



Australian Bankers Association 3rd Annual Regional Banking and Agribusiness Forum

9 September 2005
Graeme Samuel, Chairman

The Australian Competition and Consumer Commission believes all Australians, regardless of where they live, have the right to enjoy the benefits and protections of the Trade Practices Act.

Businesses and consumers living and working throughout regional Australia have the same rights as their city counterparts to participate in the economic life of the nation, and obtaining protection under trade practices law should not be based on geography.

But we have long recognised that people in regional Australia often face more difficulty than those in the major metropolitan areas in being able to access those rights.

That is why the ACCC has put a special effort into reaching out to business and consumers outside the major metropolitan areas through the Rural & Regional Program we launched in 2002.

Every year we also conduct a Competing Fairly Forum which targets specific issues of interest to regional Australia, and it's also why I'm delighted to be here today.

Banking mergers and the importance of regional banks

As the agency which enforces merger law, the Australian Competition and Consumer Commission plays a major role in maintaining the competitive structure of financial markets throughout Australia.

A crucial element any time in deciding whether a proposed merger should be allowed to proceed is the impact that the merger will have on specific markets, including regional areas.

Over the past decade the ACCC has had to consider three major bank mergers:

- Westpac/Challenge
- Westpac/Bank of Melbourne
- Commonwealth/Colonial

In all three cases the ACCC's decision was very much influenced by what we saw as the competitive constraint regional banks continue to place on the four major banks.

In defining what markets would be affected by the more recent bank mergers, the ACCC identified various product categories of retail banking as separate markets and their associated geographic markets.

This differs from the ACCC's approach to the 1995 Westpac/Challenge Bank merger when we concluded that it was appropriate to consider banking as a cluster of banking services which banks delivered to customers as a bundle.

This market definition was chosen because there was little evidence at that time that banking consumers used different banks for different services – most used the one bank for all their banking services. However, our thinking in this area has now developed, and consequently, in the subsequent bank mergers the ACCC's approach to defining the market changed.

- ***Westpac/Bank of Melbourne merger***

In contrast to the approach taken in the Westpac/Challenge Bank merger, in 1997 when the ACCC examined the Westpac/Bank of Melbourne merger it identified the following six product markets for retail banking and their associated geographic markets:

- deposits (state)
- home loans (national)
- personal loans (state)
- a cluster of small business banking products (state)
- credit cards (state)
- transaction accounts (state)

The ACCC had concerns in relation to the transaction accounts market, however such concerns were alleviated by court enforceable undertakings given by the parties.

This change in approach to defining the market in the banking sector largely resulted from the findings of the Wallis Report¹ in 1997 which stated that consumers of banking products no longer simply relied on the one bank for all their banking products.

This was particularly evident in relation to home loans where it was found that by 1997 a significant proportion of customers would shop around for the best price for a home loan.

- ***Commonwealth/Colonial merger***

In 2000 the ACCC considered the proposed merger between the Commonwealth Bank of Australia and Colonial Limited. In defining the relevant markets in this matter the market definitions adopted in the Westpac/Bank of Melbourne merger were a useful reference point.

¹ Commonwealth of Australia, Financial System Inquiry Final Report, March 1997

The ACCC focused on the following product markets:

- large corporate banking
- retail banking services
- non-banking financial services

In relation to retail banking services the ACCC identified product markets, and their associated geographic markets, in the following areas:

- home lending (national)
- personal loans (state)
- credit card issuing (national)
- credit card – merchant servicing (local-state)
- deposit/term products (state)
- transaction accounts (state)
- small and medium enterprise banking (local-state)
- agribusiness banking (local-state)

The ACCC's geographic classification of these markets showed that the ACCC, like the Wallis Committee, saw that significant elements of the banking market were still regional in character. However, it is interesting to note that the home lending market was classified as a national market as it was found that mortgage originators and regional banks were offering mortgages even in states where they had little or no physical presence.

Another important change resulting from this merger was the identification of a separate product market for agribusiness banking. This was because the ACCC took the view that lending to the agricultural sector could be separated from the provision of other business financial services. The ACCC concluded that there would not be a substantial lessening of competition in this market and an important factor taken into account was the presence of a specialist rural lending bank and of pastoral houses in rural lending which were important drivers of competition.

Following market inquiries the ACCC identified several areas of retail banking where the proposed merger would be likely to result in a substantial lessening of competition in both Tasmania and New South Wales.

