



**Australian Competition and
Consumer Commission**
Promoting Competition and Fair Trading

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Balancing the competitive pressures

Graeme Samuel, Chairman

Introduction

Thank you for inviting me to address the National Press Club. I notice my predecessor has been a regular talent on this podium. I trust we will enjoy a similar yet challenging relationship.

Today I will address three topics. Naturally the media, the direction of enforcement of the Trade Practices Act 1974 (the Act), and a new initiative regarding the Commission's decisions about mergers.

A common theme links these three issues - the need to balance public and private interests.

It is almost trite to observe that the position of Chairman of the Australian Competition and Consumer Commission is a very public one. There is an overwhelming focus on the Chairman. This is significantly the result of a practice, on the part of many sections of the media to personalise institutions by reference to the Chairman or Chief Executive. I began to understand this process almost 35 years ago when Robert Gottliebsen confided in me his journalistic style to refer to the head of an organisation instead of the organisation itself – a journalistic style that has been liberally adopted by his colleagues in the business media.

Today regularly we see reference to the likes of John Fletcher, Roger Corbett, Rupert Murdoch and Kerry Packer rather than the institutions which they head.

I will continue to reinforce to anyone who is prepared to listen that while the

Chairman is seen as the face of the Commission, all decisions are made by all of the Commissioners acting collectively.

I note that it has been suggested recently that I have introduced voting in the Commission on decisions. This is not true. The great majority of Commission decisions are made by consensus. On the odd occasion when this is not the case, decisions are made by majority. This has always been the case and is specified in the Act as the way decisions will be made.

The ultimate direction taken by the Commission on any issue will depend on the intellectual rigour of the views expressed by staff and debated by all Commissioners - not dictated by any single Commissioner, including the Chairman.

Observant journalists will have already noted that Commissioners do speak out and are often a point of reference on particular matters. It is my responsibility as Chairman to lead the general drive and direction of the Commission, and thus be the figurehead for a majority of comments to the media. This comes with the job and I accept this gracefully.

Commissioners bring to the organisation capabilities and intellectual capacity in the many areas of expertise that fall within the Commission's responsibilities. As members of the Commission they fulfil two roles: to protect consumers and uphold competition law. But without wishing to labour the point, there is no Mergers Czar, no Enforcement Commissioner - and no Commissioner has been appointed, nor views it as his or her responsibility, to protect any sectional interest in the community. We all collectively represent the whole of the Australian community in ensuring that all sectors of business conduct their activities honestly and in a vigorous, fair, competitive environment.

Publicity and the Media

There is virtually no transaction entered into between business and business, or between business and consumers, that is not in some way impacted by the Act and as a consequence potentially subject to scrutiny by the Commission.

The Commission has an important task to inform the public of its activities and decisions. This task has been reinforced in the Commission's Corporate Plan and

Priorities document.

There is a clear public benefit generated by the dissemination of information about Commission activities and initiatives.

In providing such information, the Commission accounts for its actions to the Australian public. As is proper, the community has a right to be informed of, and to assess and judge, the work and decisions of the Commission.

However, it is fundamental that perceptions must not be the overwhelming driver of the Commission's activity. The proper driver should be to achieve outcomes required under the Act for the benefit of Australian consumers.

The Commission will use the media and comment in the public forum to keep consumers informed of their rights and businesses informed of their responsibilities under the Act. For those few in the media who have not dealt with me in the past you will find me very open, accessible and transparent as to our activities – and very respectful of the media's expectations. I trust you will be equally respectful of our responsibilities.

Having said that, I also want to reassure those dealing with the Commission that we will respect the appropriate requirements of confidentiality. We must not allow the media's not-unexpected insatiable thirst for information as to our activities, to undermine the crucial community respect for the integrity of our processes.

I firmly believe the media can be of invaluable assistance in bringing about behavioural change on the part of businesses, in ensuring that they understand what their responsibilities are as well as reinforcing their obligations to behave in a proper, lawful manner in pursuing vigorous competition.

For example, the Commission has recently announced that allegations of misleading and deceptive behaviour in the property industry had become a major consumer protection priority. We had become concerned about the proliferation of seminars promoting quick wealth from property investment, the continued promotion of two-tiered property marketing schemes, and particularly 'dummy' bidding and other deceptive practices in connection with real estate auctions.

Since we voiced our concerns the Commission has received more than 300 complaints and enquiries into our InfoCentre about property seminars, two-tier/time share

properties, auctioneer bidding complaints and general complaints about real estate representations.

