of the Trade Practices Act (TPA), January this year marked the 21st birthday of the SLC test for mergers (in its current incarnation).

When I arrived at the TPC in 1992, my first job was to prepare Draft Merger Guidelines. After many years of debate, the test for mergers and acquisitions that breached the TPA was to revert to one of whether a merger would 'have the effect or be likely to have the effect of substantially lessening competition' in a market (SLC). The TPC had agreed to publish draft guidelines explaining how we would assess mergers under this 'new' test in order to facilitate Parliament's consideration of the legislation.

'...the same arguments seem to have come full circle'

It is interesting to reflect today, as Chair of the ACCC's Merger Review Committee, on the debate that preceded the (re-) introduction of the SLC test in 1993, as the same arguments seem to have come full circle and are being re-run before the Harper Review. It was said that the previous 'dominance' test was more appropriate for the Australian economy, which needed to be able to grow 'national champions' better able to compete in global markets.

The arguments that won the day for the SLC test then are equally relevant today. Michael Porter's

influential work, *The Competitive Advantage of Nations*, emphasised the important role played by domestic competition in driving efficiency and innovation, sharpening the ability of firms to compete successfully in global markets. Furthermore, firms competing in global markets often rely on non-traded inputs – maintaining competition in these markets is equally critical to their success.

The significance of this debate at the time was also reflected in both the primacy accorded to import competition at the top of the list of factors to be taken into account under section 50(3), and the new provisions inserted into the merger authorisation test, requiring specific consideration of issues relating to international competitiveness.

Nor did the debate go away once the new test had been introduced. Arguments continued that the TPC, and then the ACCC, was not taking sufficient account of global competition. The 1996 guidelines adopted a qualified indicative position that we would not oppose a merger in a market which was subject to sustained competitive import competition with at least a 10 per cent market share; and the following year the ACCC released *Exports and the Trade Practices Act*, described as a supplement to the merger guidelines and which was specifically designed to address issues of global competition.

Another issue which seems to still stir up commentary is 'coordinated effects' in merger analysis. The 1992 draft merger

guidelines made it clear that the TPC considered the new SLC test to encompass coordinated as well as unilateral effects theories of harm in relation to mergers. This was met with considerable consternation by members of the legal fraternity—as most colourfully articulated by one commentator, who considered that this would 'be seen as an academic exercise and theoretical ravings of economists, without realistic backing!'

'The new test required a different mindset'

The new test required a different mindset, a shift from thinking about current (or imminent) market structure (dominance) to thinking about future market conduct, and the likely impact of the merger on that conduct, whether unilateral or coordinated. One of the first mergers to be opposed under the SLC test was the Caltex-Ampol merger, which rested on a coordinated effects theory of harm. When I returned to the ACCC as a Commissioner in 2009, I again found myself in the middle of a petrol merger, Caltex-Mobil, which we opposed, in part, on the basis of a coordinated effects theory of harm. Hence I am now, like storks and babies, associated in some circles with having invented this theory of harm, which has of course been a constant in every version of the merger guidelines, as it is in the guidelines of other jurisdictions.

Dr Jill Walker is a Commissioner of the Australian Competition and Consumer Commission.

Watchdog profile:



Chris Pattas



Chris Pattas joined the ACCC on its inception in 1995. He was involved in the areas of utilities and micro-reform before helping bed down the telecommunications regulatory regime. He is currently a General Manager with the Australian Energy Regulator.

What were the hot issues in 1995?

Chris Pattas: I was working in the utilities and micro-reform areas, particularly aviation and transport. We were also starting to put the post Hilmer access regime (Part IIIA) into place, so there was a good deal of developmental work around access regimes, access pricing and the like. I became involved in developing the telecommunications regime when those functions transferred to the ACCC in 1997.

'more than my fair share of interesting things'

Cap in hand

In July 2010, the Federal Court penalised Telstra \$18 million for denying competitors access to infrastructure in contravention of its carrier licence. Telstra admitted to contravening the law by refusing access to other telecommunications providers in seven key metropolitan exchanges for the connection of their broadband equipment. Telstra maintained to the companies seeking access that the main distribution frames in these exchanges were 'capped', where in fact, there was capacity or it could have been made available.

What is the most interesting matter you've worked on? why?

CP: I've had more than my fair share of interesting things and have been quite grateful for it. The seminal work on unbundling the local loop and opening up access has been one of the most rewarding and interesting tasks. From that everything else in the comms space, including the NBN, has followed. At the AER, it has been implementing a new regime for network regulation, one that is still in transition and which will also need to deal with the transformation of the industry - still a work in progress.

What has been the most satisfying outcome?

CP: The real satisfaction is not just about getting any particular satisfying outcome (of which there have been many) but in working with many talented and highly committed individuals to get the job done.

'Promoting competition for the welfare of Australians'

If you could sum up the Act?

CP: Promoting competition for the welfare of Australians, captures pretty much everything we do. In the regulatory space it is all about ensuring inputs are provided efficiently so competition in the wider economy can flourish.

Stability brings understanding



By Brian Cassidy

When I commenced as the CEO of the ACCC in mid-2000 what was then the *Trade Practices Act* had already proven itself a remarkably durable and important piece of legislation.

The Act was rapidly approaching its 30-year anniversary and yet many of its provisions were still basically the same as they were when they were first enacted. This enhances the Act in its role of enabling consumers to make well informed decisions in competitive

markets as the stability of the law enhances the average person's understanding of the law and their rights and responsibilities under the law.

When I started as CEO it was not that long after the changes to the competition provisions of the Act arising from the National Competition Review had been enacted in 1995. These changes were largely about widening the coverage of the competition provisions of the Act both in terms of the transactions covered as well as the extending the coverage of the competition provisions to the whole economy. The changes were very much about strengthening the Act rather than fundamentally changing it.

'strengthening the Act rather than fundamentally changing it'

So it was with a number of the changes that were made to the Act by successive Governments during my time as CEO.

In regard to the competition provisions of the Act the significant increase in penalties for civil breaches was an important development in increasing the deterrence and bringing penalties more into line with those in other jurisdictions.

Similarly, the introduction of criminal sanctions for the most serious cartel offences was another important development. Not only did criminal sanctions already exist in a number of other jurisdictions but they are appropriate for what is basically collusion to steal from unsuspecting consumers.