The ACCC again accepted court enforceable undertakings from the parties which addressed our concerns by opening up Tasmanian and NSW retail banking markets to more competition and minimising the ability of the merged firm to abuse any accumulated market power.

However, the ACCC's concerns in NSW were also partially alleviated by the presence of another well-established regional bank, without which our concerns were likely to have been more substantial.

Importance of regional banks

So regional banks are crucial to competition in the banking industry and continue to promote competition and restrain the market power of the big four.

The competition provided by regional and specialist rural banks played a part in alleviating the ACCC's competition concerns in the Commonwealth/Colonial merger.

In the 1997 Westpac/Bank of Melbourne merger the decision not to oppose the merger was influenced by recent changes in the regional banking market.

The ACCC noted that in 1995, when the Westpac/Challenge Bank merger was assessed, there was a real prospect that, were it not for the Trade Practices Act, numerous regional banks would be taken over by the majors.

However, by 1997 developments such as the St George/Advance/Bank SA merger; Bank of Scotland acquisition of BankWest; and the Metway/Suncorp/QIDC merger in Queensland had reduced the likelihood that the diversity which the regional banking sector brings to the market would soon disappear.

The Wallis Report in 1997 also recognised that regional banks had become an increasingly important source of competition. This report indicated that regional banks had achieved success by leading the way on service, innovation and pricing on some products.

Since the time of the last banking merger considered by the ACCC the Parliament passed the *Trade Practices Amendments Bill (No 1)*. Under this Bill an amendment was introduced which extended the definition of 'market' to include a substantial market in a region of Australia.

This amendment provides support for the ACCC and the courts to consider the competitive impact of proposed mergers and acquisitions on substantial regional markets. This amendment arose in part out of the ACCC's increased focus on regional markets.

The ACCC's approach to future mergers in the banking industry

With the most recent proposed banking merger now dating back to 2000, it's now been some time since the ACCC has had to act in this area. Nonetheless, should such a proposal arise the ACCC would, as in the past, assess the acquisition on its merits in light of the particular circumstances at the time.

Obviously this assessment would also be influenced by the increasing capacity of consumers to shop around for banking services and would take account of the amendments to the Trade Practices Act which extend the definition of a market to a region. In addition, given that regional banks in Australia are continuing to be a vigorous source of competition, it is likely that the ACCC would have careful regard to the effect on competition of the presence of, or removal of, such a competitor in a market.

It's also worth highlighting the recent changes to merger procedures in Australia.

As you may be aware, the ACCC has a mostly informal process for approving mergers.

Companies planning mergers usually come to us informally to tell us of their plans. In matters which raise competition concerns we then talk to them and work informally with them on possible resolutions to these concerns.

For the most part those involved believed this was a very good process, which is not surprising given over 95% per cent of merger proposals submitted to the Commission received approval, and none of the approved proposals have been subsequently challenged.

However, some practitioners argued for a more formal process to deal with the very small number of mergers that are knocked back.

This was taken up by the Dawson Review which recommended that there be a voluntary formal clearance process to operate in tandem with the informal one.

It also recommended a tight time frame which would see any merger not approved by the Commission within 40 days regarded as a rejection with the applicants alone then having a right of appeal to the Australian Competition Tribunal.

The ACCC remains committed to the popular informal process, and in October last year, adopted a new series of merger guidelines to improve transparency and accountability in the conduct of informal merger clearance processes.

During 2004-05, a total of 189 mergers were considered by the ACCC. Of those, 32 complex matters were examined and decided under the new informal merger guidelines.

Of these 32 many were concluded in considerably less than our standard eight week timeframe, with 50 percent completed in less than six weeks and 84 percent in less than 8 weeks. Only five assessments of these complex matters required more than the first phase eight-week assessment period and all were significant and or contentious.

The guidelines have had the desired effect — they have produced significantly greater transparency. ACCC concerns and comprehensive reasons for decisions are now published on our website, and as a result, there is significantly more accountability not only on the part of the ACCC but also on the part of merger parties in the way in which the informal merger process is conducted. Most parties now welcome the transparency, accountability and greater degree of certainty the new guidelines provide about the manner in which we conduct our informal merger clearance process.

The other significant change in this area concerns applications for merger authorisations.