We are now in court over some of these matters and have investigations under way in several States in relation to allegations of dummy bidding and misleading valuations.

The Commission considers all vendor bidding to be misleading unless fully disclosed both at the start of the auction and at the time of the bid. An undisclosed vendor bid has no more intention of purchasing a property than a tree or gnome.

In some jurisdictions, such disclosure is not yet mandatory, and in others, there are limitations to a maximum of one vendor bid. The Commission is simply standing firm on the need for open and transparent processes that are not likely to mislead.

For however much real estate professionals may like to believe otherwise, consumers do not necessarily understand the terminology used at auctions or have the ability to readily discern between truth and deceit. It is important that the Commission reminds all real estate professionals that the provisions of the Trade Practices Act are unchanged by any regulatory debate going on at State or Territory level.

The Commission has also made it very clear that vendors may be at risk of action under the Act if they knowingly allow dummy bids or other deceptive practices to be engaged in by vendors' agents when offering their properties for sale.

We have recently seen a marked change in behaviour by real estate agents regarding dummy bids. This is very pleasing and is a positive outcome for consumers.

The reaction from real estate agents and their associations across Australia has been strong and continued Commission monitoring will ensure that changed behaviour is not temporary.

Change in behaviour by industry has benefits for consumers and the industry itself whose reputation can only be enhanced by fair and ethical behaviour.

A good reputation is highly prized by all businesses and publicity such as that in the case of the real estate industry or publicity attending an adverse judgment of say, price-fixing or unconscionable conduct, can lower a firm's standing and reduce sales. This is of concern to the companies involved, and, *sometimes*, a matter of complaint.

Those planning unlawful anti-competitive conduct or unlawful behaviour that would breach the Act put at risk this valuable asset.

That said, there is an important balance to be struck.

The Commission is not cavalier in its treatment of individuals or corporations about whom we allege wrongdoing – not in public, not in private, not by statement, not by innuendo, not by background briefing.

The Commission will be circumspect where rights and reputations might be improperly adversely affected. Announcements of the institution of legal proceedings will be factual, moderately worded and balanced. They will not be subject of further comment or backgrounding.

The Commission will not discuss cases while it is carrying out an investigation or going through the court process. This will be facilitated if those who are the subject of our proceedings also refrain from commenting to the media other than in a factual way.

Such an approach may disappoint the news hounds amongst you, but I believe that the public good must be balanced against an insatiable desire for a scoop.

The Commission has, of course, long-standing expertise in both the theory and administrative practice of competition law.

I believe that public policy should not be debated in the media by the Commission. In my view the best approach to take is to allow Government and appropriate Parliamentary Committees to draw upon the Commission's expertise to establish, and modify where appropriate, the law under which we operate.

It is appropriate to leave it to Parliament to determine whether the law is adequate and whether or how it should be modified. And in that context, it is up to Parliament to determine whether it has regard to the advice that we have provided.

Enforcement and Compliance

The Trade Practices Act's compliance and enforcement instruments are designed to complement one another and work interdependently to promote conformity with the law. No part stands alone and no part can be effective in isolation.

The public has expectations of the Commission's ability to deliver timely and effective outcomes in the public interest. For example the Commission recently

instituted proceedings against Mr Henry Kaye and National Investment Institute Pty Ltd over their promotion of 'property millionaires' investment strategy. As a result of the Commission's action, Mr Kaye and the company in question have agreed not to publish any further advertisements pending the final outcome of the Federal Court proceedings.

Since then the Commission has noticed a reduction in the number of property investment seminar advertisements and also noted from press reports that attendances at these seminars are much lower than they once were. Hopefully consumers are now more wary of the promises being made and are acting to better educate themselves before they sign on the dotted line.

The Commission must strike the proper balance between our educative and enforcement role. For example, we have broadly based programs such as those run under the Rural and Regional Outreach Program, which inform business and consumers of their rights and responsibilities under the Act. We also have an active consumer liaison and education program to inform consumers of their rights under the Act.

Compliance with the Act is not an option. Consumers have the right to be protected from unfair practices. Those in business who do not comply with the law will face enforcement action by the Commission.

The Commission acknowledges that responding to unlawful behaviour by seeking remedies is a second-best approach to full compliance.

For despite the Commission's best endeavours, and those of the courts, there are individuals, and perhaps society at large, who are made worse off by the unlawful conduct of others – even if the conduct was stopped and penalties have been obtained.