'criminal sanctions... are appropriate for what is basically collusion to steal from unsuspecting consumers'

In relation to the consumer protection provisions of the Act there were important changes following two reviews of the Act's provisions by the Productivity Commission. One related to the product safety provisions and the other to the consumer protection provisions.

The changes to the product safety provisions basically established the provisions as a single national law with a single regulator. These were important changes recognising the at least national in some cases transnational, nature of markets for consumer goods and the need for a consistent approach in enforcing the product safety provisions.

A somewhat similar approach was taken in relation to the changes to the consumer protection provisions and the establishment of the Consumer Law as a single national law although this time with multiple regulators. The multiple regulators being a recognition of the fact that some consumer protection issues can be fairly regional or localised in their nature.

In addition to these changes to the competition and consumer provisions of the Act there was also the change in the name of the Act itself from the Trade Practices Act to the Competition and Consumer Act. While of lesser note than other changes I have mentioned above it was still important in conveying more readily to the average person that the Act is about enhancing competition and protecting consumers.

‘the change in the name of the Act... important in conveying more readily to the average person that the Act is about enhancing competition and protecting consumers’

With a number of changes being made to the Act over the years it might be thought that the Act has been quite considerably altered over its 40 year history. However, in my view many of the changes that have been made have been about strengthening the Act and improving its effectiveness. As I said at the outset the Act is still in many ways fundamentally the same as that enacted 40 years ago and it has therefore been able to deliver long term benefits for consumers and for the economy.

Brian Cassidy was Chief Executive Officer of the Australian Competition and Consumer Commission between 2000 and 2014.



In sickness and in health

Dodgy health claims and miracle cures are one of the oldest forms of consumer deception. Promoters looking to cash-in on the latest fad to the traders who put the health of vulnerable people at serious risk, the TPC and the ACCC have dealt with the full spectrum of shonks.

1997: a promoter of six weight loss products, including a wafer said to burn calories, consented to court orders restraining him from making unsubstantiated representations about slimming products.

1999: the Federal Court found Giraffe World had engaged in misleading and deceptive conduct in promoting the health benefits of the ‘negative ion’ mat.

2001: the Federal Court ruled that Purple Harmony Plates Pty Ltd made unsubstantiated claims about the health benefits of its anodised aluminium products. It claimed the products could protect against electromagnetic radiation, increase health, reduce pain, stress and fatigue and rejuvenate plants.

2002: the Federal Court found David Zero Population Growth Hughes, trading as Crowded Planet, engaged in misleading or deceptive conduct and made false representations in selling oral contraceptives over the Internet without a prescription.

2007: the Federal Court declared that cancer cure and other claims promoted by several NuEra companies under the RANA System breached the TPA. It was claimed the system could cure cancer, or reverse, stop or slow its progress or would prolong the life of a person suffering cancer.

2010: the ACCC intervened to stop misleading advertising claims about the alleged benefits of Power Balance wristbands and pendants. The supplier claimed the wristbands could improve balance, strength and flexibility and worked positively with the body’s natural energy field.

2003

Visy Paper Pty Ltd v Australian Competition and Consumer Commission [2003] HCA 59

This is a significant decision concerning exclusive dealing, anti-competitive agreements and the anti-overlap provisions of the TPA. The High Court dismissed Visy's appeal and ruled in favour of the ACCC. The majority of the High Court held that a proposed supply agreement between Visy and a competitor breached the TPA as it would have prevented the competitor from purchasing products and supplying services to some of Visy's customers. The High Court considered the relationship between sections 45 and 47, in particular the anti-overlap provision in section 45(6).

Rural Press Ltd v Australian Competition and Consumer Commission [2003] HCA 75

The fourth landmark High Court decision concerning misuse of market power. The High Court held that Rural Press and its competitor Waikerie had breached section 45 of the TPA by reaching an agreement that had an anti-competitive purpose and effect and contained an exclusionary provision within the meaning of section 4D. However, the High Court held that Rural Press' threats to Waikerie, to the effect that it would circulate a new newspaper in Waikerie's prime circulation area unless Waikerie ceased circulation of its own newspaper in a subsidiary of Rural Press' prime circulation area, did not constitute a misuse of market power. Relevantly, the 'taking advantage' element of section 46 was later clarified by legislative amendments to the TPA in 2008.

News Ltd v South Sydney District Rugby League Football Club Ltd [2003] HCA 45

This case clarified the application of certain provisions dealing with exclusionary conduct. The High Court overturned the Full Federal Court's decision and held that the term which excluded South Sydney from the National Football League was not an exclusionary provision under section 4D and in contravention of 45(2) of the TPA.

The ACCC intervened in the appeal and submitted that the objective purpose of the provision and the subjective purpose of the parties are relevant when determining whether the term falls within section 4D. However, Gummow J stated that such a construction was not the product of reasoned statutory interpretation.

2004

NT Power Generation Pty Ltd v Power and Water Authority [2004] HCA 48

One of the very few successful claims made under the misuse of market power provision. The High Court held that the Power and Water Authority contravened section 46 by refusing NT Power access to its transmission and distribution infrastructure to sell electricity to consumers, simply to protect its electricity sales revenue.

2007

Australian Competition and Consumer Commission v Baxter Healthcare [2007] HCA 38

The High Court allowed the ACCC's appeal and clarified the application of derivative Crown immunity. The majority concluded that Crown immunity does not extend to Baxter Healthcare's dealings with a State or Territory government to the extent that the government carries on a business under section 2B. Baxter Healthcare was therefore not immune from the TPA and the High Court remitted the matter back to the Full Federal Court to consider whether Baxter Healthcare had contravened sections 46 and 47.

East Australian Pipeline Pty Limited v Australian Competition and Consumer Commission [2007] HCA 44

This case clarified the ACCC's role concerning the National Third Party Access Code for Natural Gas Pipeline Systems. The High Court found that the Australian Competition Tribunal had correctly found that the ACCC had misconstrued, and as a result misapplied, the National Third Party Access Code for Natural Gas Pipeline Systems.