Applicants will continue to apply to the ACCC for clearance of a merger on competition grounds alone - that is, if they want to know whether or not in the ACCC's view the merger is likely to lead to a substantial lessening of competition in a market.

On the other hand, if a merger party decides for whatever reason – possibly a concern the action may involve a substantial lessening of competition - that they are not going to seek our views on competition grounds, then they have the option of seeking authorisation of the merger. This involves attempting to prove that the public benefits flowing from the merger will outweigh the anticompetitive detriments. To do this they may now bypass the ACCC and proceed directly to the Australian Competition Tribunal.

The ACCC will have a significant role in assisting the Tribunal in assessing authorisation applications which relate to mergers and acquisitions. The Tribunal is required, before making its decision, to request and consider a report from the ACCC. The ACCC will continue to provide any additional assistance that the Tribunal may require.

ACCC Rural and Regional Program

While this conference is principally concerned with the banking sector, the ACCC's involvement in rural and regional Australia goes far beyond bank mergers. So I'd now like to turn to the work the ACCC is doing to more generally benefit business in rural and regional areas.

As I mentioned at the outset, the ACCC is committed to assisting businesses and consumers in rural and regional Australia enjoy the same protections under the Trade Practices Act as those in metropolitan areas.

But we recognise that smaller populations and greater distances mean that sometimes, a greater effort is needed on our behalf to ensure rural and regional Australia have access to advice and information about the Trade Practices Act.

As a result, in March 2002 the Commission launched the Rural and Regional Program to better inform businesses and consumers outside the major metropolitan areas about their rights and obligations under the Trade Practices Act. The program has two important elements: regional outreach managers and regional supporters.

Regional outreach managers

ACCC Regional outreach managers keep in regular contact with industry and consumer associations, business enterprise centres, ethnic associations, local government and other relevant bodies through seminars, presentations, mail outs, articles and radio interviews. They also organise regular seminars and

local visits to provide trade practices information and discuss any areas of concern.

ACCC supporter network

Organisations in regional communities form a key part of the network. The ACCC works with certain organisation to give local businesses and consumers better access to materials that explain the ACCC's role in administering the Trade Practices Act. These include publications designed to help businesses understand their rights and obligations under the TPA, and to help train their staff to comply.

- **Education initiatives**

Rural and regional Australians are the target audience of a series of ACCC feature presentations being broadcast on the national rural and regional affairs program 'On The Land'. These presentations provide up-to-date information on various aspects of the ACCC's work specifically relating to rural and regional Australia. Segments cover topics such as ACCC participation at agricultural expos, rural doctors and the TPA, product safety, refunds and warranties, franchising, collective negotiations, how to contact the ACCC and more.

The program is broadcast on weekends through the Prime Network in regional areas throughout Australia.

- **The Competing Fairly Forum**

The Competing Fairly Forum is an integral part of the ACCC's focus on educating regional businesses and consumers about their rights and obligations under the Trade Practices Act. It is also used by the ACCC to gather information about trade practices issues affecting these areas.

The Forums feature a panel of experts discussing trade practices issues, the broader economic impact of these issues, and the approach taken by the ACCC in administering the Trade Practices Act.

Previous panels have included ACCC Commissioners, legal practitioners, compliance professionals, mediators, and other key industry representatives.

The first Competing Fairly Forum took place in November 2000 with a Sky Television broadcast of a panel discussion covering the basics of the Trade Practices Act. Since then the Forum has continued to evolve with more venues and wider coverage. Forums are delivered to regional venues via a variety of methods including satellite broadcast, Westlink WA and presentations by ACCC staff.

The next Competing Fairly Forum will look at collective bargaining for small businesses.

- **Consultation with the small business sector**

The ACCC regularly consults with business and consumer groups on a range of issues affecting small businesses through special forums.

The Small Business Advisory Group (SBAG) is one such consultative mechanism. The Group itself is comprised of a number of industry associations which in turn represent various sectors of the economy with a significant small business membership. SBAG meetings provide the ACCC with an opportunity to not only pass on information through established networks, but to receive important feedback on trade practices issues affecting small business.

In recent years franchising has been a very important growth area for small businesses and the Franchising Consultative Panel (FCP) also provides the ACCC with an opportunity to focus specifically on franchising issues.

Its membership includes franchisors, compliance professionals, franchise associations and franchisees and the feedback we get enables the ACCC to identify ways to assist both franchisors and franchisees to understand their rights and obligations under the Trade Practices Act.