By taking enforcement action the Commission reiterates its determination to seek compliance with the Act. If individuals and companies believe that the Commission will take action for a breach, they are more likely to think twice before breaking the law.

As I have already told a number of senior executives, they should not consider compliance can be achieved through a tick-a-box approach. Compliance must be part of the culture, the fabric of their company, starting with them as leaders of their organisations.

I would hope that business leaders generally, view compliance and a strong collaborative working relationship with the Commission as an essential part of normal business practice.

However, the Commission is not so naïve as to believe that compliance is regarded by all business as an altruistic nicety to be pursued in the public interest. For the reality is that regulation does exist to deal with misconduct. Its strength flows directly from the effectiveness of the Commission's enforcement regime.

Enforcement action by the Commission will be focused and effective. It is the 'sharp point' of the Commission's compliance approach. Where the Commission believes that the Act has been breached in a serious way, we will not hesitate to take enforcement action.

Our enforcement action will be directed towards breaches of the Act where there is widespread consumer detriment, deliberate breaches of the law, emerging trends of misbehaviour in particular industries, or recidivist behaviour.

Our approach will be aimed at stopping unlawful conduct and sending a strong message to those who would consider similar breaches, that the Commission will be swift and firm in its reaction.

Whilst we look at matters on a case-by-case basis, we also seek to identify systemic problems within particular industries. Decisive action against one company can be a shot across the bow for an entire industry. But we will not hesitate to take follow up action if transgressions reoccur.

Our priorities will be to stop the behaviour and damage to the consumer as soon as possible. We want to ensure, where legally possible, that where consumers have suffered loss or damage, there is restitution. Finally we want to prevent the behaviour reoccurring in the future.

Litigation is an essential weapon in our armoury and will be pursued where it meets our objective of a timely and effective response to misconduct. But we are conscious that the process of litigation, from the institution of proceedings through to the completion of all appeal processes, can be time consuming and costly. It may not be the most effective strategy to bring about the desired outcomes in protecting consumers from the harm that can be wrought by business misconduct. Where appropriate, alternative strategies will continue to be used to bring about desired

outcomes.

Mergers

You are no doubt aware of the recommendations made by the Dawson Committee in its review of the competition provisions of the Act. What I particularly want to refer to today are the recommendations in relation to the merger processes.

The Dawson Committee recommended firstly, that the Commission should provide adequate reasons for its decisions rejecting merger proposals or amending them through enforceable undertakings, or where the parties to the merger request that the reasons for the Commission's decision be published. Secondly, the Committee recommended that there be a voluntary formal clearance process developed to operate in tandem with the current informal one. Thirdly, the Committee recommended that parties seeking authorisation for their merger be required to proceed directly to the Australian Competition Tribunal, rather than approaching the Commission with a right of appeal to the Tribunal. Under this recommendation, the Commission would assist the Tribunal in its consideration of the authorisation application.

Associated with these recommendations are some fairly tight time frames within which both the Commission and the Tribunal would be required to operate. The Commission would have forty days in which to consider an application for formal clearance of a merger which would only be able to be extended at the request of the applicant. If the Commission does not make a decision within forty days, the Commission is to be taken as having refused a clearance. The Tribunal would have three months within which to consider a merger authorisation application.

While I welcome suggestions to streamline and improve the Commission's merger processes, I am also concerned to ensure that we don't detract from the benefits that flow from the current informal process.

I am concerned that the adoption of a formal process may be followed by an end to the informal system as happened in New Zealand. As a consequence, one of the great benefits of the Australian regime, that is, the ability for parties to come to the Commission and to engage with both Commissioners and staff during the assessment process, may well be lost.

It is a process that has been commented on favourably in international comparisons of merger assessment systems. In its 2003 ratings, the Global Competition Review commented on Australia's current merger regime that the

“... regime is deemed to reach the correct result in merger reviews consistently, and to do so efficiently.”

At the very least, the institution of a formal clearance system will mean more formalisation of the informal system. For example, there will need to be certain up front information requirements instituted for the informal clearance system so that it is quite clear, when prospective merger parties approach the Commission, on what basis they are doing so.

As noted, the limited time period for considering formal merger clearance applications would also mean there would be reduced scope for an interactive process with the Commission.

Similarly, with authorisations proceeding direct to the Tribunal, parties would not be able to come in early to discuss matters with the Commission. This would be entirely inappropriate given the Commission's envisaged role in assisting the Tribunal. The Tribunal has already made it clear that it would not countenance merger parties seeking to negotiate the terms of a proposed merger with the Tribunal members.