Touching the lives of many



By Cristina Cifuentes

The Competition and Consumer Act is widely recognised within the broad community for the protection it affords to consumers and for the ACCC's actions in regulating anti-competitive behaviour in the marketplace. What is less well known is the role the Act, specifically Part IIIA, plays in giving effect to the National Access Regime.

The National Access Regime is part of a broader economic reform package aimed at improving productivity and growth in the Australian economy. Part IIIA, through a declaration and arbitration process, is directed at addressing the potential for an infrastructure service provider to deny access to or charge excessive prices for, its infrastructure service, thereby reducing competition, economic efficiency, productivity and growth in the economy.

Whilst perhaps having limited recognition in the wider community, Part IIIA has been influential in underpinning key principles in areas which touch the lives of most Australians, for example, industries such as energy, telecommunications, ports, water and rail. The various access and economic pricing regimes administered by Commonwealth, state and territory regulators are directed

towards promoting efficiency in the use of, and encouraging appropriate investment in, key infrastructure, and fostering effective competitive outcomes.

Common considerations for these regulators revolve around issues such as the long-term interests of consumers and promoting efficient investment through the ability of service providers to recover their efficient costs including an appropriate rate of return on their investments. Depending on the specific regime, we must also take into account factors such as the safety, reliability, security, price and quality in the supply of electricity; end to end connectivity in telecommunications and in wheat ports, we must also have regard to the public interest.

Whilst these principles might appear straight forward, their application is complex and regulators and businesses alike are faced with increasing rather than decreasing complexity in the process.

Foremost amongst this is the information required to make these assessments. Not only is the volume and transparency of information an issue of interest for all parties, but also the availability of timely and informative data. This is proving to be quite a challenge in times where policy frameworks are under active consideration or where technology is rapidly changing the nature of competition in, and demand for a particular service.

The impact of falling demand is particularly significant in the pricing of services in

the regulated parts of the telecommunications and energy sectors. These are services which have required large investments with long lived assets and demand may be declining as consumers switch to alternative technologies or just reduce their consumption. However, the costs of providing the original service may yet have to be recovered. Whilst there may be agreement that access to the services should continue to be regulated, there is far less consensus on the appropriate approach, or the level or form of pricing for those services.

Implicit in this process is a recognition that there is no single correct or precise answer and that in reaching a decision on access and the terms of access, assessing the various factors involves a balancing of interests, in particular those of the service providers and those of users or consumers, and the exercise of judgement by the regulator. This is in itself a challenge as quite often the balance cannot be quantified.

Overall however, we have seen that national productivity has risen as a result of these economic reforms and consumers have benefitted in many instances through enhanced competition, price and product results. So whilst Part IIIA may be largely invisible to the broader community, the impact of its underlying principles should not be understated.

Cristina Cifuentes is a Commissioner of the Australian Competition and Consumer Commission.



Holding court with Glenn Owbridge



The Australian Government Solicitor has always been a close partner to the ACCC in achieving court outcomes. From the highly successful string of air cargo cartel cases to the long running Baxter case, Glenn Owbridge provides an insider's perspective on the Act and his experience in taking suits to the cleaners.

What was your first TPA case?

Glenn Owbridge: My first case was Attorney-General v David's Holdings in 1993. I acted for the Attorney who brought proceedings after the TPC decided not to contest the merger of David's and QIW. Initially we were simply holding the door for the target QIW; later we were instructed to take a more active role. I met Bob Alexander, Allan Myers, Rhonda Smith, Phillip Williams, George Hay, Gaire Blunt and Charles Sweeney. I was fascinated by the statute and the players. I decided this is what I wanted to do.

'it cleared a major obstacle to effectively regulating dealings with the public sector'

Is there a judgment or decision that stands out over time?

GO: Baxter in the High Court stands out because it represented so many years of work (by others) and so much faith (inspired by Bob Alexander) in the notion that once we got to the High Court, we could win. It was my first High Court matter and it cleared a major obstacle to effectively regulating dealings with the public sector.

What is the most interesting case you've worked on? Why?

GO: The Air Cargo cases were my most interesting so far, from both a litigation and conceptual perspective. They had size and complexity, foreign and international law, well-resourced opponents and a class action sweating on the result. Win or lose on the last two Cargo cases, I think they will also remain my favourite matter because of the team from ACCC and AGS that gave everything they had to run it.

'satisfying because of the array of voices and tactics deployed to say it couldn't be done'

What has been the most satisfying outcome?

GO: Air Cargo has been the most satisfying in terms of reward for effort, which is something we do not always see

in this business. Flight Centre has been particularly satisfying because of the array of voices and tactics deployed to say it couldn't be done. In applying the Act's principles and forms to modern and complicated market structures that are real but somewhat amorphous, I believe we achieved a great leap forward. Now if we can only hold it on appeal...

Any moments in court you would prefer to forget?

GO: On the morning of the hearing in Baxter, I discovered that both suits that I had brought, still in their bags from the dry cleaner, were no longer favoured with trousers. Waiting for any shop in Canberra to open and sell me a suit before the hearing started was my worst litigation experience. Attending the hearing in the High Court in pants two inches too long and pinned together at the back would have been my worst litigation experience but for the continual outpouring of sympathy and compassion from my ACCC colleagues throughout the day.

If you could sum up the Act in a word?

GO: 'Worthwhile', as in worthy of a career.



Australian
Competition &
Consumer
Commission



BUSINESSES COMPETE
CARTELS JUST CHEAT

THE MARKER

The Marker, a short film that shows the devastating effects involvement in a cartel can have on individuals and businesses. Released August 2012.



Far reaching effects

By Graeme Samuel

The period July 2003 to July 2011 was a time of enormous growth and change for the ACCC which saw it reach its apex in both size and functions.

Over this period the ACCC and the Trade Practices Act was the subject of many parliamentary inquiries – relating to small business, banking competition, consumer law, telecommunications, milk prices, together with two major industry inquiries conducted by the commission relating to the retail petrol and grocery industries.

Significant changes to the Trade Practices Act took place through this period, including:

- the introduction of a formal merger review process and by bypassing of the ACCC with authorisation of mergers being considered at first instance by the Australian Competition Tribunal.