Collective bargaining and Unconscionable Conduct and Small Business

Finally, I'd now like to turn to some recent developments that affect small business more generally.

The Commission has long recognised that small business does not have the same sort of resources as big business to educate staff about the requirements of the Trade Practices Act and ensure compliance. For some time therefore we have had a dedicated small business unit within the Commission.

For the last 6 years the ACCC has put significant effort into tackling unconscionable conduct against both consumers and small business.

It's important to distinguish between unconscionable conduct – which is illegal – and conduct which simply represents hard bargaining – which is legal. The ACCC has released a detailed guide and a simple handbook to assist in defining these boundaries.

For conduct to be regarded as unconscionable courts have found that serious misconduct or something clearly unfair or unreasonable must be demonstrated. This might include an overwhelming case of unreasonable, unfair, bullying and thuggish behaviour, actions showing no regard for conscience or behaviour that is irreconcilable with what is right or reasonable.

Conduct by a larger entity dealing with a small business found to be unconscionable includes:

- blatant disregard of industry codes of conduct or other law
- placing unreasonable conditions on a franchisee.
 - In the LeeLee case, an Adelaide food plaza landlord was found to have acted unconscionably by insisting that dishes be sold at a certain price, to inhibit competition

- threatening to withhold essential franchising supplies or placing unreasonable conditions on supply of essential franchising goods to franchisees.
 - In the Simply No Knead case the court ruled that the franchisor had acted unconscionably by withholding essential supplies from franchisees that refused to go along with what they considered unreasonable terms and conditions.
- attempting to terminate a commercial agreement for contrived reasons
- failing to honour important terms of a retail lease
- failing to adequately disclose key changes to a contract.
- granting an 'exclusive' dealership to one business, while at the same time negotiating with another business.
 - Korean industry giant Daewoo was found to have acted unreasonably when it caused a smaller firm to believe it would have exclusive Queensland dealership rights, then refused to supply it with machines and directed work to a competitor.
- unreasonably refusing to supply a business
- conduct that is unfair, unreasonable, harsh or oppressive, intimidating, bullying or thuggish, or wanting in good faith
- terminating a contract in a capricious and unreasonable manner.

A 2004 Senate Inquiry into the effectiveness of the Trade Practices Act to protect small business recommended a range of reforms, including some relating to unconscionable conduct.

As a result of that inquiry the government subsequently signalled its intention to introduce a number of reforms including the outlawing of the inappropriate use of unilateral variation clauses in contracts, and confirmed measures that will improve access to collective bargaining.

Normally, where groups of competing businesses come together to collectively negotiate terms and conditions and, in particular, prices, this is likely to raise concerns under the Trade Practices Act. However, the ACCC is able to grant immunity through an 'Authorisation' process, but only where we are satisfied that this is in the public interest. This assessment is made on a case by case basis.

Generally, in relation to small businesses collectively bargaining with a larger business, the ACCC finds these arrangements to be in the public interest and allows them to proceed. In recent years, ACCC Authorisation has enabled collective bargaining by chicken growers, dairy farmers, sugar cane growers, lorry owner-drivers, TAB agents, hotels, newsagents and small private hospitals amongst others.

The Commonwealth has decided to make this process easier for small business by introducing a notification system for collective negotiations with

tight time constraints, minimal cost and provision for collective boycott arrangements.

By lodging a notification allowed under the new legislation, the onus of proof is reversed. Small business will, after 14 days, be afforded the same immunity from the Act to collectively bargain, unless the ACCC is satisfied that it is not in the public interest.

It will thus be up to the ACCC to demonstrate that immunity is not justified, rather than, as is currently the case, on the applicants to demonstrate that it is.

Conclusion

As I mentioned at the outset, the Australian Competition and Consumer Commission believes all Australians, regardless of where they live, have the right to enjoy the benefits and protections of the Trade Practices Act.

A very good example of that has been the work we have done in recent years in the banking sector, and the fact that when considering banking mergers, a crucial element we now consider is the impact that the merger will have on regional markets.

People living in rural and regional Australia often face more difficulty than those in the major metropolitan areas in being able to access government services.

That is why the ACCC has put in a special effort into reaching out to business and consumers outside the major metropolitan areas to ensure their right to be protected from anti-competitive, misleading and unconscionable conduct are upheld no different from those living in the city.