I am also concerned that in a formal clearance process with such tightly defined time limits, the Commission may not be in a position to provide clearance within those limits. Given the Commission's decision under the formal clearance system would be a binding one, the formal clearance system will not be able to accommodate confidential merger applications.

Furthermore where a merger proposal is complex and/or the initial proposal needs to be varied or supported by enforceable undertakings, the forty day period proposed for the formal clearance system may simply not be long enough for the Commission to adequately consider the merger proposal.

In these situations either the parties would have to request an extension of the forty day assessment period or the Commission would have to reject the merger application. Faced with insufficient time or insufficient information to consider a

merger properly under the proposed formal clearance system the Commission could do nothing other than refuse a clearance. It would be an abrogation of the Commission's duties if it granted a binding formal clearance to a merger proposal, which under the Dawson Committee recommendations would also take away third party rights of appeal, unless the Commission was satisfied that the merger would not result in a substantial lessening of competition and, therefore, would not breach section 50 of the Trade Practices Act.

For these reasons I am concerned that the introduction of more formalised merger assessment processes will lead to more mergers being rejected than is currently the case. In recent years the Commission has, on average, only had problems with about five percent of the mergers it considers and about half of these are able to proceed after discussion and, in some cases, the offering of appropriate enforceable undertakings. Without wishing to put a figure on it I can see that this rejection rate is likely to increase with the introduction of more formalised merger assessment processes.

There is, in my mind, a trade-off here between merger processes which are more formalised, more certain in their timing and perhaps more predictable in their processes but which are likely to have a higher rejection rate, and the current informal processes which while being less structured, and perhaps at times slower than the merger parties wish, nonetheless result in merger rejection rates which are comparable with international standards.

All this said I reiterate what I said before in that I welcome suggestions to streamline and improve the Commission's merger processes. In particular I have in mind comments in international comparisons about the lack of transparency or reasoned decisions in the current merger process.

The Commission has decided to implement the Dawson Committee's recommendation that it provide adequate reasons for its merger decisions under the current informal clearance system. In line with the Committee's recommendation the Commission will begin, from now, publishing its reasons for merger decisions where:

- the merger is rejected;
- the merger is approved but with enforceable undertakings; or

- the parties to the merger request that the reasons for the Commission's decision to approve the merger be published.

In deciding to publish the reasons behind its merger decisions, the Commission is conscious that this should provide the market with a better idea of the Commission's analysis of various markets and associated merger and competition issues. It will also alert the market to the circumstances where the Commission's assessment of the competitive conditions in particular markets is changing, perhaps as a result of developments such as technological change or as a result of previous mergers that have already occurred in those particular markets.

It is intended that in the relevant cases, the Commission's reasons for its decision on a particular merger will normally be published on its website at the same time, or shortly after, its decision on the merger is announced.

In deciding to publish the reasons behind certain of its merger decisions the Commission is, of course, aware of the market sensitivities that may be involved.

The Commission will continue to protect confidential information it has received, either from the merger parties or through its market inquiries. In particular, the Commission will continue to strenuously protect the identity of market participants who provide it with sensitive market intelligence. The Commission believes that in the majority of cases it will be possible to provide an appropriately detailed explanation of the reasons behind a merger decision while protecting confidential information and its sources. In the few cases where this is not possible, maintaining confidentiality will be the Commission's paramount concern.

The Commission is also conscious that certain mergers and acquisitions can be particularly market sensitive. Where necessary the Commission will frame the content of its reasons and/or the timing of their release with these market sensitivities in mind.

Notwithstanding these necessary limitations on the information the Commission will publish, or its timing, I believe that the Commission's new practice of publishing its reasons for certain of its merger decisions will provide market participants with the further insights and guidance they have been seeking on the Commission's merger decisions.

Conclusion

Let me conclude today by reinforcing that the Commission is a strong organisation dedicated to bringing the benefits of competition law to all Australians.

In doing so we are committed to fostering a competitive culture where individuals and their businesses, large and small, have the opportunity to trade efficiently and fairly.

The Commission will balance the public right to know about its activities with the need for certain activities to remain confidential to protect individual identities and reputations and enhance the effectiveness of its enforcement activities.

In particular, today's merger initiative will be a major step forward in enhancing the accountability of the Commission's decision making processes, while achieving this required balance.

I look forward to a continuing robust engagement with the media in this, its national club.