- a complete revision of the Australian Consumer Law, encompassed in a restructure of the Trade Practices Act into the Competition and Consumer Act, including the introduction of financial penalties for breaches of specific prohibitions of that law.
- vesting responsibility for product safety laws in the ACCC
- revision of provisions affecting small business, in particular those relating to misuse of market power, predatory pricing and unconscionable conduct and the appointment of a deputy chair of the ACCC with special responsibility for small business.
- the inclusion of provisions prohibiting price signalling between competitors but with a restricted application to the banking industry.

An enormously significant change was the substantial increase in civil penalties for breaches of

the competition laws and the provision of criminal penalties, jail sentences, for persons involved in serious cartel activity—a legislative move that brought Australia into line with major competition enforcement regimes in the developed world. These amendments followed upon successful prosecutions against cartel activity in the packaging and airline industries, each of which had far reaching effects on Australian consumers.

‘expansion and maturing of its role as the national utility regulator’

The ACCC also saw an expansion and maturing of its role as the national utility regulator. The regulation of the telecommunications sector, which had been complicated by the privatisation of Telstra commencing in 1997 continued to evolve.

At the same time the agency’s role in energy regulation continued to grow as the States transferred the regulation of

distribution and retail in both electricity and gas to the existing functions of the ACCC. This was done through the establishment of an energy regulatory body, the Australian Energy Regulator within the ACCC.

The ACCC was also requested to provide advice and to take on regulatory responsibility in the regulation of rural water markets in the Murray Darling Basin particularly in the trading of water rights in those markets. The national access regime laws saw the ACCC becoming involved in rail freight and in grain handling.

'significant growth ... the direct outcome of the organisation earning the trust and respect of Australian governments'

The result of all these changes resulted in significant growth to the organisation. In July 2003, the ACCC had a total staff complement of 350 and an annual budget of \$62m. By July 2011, the staff complement had increased to 820 and the budget to \$130m. This was not a case of empire building—rather it was the direct outcome of the organisation earning the trust and respect of Australian governments and as a result being vested with more responsibilities and relevant powers to carry out its mandate.

There were also very significant changes to the ACCC's internal processes and mode of operation to enhance its accountability and transparency. Early in 2003, the Federal government released its response to the Dawson committee of review into the competition provisions of the Trade Practices Act—a review which focussed as much on the governance of the ACCC as it did on the laws it had been entrusted to administer.

To address some governance concerns raised by the Dawson Inquiry, the Commission agreed in early 2004 to adopt five principles that would govern its administrative processes—



Graeme Samuel on the set of the Competing Fairly Forum with ABC's Emma Alberici

principles enshrined in the headlines of timeliness, consistency, fairness, confidentiality and transparency with resultant accountability.

'greater transparency in the review process'

These principles drove a fundamental cultural shift in the organisation that was deeply imbued within the organisation's governance. Nowhere was this more evident than in the adoption by the commission in mid 2004 of protocols for the conduct of informal reviews of proposed mergers - protocols designed to provide greater transparency in the review process with resultant accountability on the part of the ACCC and merger parties for the efficient conduct of merger reviews.

All in all, the 8 years from 2003 to 2011, saw significant evolution in both the legislative framework of Australia's competition and consumer laws and its administration. The ACCC developed from a relatively small regulatory agency to a substantial organisation with responsibilities and powers that touched upon the daily lives of Australian consumers. The fact that Australian governments were prepared to vest these responsibilities and attendant powers in the ACCC is a testament to the intellectual integrity of its staff and commissioners.

Professor Graeme Samuel was Chairman of the ACCC between 2003 and 2011.

Cartels are a cancer on our economy. Their price fixing, bid rigging and market sharing are a silent extortion that in many instances do far more damage to our economy, to business, and to consumers, than many of the worst consumer scams'

Graeme Samuel addressing the international Cracking Cartels conference in 2004.



Holding court with Peter Renehan



After cutting his teeth in the Pioneer Concrete dispute, Peter Renehan has fought to the ‘bitter end’ and engaged in ‘trench warfare’ in some of the ACCC’s biggest cases. Peter is currently Special Counsel within the ACCC Legal Group, a position he has held since 2006.

What was your first TPA case and when?

Peter Renehan: I went to the bar in NSW in 1992 and read with Ian Faulkner SC. He got me involved in that year as a junior in a long running dispute between Pioneer Concrete and its lorry owner drivers (LODs) who were at the time mainly independent contractors. It was a lesson for me as to the limits of the law and other ways to ‘skin a cat’. Even though our clients (the LODs) lost the case in the Federal Court and did not appeal, they effectively lobbied the then NSW Labor Government and legislation was eventually passed which provided for payouts to them.

Is there a judgment or decision that stands out over time?

PR: The judgment of Justice Allsop (as he then was) in ACCC v Liquorland (Australia) Pty Ltd is one that clearly stands out. Liquorland eventually settled but Woolworths fought the case to the bitter end, mainly on the issues of purpose and market definition. Justice Allsop’s decision (from which there was

no appeal) contains a number of significant contributions to the development of competition law in Australia. In particular, his eloquent exposition of the proper approach to defining markets for the purposes of the TPA/CCA.

What is the most interesting case you’ve worked on? why?

PR: I left the bar and joined the ACCC as its Special Counsel at the end of 2006. A few months later, I became involved in a case the ACCC was then preparing to take against Google and Trading Post. Little did I realise that I would be living with this case, off and on, over the next six years or so as we engaged in ‘trench warfare’ with Google. What was fascinating about the case was how the issue which became critical at the appellate level, namely whether it was Google, the advertisers (or both) who in fact made the misleading representations, was approached in such fundamentally different ways by the two appellate benches.

What has been the most satisfying outcome?

PR: I would have to say the parallel import CDs case where I appeared with Julian Burnside QC and Stephen Gageler SC (as he then was) for the ACCC against the record companies Universal Music and Warner. The conduct involved the record companies withholding supply (or threatening to withhold supply) of current release CDs from record shops (remember them?) if those

record shops stocked parallel import CDs.

After a lengthy and hard fought case, Justice Hill found that the conduct breached both sections 46 and 47 of the TPA. On appeal, the conduct was found to breach section 47 but not 46. An appeal to the High Court would have been fascinating on the section 46 market power issue but the ACCC (much to my dismay!) decided not to seek special leave. To my mind, the Full Court case still stands as a very significant reminder of the importance of the ‘purpose’ limb of the SLC test.

Any moments in court you would prefer to forget?

PR: I recall an amusing exchange in the parallel import CDs case. During cross-examination, Justice Hill asked the witness a question along the lines—‘just out of interest, what would be the weight of an average shipment of CDs?’ Before the witness had time to answer, David Hammerschlag SC (now Justice Hammerschlag of the NSW Supreme Court), appearing for Warner, interjected from the bar table in his distinctive South African accent—‘That depends your Honour, on whether or not it was heavy metal.’

If you could sum up the Act in a word?

PR: Just one word is too difficult to capture so I will proffer a phrase—‘economics dressed up as law—or perhaps vice-versa.’

Watchdog profile:



Sam Di Scerni



Sam Di Scerni joined the Perth office of the Trade Practices Commission in 1995. He spent the first year talking about the Hilmer reforms and explaining competitive neutrality and access pricing. Unable to escape the Eastpoint Plaza labyrinth, Sam is currently General Manager of Enforcement Group, Western Australia.

What were the hot issues in 1995?

Sam Di Scerni: Soon after I joined the TPC, the Hilmer reforms were formally implemented and the TPC became the ACCC. Allan Fels fought valiantly for many months to convince government, media and the public that the proper way to cite the ACCC was to individualise the letters and call it the A.C.C.C. but thankfully that never took off. The biggest issues were the phasing out of the statutory marketing authorities, save for the WA potato board which still exists. Dairy was particularly problematic and there were many times when I faced rooms of angry farmers.

‘explosion in the breadth of the work we do’

What has been the biggest change within the agency?

SD: I have been astounded by the explosion in the breadth of the work we do. It has often been said that the ACCC is burdened by more work simply because it is so successful. This has been borne out by the significant amount of market monitoring we now do, as well as the additional workloads imposed by the carbon tax and GST legislation. The introduction of the criminal cartel provisions and the ACL also count as very significant events.

‘The Hungry Jacks sunglasses matter led to the first televised corrective advertisement’

What is the most interesting matter you’ve worked on? why?

SD: The ones that stand out contributed to the expansion or clarification of the law and/or in the remedies sought. The Hungry Jacks sunglasses matter led to the first televised corrective advertisement, which was pretty awful. The Target ‘every stitch of clothing’ outcome is memorable because of the sheer volume of correctives on every television station and in major newspapers in Australia. Other cases include the Berbatis unconscionable conduct matter which went to the High Court, and the Admiral air conditioning cartel which was largely discovered and then run on old fashioned investigative work.

‘quite ground-breaking’

What has been the most satisfying outcome?

SD: All cases investigated are satisfying, even the losses. The two unconscionable conduct cases, Berbatis to the High Court and Samton to the Full Federal court, were extraordinarily interesting and stimulating even though we ‘lost’ both. They were quite ground-breaking.

If you could sum up the Act in a word?

SD: Empowering.

2009

Australian Competition and Consumer Commission v Channel Seven Brisbane Pty Limited [2009] HCA 19

This case provided clarity on the extent to which 'prescribed information providers' are exempt from claims concerning misleading and deceptive conduct. The High Court held that Channel Seven could not rely on the defence in section 65A for 'prescribed information providers' to a claim for misleading and deceptive conduct because it was not providing 'information' through its Today Tonight program. The High Court reasoned that Channel Seven had an arrangement in place with a supplier of goods and services to advertise or effectively 'sell' those goods and services in its broadcast.

2012

Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal [2012] HCA 36

This is a significant case that clarified aspects of the declaration process. The High Court concluded that criterion (b) of sections 44G(2) and 44H(4) should be determined by reference to a 'private profitability' test, instead of a 'social benefit' or 'natural monopoly' test.

2013

Google Inc v Australian Competition and Consumer Commission [2013] HCA 1

Although the ACCC did not win this case, the case importantly clarified the law concerning sponsored links on websites. The High Court unanimously held that Google had not engaged in misleading or deceptive conduct, or endorsed or adopted the representations which it had displayed on behalf of advertisers. The ACCC had considered that providers of online content should be accountable for misleading or deceptive conduct when they have significant control over what is delivered. However, the High Court reasoned that Google did not create or produce any of the four sponsored links, and to the extent that it displays sponsored links, the Google search engine is only a means of communication between advertisers and consumers. Nonetheless, it remains the case that all businesses involved in placing advertisements on search engines must take care not to mislead or deceive consumers.

Australian Competition and Consumer Commission v TPG Internet Pty Ltd [2013] HCA 54

This case was a significant victory for the ACCC and consumers. The High Court allowed an appeal by the ACCC concerning false or misleading representations made by TPG in relation to its Unlimited ADLS2+ advertisements. The High Court found that TPG had not adequately disclosed telephone bundling requirement and set up charges and consumers would not have known that internet services were commonly bundled with telephony services. The High Court also overturned the Full Federal Court's order that TPG pay total penalties of \$50 000 and reinstated the \$2 million penalty against TPG in respect of its misleading advertisements. The ACCC said 'this case is of great significance because it is important that penalties imposed for breaches of the Australian Consumer Law are set at a level that deters future breaches.'

TOP 5 COMPETITION PENALTIES

1 **\$98.5 million** (to date)

Air Cargo Litigation—multiple proceedings

The ACCC commenced proceedings against 15 international airlines for alleged collusion on fuel surcharges and security surcharges on air cargo services. This matter resulted in the highest amount of fines from a single investigation by the ACCC. This included a penalty of \$20 million against Qantas (in *ACCC v Qantas Airways Ltd* [2008] FCA 1976) for breaching the price-fixing provisions of the *Trade Practices Act 1974* by reaching an understanding with other international airlines in relation to the imposition of fuel surcharges on air cargo across its global networks between 2002 and early 2006.

2 **\$36 million** (November 2007)

Cardboard packaging cartel case—ACCC v Visy Industries Holdings Pty Ltd (No 3) [2007] FCA 1617

The Federal Court ordered Visy to pay a pecuniary penalty totalling \$36 million for its involvement in price-fixing and market-sharing in the cardboard packaging industry between 2000 and 2004. The Court also

ordered two of its senior officers to pay \$1.5 million and \$500 000 each for their involvement in the conduct. This case had a significant impact on the industry and consumers. It triggered a private class action, in which the Federal Court ordered Visy and Amcor to pay \$95 million in damages.

3 **Approximately \$35 million** (April 2004)

Transformer cartel litigation—multiple proceedings

Penalties totalling \$35 045 000 were ordered against ABB Power Transmission Pty Ltd and ABB Transmission and Distribution Ltd, the managing director and three other senior executives for their involvement in price-fixing and market-sharing. The breaches were long-running cartel arrangements in significant markets for the supply of power transformers and distribution transformers in Australia. It was significant that this investigation began following an anonymous email to the ACCC. This highlighted the importance of the ACCC's Leniency Policy which had been recently issued at the time.

4 **\$26 million** (February 2001)

Animal vitamin cartel case—ACCC v Roche Vitamins Australia Pty Ltd [2001] FCA 150

The Federal Court ordered three animal vitamin suppliers—Roche Vitamins Australia Pty Ltd, BASF Australia Ltd and Aventis Animal Nutrition Pty Ltd—to pay penalties totalling \$26 million for their involvement in price-fixing and market-sharing between 1990 and 1999. The contraventions were extremely serious and involved local companies giving effect to global arrangements. The three animal vitamin suppliers collectively controlled 90 per cent of the market. This was the first time a penalty in excess of \$10 million had been imposed on a single corporation under the *Trade Practices Act 1974*.

5 **Over \$20 million** (December 2005)

Pre-mixed concrete cartel litigation—multiple proceedings

The Federal Court ordered penalties totalling over \$20 million against concrete companies in Queensland for price-fixing and market-sharing arrangements in relation to the supply of pre-mixed concrete in Queensland.

The big picture on small business



By Michael Schaper

The needs of Australia's many micro, small and medium-sized enterprises have been a concern of competition law, and of the Commission, since the inception of the Trade Practices Act.

When the TPA came into existence, there were about 800 000 businesses trading, and most of them were not subject to the law because they were unincorporated. Today, all of Australia's 2.1 million private sector firms fall under the umbrella of the Act. This alone has seen growth in responsibility for the Australian Competition and Consumer Commission.

'all of Australia's 2.1 million private sector firms fall under the umbrella of the Act'

During the years, we have seen formal inquiries into small business and the operation of the Act. These inquiries, and other policy initiatives, have seen the introduction of several legislative mechanisms to address the needs of small firms. This includes the introduction of collective

bargaining notifications, the strengthening of unconscionable conduct provisions and the requirement for an ACCC Deputy Chair with a small business background.

In terms of scope, the most significant change occurred in 1995 with the expansion of the Act to include sole traders and partnerships, not just corporations. Given most businesses do not have corporate structures, this brought most of the country's SMEs under the Act's ambit for the first time.

'our focus is on educating SMEs about both their rights and responsibilities'

Rather than simply enforcing compliance with the law, our focus is on educating SMEs about both their rights and responsibilities under the Act. In doing so, we have developed structures to discuss issues and receive feedback from the small business sector. In 1998, a Small Business Advisory Group was formed, with members drawn from a wide variety of different industry associations. In 2009, the group was renamed the Small Business Consultative Committee and membership expanded, selected by public expressions of interest.

In recent years, we have published *Small Business in Focus*, a report on the contacts we receive from the sector, the actions we were taking and current issues. Recognising the fact that owners of small firms are pressed for time and money, we have also launched 'do it yourself' education material for small businesses on how the Act applies to them.

The evolution of the Franchising Code of Conduct

Franchising in Australia was in its infancy in 1974. The number of franchise systems grew rapidly throughout the 80s and 90s and there were repeated calls for formal regulation of the sector.

After a short attempt at a voluntary industry-wide code of practice, in 1998 a mandatory Franchising Code was introduced. Several inquiries into, and amendments to, the Code have since taken place, and in 2011, some enhancements to ACCC's ability to police the Code (such as the ability to audit a franchisor's compliance) took effect.



'there are some 1200 franchise systems operating in Australia'

Today, there are some 1200 franchise systems operating in Australia, containing around 70 000 franchisees. Australia is one of only about 30 countries in the world with formal franchise legislation, and we are working to develop links with our international counterparts.

Again, our Franchising Consultative Committee (first established as the Franchising Consultative Panel in 1998) is an important and active part of our overall work within the franchise sector.

Most importantly, a wholesale revision of the Code is being proposed by the Government to take effect from 1 January 2015. Clearly, the Code and the Australian franchising sector will continue to evolve, and the ACCC will play an important role in this process.

Dr Michael Schaper is a Deputy Chair of the Australian Competition and Consumer Commission.

Talkin' shop

The TPC and ACCC have put in place many initiatives to help businesses learn about both their rights and obligations under the Act.

1975: In the first nine months of the Act, Commission members and senior staff addressed more than 200 meetings, including business, professional and consumer groups, service clubs, company training sessions, conventions, university groups and classes and teacher training sessions. This tradition continues today.

1980s: A series of brochures are published covering issues such as refusal to deal, trade associations and recommended prices.

1987: Business studies teachers are provided with a trade practices resource kit for use in the technical and further education system.

1990: The TPC works with the Metal Trades Industry Association to develop a multimedia education package for the association's 7000 member companies. Comedian Max Gillies makes a cameo. The TPC later joins with the association to run seminars.

1994: The modular training package *Best and Fairest* is launched. Over 80 businesses—ranging from banks to small manufacturers—purchase the package in the first six months. The TPC is also represented at a series of events called Business Opportunities Expos.

1995: *Small Business and the Trade Practices Act* is one of the first publications produced by the newly established ACCC.

1997: Benchmarks for Dispute Avoidance and Resolution is prepared by a roundtable made of big and small businesses representatives.

2000s: In conjunction with the Australian Retailers Association, the ACCC produces Retail Flash to inform small retailers about fair-trading. A series of Competing Fairly Forums are broadcast via satellite to 64 towns across Australia. The forums are screened at local events and later forums are streamed online.

2010s: A pre-entry franchise education program in partnership with Griffith University is launched. The first half-yearly *Small Business In Focus* report is published. A free education program for small businesses is made available online. An education program for tertiary institutions is also released.

Counting the change



By Delia Rickard

The Australian Competition and Consumer Commission and its predecessor, the Trade Practices Commission, truly deserve their moniker of The Consumer Watchdog. I spent five years in the 1990s heading up the then Consumer Protection Branch and I have recently returned as the Consumer Deputy Chair. What's changed and what remains the same?

Then and now we have used integrated strategies to tackle big issues. We research issues to fully understand them, work with sectors to improve their compliance, take enforcement action to send strong deterrence messages and empower consumers to help them make smarter choices.

A good example from the 1990s is the work the Commission did on the life insurance sector (including sales to Indigenous consumers in remote communities) which led to wide spread reforms. A current example is the ACCC's work on door-to-door sales in the energy sector. We put the industry on notice about our expectations; commissioned research on how the sector worked; took enforcement actions and provided consumers with 'do not knock' stickers and guidance. We've seen large reductions in complaints as a result.

Then and now we've sought to balance identifying and acting on emerging problems to prevent them becoming major issues with responding to the big problems of the day. At the time competition was introduced for utilities in the 1990s we not only focused on the new access regimes, we also worked to identify and address the consumer issues we expected to emerge—issues such as prices, quality, service standards and redress.

These days the ACCC is focusing on protecting consumers in their online transactions and doing ground breaking work on fake online reviews; preventing unsafe goods entering Australia and ensuring comparator tools don't mislead consumers and can deliver on their potential. All of this work involves a blend of research, compliance guidance; enforcement action and consumer empowerment.

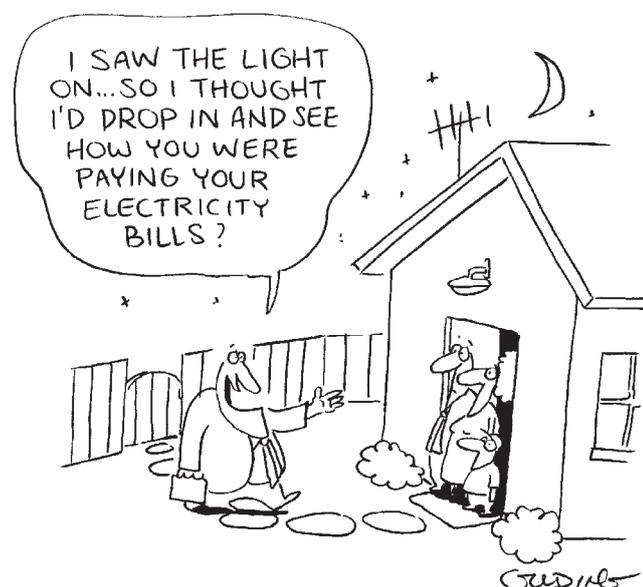
Then and now we've worked closely with the consumer and

community sectors. This has been an enormous assistance in identifying problems early—especially where disadvantaged and vulnerable consumers are concerned.

So what's changed?

There is more competition today in most major areas of consumer spending—energy, telecommunications and even consumer goods with the opening up of international markets through internet sales. This has led to consumers needing to make more complex decisions and increased opportunities for misleading conduct. It has also led to the ACCC needing to find new ways of helping consumers.

In doing this we've been assisted by behavioural psychology/economics. We better understand the limits of disclosure and the need to understand why consumers do and don't do



certain things in order to tailor our responses. We've also been assisted by new technologies which enable us to push messages and tools to consumers at the times they need them.

'reforms enable problems to be identified and addressed earlier and we have no doubt have saved many lives'

Our product safety role has expanded. Today we benefit from CoAG reforms which delivered a nationally harmonised regime and improvements like mandatory reporting of consumer injuries. These reforms enable problems to be identified and addressed earlier and we have no doubt have saved many lives. Protective systems are well in place for long known dangers and we are entering an era of new, less visible, product safety issues. Issues around the chemicals in consumer goods and problems caused by inadequate product stewardship for goods made more cheaply off shore.

Perhaps the greatest change though has been the new national Australian Consumer Law. This has not only done away with a multitude of laws making life easier for suppliers, but also provided consumers with new protections, regulators with new powers and ensured that consumer protection agencies across Australia work more cooperatively to better protect consumers.

Of course, perennial problems such as scams and misleading and unconscionable conduct remain, and new problems constantly emerge, but the commitment of the dedicated and talented staff of the ACCC ensure that the Commission's will and ability to protect consumers is as strong as ever.

Delia Rickard is a Deputy Chair of the Australian Competition and Consumer Commission.

TOP 5 CONSUMER PENALTIES

Civil pecuniary penalties up to \$1.1 million for companies and \$220 000 for individuals for breaches of the Australian Consumer Law came into force in 2010.

1

\$3.6 million

ACCC v Singtel Optus [2011] FCA 87
March 2012

misleading advertising of broadband internet plans

2

\$3 million

ACCC v Hewlett-Packard Australia Pty Ltd [2013] FCA 653 July 2013

misleading representations to customers and retailers about consumer guarantee rights

3

\$2.7 million

ACCC v Yellow Page Marketing BV (No 2) [2011] FCA 352 April 2011

misleading faxes and invoices sent to thousands of businesses in an attempt to obtain subscriptions to their online directories

4

\$2.5 million

ACCC v EDirect Pty Ltd [2012] FCA 1045
September 2012

telemarketing and 'voice' contracting with 350 customers from remote and regional communities who had no network coverage where they live

5

\$2.25 million

ACCC v Apple Pty Limited [2012] FCA 646
June 2012

misleading advertising in promoting its 'iPad with WiFi + 4G'

Consumer frontline with Fiona Guthrie

Executive Director of Financial Counselling Australia, Fiona Guthrie explains the significance of the Competition and Consumer Act and its real world practicalities.

When did you first come across the Trade Practices Act?

Fiona Guthrie: In the early 80s I was doing some voluntary financial counselling which is when I first learned about the TPA. I can't recall using the Act directly, but certainly knew of its key provisions such as prohibiting misleading and deceptive conduct.

'a key part of the regulatory toolbox'

How does the Act relate to your day-to-day work?

FG: Financial counsellors provide information, support and advocacy to people in financial difficulty. For some of our clients, financial hardship may have been caused or exacerbated by poor marketplace practices—the TPA, now the CCA, is a key part of the regulatory toolbox in dealing with these situations. A good example would be door-to-door sales. Sadly, we continue to see problems in this area, particularly in Indigenous communities with traders selling non-essential, shoddy or overpriced goods (often all of these).

Financial counsellors also need a broad understanding of other important provisions in the Act such as consumer guarantees, unfair contracts, unconscionability and misleading and deceptive conduct. If we come across these kind of problems, a financial counsellor may need to get legal advice from a consumer lawyer about the next steps to assist their client. And, that is a final and important point: legislation is only effective if it can be enforced and there are not enough consumer lawyers.



What has been the most significant development?

FG: National legislation of this nature was a huge leap forward. It is worth reflecting that the TPA/CCA was born in 1974, but national credit legislation only took effect in 2010–2011, some 25 years later. I wasn't around for the debates in the 70s, but my guess is that some industry/business commentators said the world would end when the TPA was introduced. It hasn't. It is hard to point to one significant development though as there have been many—unfair contract terms and the Australian Consumer Law come to mind.

What has been the most satisfying consumer outcome?

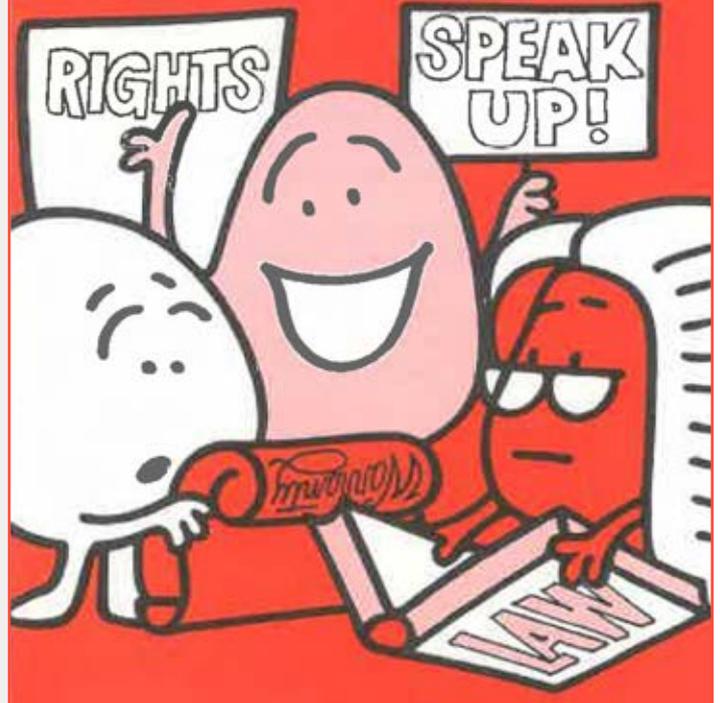
FG: At the policy level, recent court decisions about the door-to-door sales channel have been incredibly important. The decision in Lux (sale of vacuum cleaners) confirmed the problems inherent in the door-to-door sales and we now have legal authority for the validity of 'Do Not Knock' stickers. From a caseworker point of view, actually using the legislation is always going to be satisfying—and we do that.

If you could sum up the Act in a word?

FG: Ground-breaking



SHOPPERS' RIGHTS



The first consumer campaign

The Trade Practices Commission's first major consumer education campaign paid tribute to the important role community organisations play in assisting disadvantaged consumers. Shoppers' right: A guide book on consumer's problems was issued in February 1979 as a resource for community groups. The booklet covered protections against false and misleading advertising and undesirable marketing techniques. It also outlined the rights of consumers and how they can take action to avoid and resolve problems. As part of the campaign, the TPC sought to develop closer ties with the community sector and committed to using the broadcast media to reach consumers who might not be unaware of their rights.

Trade Practices Commission Annual Report
30 June 1979

Watchdog profile:



Glenn Probyn



Glenn Probyn joined the ACCC in 2001 coming from Consumer Affairs Victoria. He is currently a Director with the Product Safety team in the Melbourne office.

What were the hot issues at in 2001?

Glenn Probyn: The hot issue around that time was the introduction of the mandatory standard for baby walkers. Responsible for many serious injuries, the mandatory standard required baby walkers to be fitted with a device to prevent walkers falling down stairs, which was a common cause of accidents and injuries.

What has been the biggest change within the agency?

GP: The biggest change within the agency from a product safety point of view was the transfer of the policy development role from Treasury to the ACCC in 2006.

What is the most interesting matter you've worked on? why?

GP: The most interesting matter I have worked on is the review of the mandatory standard for vehicle jacks. Notwithstanding heavy lobbying from the automotive industry and injury prevention agencies, we were able to strike a balance in the requirements of the standard that satisfied all stakeholders and ensured consumer protection.

Key developments in product safety

1978: Safety regulations were introduced for child restraints and childrens' nightwear. These are some of the most important safety regulations and are still in place today. Nine bans on toys were also introduced including toxic coated toys, lead covered money boxes and erasers that looked and smelled like food.

1986: Recall provisions were introduced into the Trade Practices Act. Recalls are fundamental to the removal of unsafe products from the marketplace.

2008: CoAG agreed to implement major reforms in product safety. Non-regulatory reforms included the development of a 'one stop shop' product safety website (productsafety.gov.au); a clearinghouse to collect incident information and a review of the effectiveness of the recall system. Regulatory reforms included the introduction of a mandatory reporting requirement and vesting the power to make safety standards and permanent bans with the Commonwealth.

2011: Coinciding with the introduction of the Australian Consumer Law safety standards and bans were harmonised. State and territory regulations ceased to exist and a harmonised set of regulations were made under the ACL. This reduced product safety regulation in Australia by around two thirds.

2013: Following the ACCC's case against Cotton On Kids Pty Ltd for breaching the ACL (which resulted in a \$1 million penalty), Consumer Affairs Victoria took action under the ACL against Dimmey's Stores Pty Ltd in relation to non-compliance with a range of mandatory standards. The penalty imposed amounted to \$3.72 million, the company director was disqualified from being a company director for six years and Dimmeys has been restrained from selling products subject to product safety standards for six years.

