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# Research and information

## Small business and competition policy

For small businesses the most significant aspect of recent developments in national competition policy is the application of the Trade Practices Act to all businesses. This will affect small business in two important ways.

Firstly, the competitive conduct rules in the Act will apply to all small businesses. Previously most small businesses were exempt from Part IV because the Act did not apply to sole traders and partnerships that traded solely within a State. State and Territory Parliaments are currently passing legislation extending the coverage of Part IV to all businesses, no matter how they are structured.

Secondly, small businesses in their capacity as consumers will benefit from the extension of the Act to utilities, the professions and government business enterprises.

It is expected that exposure of the professions and utilities to market competition will lead to more choice, improved service and lower costs for consumers. Professional services and utilities are significant costs to most small businesses. The reduction in some phone charges and air fares since the introduction of competition in those sectors indicates some of the potential benefits of more competition.

Another potential benefit to small business of the national competition policy reforms is the exposure of government business enterprises to the Act. This will place all small businesses in a better position to compete fairly with government business enterprises.

## Small business problems and competition policy

The implementation of the national competition policy package means that the Trade Practices Act is more relevant to small business than ever before. However, the changes to competition policy will not solve all small business competition problems.

Many of the problems experienced by small businesses arise from the structure of markets and the use of market power by strong suppliers and buyers. Small businesses are often disadvantaged by changes to the structure of the market. However, this is part of the inherent risk of being in business and is not a matter that is appropriately resolved through the Trade Practices Act.

## Economic duress

Small business enterprises in the areas of manufacturing, wholesaling and retailing suffer from competition problems that deserve further consideration. Some small retailers experience difficulties competing with large discount stores. Franchisees sometimes experience difficulties with the economic power of their franchisors. In addition, small businesses are often unable to obtain satisfactory contractual terms from larger businesses and can be subject to predatory conduct by large market players. Problems also arise in relation to commercial tenancies and in supply relationships in the petroleum and automotive sectors.

To address these issues, the Commission has expressed support for including the equitable

concept of economic duress in the Act. This would remove problems associated with having to prove, in order to establish unconscionable conduct, that the dominant party knew of and exploited the special disadvantage of another party, and would recognise the concept of removal of choice through economic power. Small business groups have long been concerned that the current provisions on unconscionable conduct are ineffective in solving small business problems.

## **ACCC's small business program**

Because of the important role of small business in the Australian economy in terms of employment and the retail area, the Commission has an important role in ensuring that the business environment they operate in is a fair and competitive one.

For a decade, the Commission has had a clear focus on small business issues, although this has not been widely recognised. In the past, analysis showed that a substantial proportion of complaints made to the Commission related to small business, either as the perpetrator or the victim of unfair trade practices.

In September 1995, the then Government announced the establishment of a small business unit within the Commission as part of a small business package. The small business program has been established, with one officer in Central Office and nominated officers in regional offices as small business contacts.

The objectives of the program are to coordinate:

- the enforcement of the Trade Practices Act in relation to small business issues;
- the education of small business about their rights and obligations under the Act; and
- the promotion of small business aspects of Commission activities.

Small business organisations will be consulted about problems being faced by small firms, which may result in the Commission taking

legal proceedings on behalf of small businesses in appropriate circumstances.

### **Priorities for enforcement**

The small business program analyses small business aspects of current Commission activities, from complaints to court action. The director of the program has begun to discuss trade practices issues with small business organisations. Such consultation will also take place through a small business advisory group, soon to be established by the Commission.

One current priority for enforcement is the franchising sector. Areas of concern are misleading and deceptive conduct and possible unconscionable conduct by franchisors. The Commission is currently formalising a closer working relationship with the Franchising Code Council and will closely monitor franchisors who are not members of the Franchising Code of Conduct or whose behaviour breaches the Code.

The small business program will examine other areas which have high levels of disputes involving small businesses and trade practices issues, including shopping centre leases, film distribution, suppliers and banking.

### **Small business problems and complaints**

The Commission has long been committed to preventing disputes and problems. It promotes the use of alternative dispute resolution mechanisms and voluntary codes of conduct. These are cost-effective strategies, particularly where there is an imbalance of power between large and small businesses.

The Commission is developing a publication to help small businesses avoid disputes and know how to handle disputes once they have arisen. It is also developing a guide on the hallmarks of best practice in business codes disputes resolution and complaints handling systems.

## **Educating small business about the Act**

A major challenge for the Commission is reaching the estimated 800 000 small businesses in Australia. The Commission is examining ways of working with organisations which provide training to small business. The Commission also plans to educate professionals such as lawyers and accountants, who are often the first line of advice to small businesses.

The small business education program incorporates a strategy for educating ethnic small businesses about trade practices issues. The Commission has developed a plan for communicating with ethnic small business, based on using existing structures within specific ethnic communities. The project will begin with trade practices seminars for the Korean business community in Sydney, working in conjunction with the Korean Chamber of Commerce.

The Commission has developed links with small business organisations, Ausindustry and State government small business corporations, including rural organisations, to communicate with the small business sector about their rights and obligations under the Act.

The Commission has a range of publications which are applicable to small businesses. Its 'Best and Fairest' compliance education package is as applicable to small businesses as to large corporations. This package uses everyday language and real-world examples drawn from the experience of the Commission and from leading cases. It aims to show staff in businesses how to compete aggressively but fairly within the rules; how to avoid mistakes; and how to use the Act for their businesses' benefit.

## **Promoting the ACCC's small business focus**

Since the Commission's current involvement with small business issues is not well known, the program will work to improve public recognition of the Commission's activities. The program will target the small business press, taking opportunities to emphasise the small business angle of Commission activities.

## **Minister warns on small business 'registers'**

The Minister for Small Business and Consumer Affairs, the Hon. Geoff Prosser, MP, has urged all businesspeople to carefully scrutinise any letters received about registration. The ACCC, the Australian Securities Commission, and State and Territory consumer affairs bureaux and fair trading agencies have received complaints about several small business 'registers'.

New and existing small businesses are being targeted by several groups who send official-sounding letters which imply that a small business must be registered with them. The forms attached to the letter look similar to those of legitimate government bodies and imply legal authority.

The letterhead often implies a national organisation, although there may be only one 'office', or simply a telephone number, and the letters are worded in such a way that the reader may believe the 'service' is mandatory. In at least one case, the fee was exactly the same as that charged by the ASC to lodge an annual return, leading to further confusion.

Those promoting these registers seemed to particularly target new businesses whose operators were not familiar with the ASC and consumer affairs agencies' documents and official registration processes.

## **Inquiry into petroleum products declaration**

The Commission's inquiry into the petroleum products declaration was the last of a series of public inquiries initiated by the Commonwealth Government in December 1993 reviewing whether prices surveillance of industries declared under the Prices Surveillance Act is

warranted. Additional terms of reference were received from both the previous and current Governments, including an examination of country-city price differentials, retail petrol pricing and a possible terminal gate pricing system.

The Commission presented its report to the Treasurer on 15 August 1996. It concluded that the four oil majors jointly have substantial market power in relation to petroleum products (petrol and distillate), derived from high concentration levels, barriers to entry, and the depth and breadth of the vertical and horizontal relationships between market participants. In addition, actual wholesale prices in most locations exceeds import parity benchmarks.

While, on balance, the evidence on the structure, conduct and performance of the four declared companies suggests that they retain substantial market power, the Commission believes there are now good prospects of that power being undermined in the near future by independents increasingly accessing product and the growth and spread of imports. A catalyst for imports has been the lowering of barriers brought about by the enforceable undertakings given to the Commission in relation to the Ampol/Caltex merger. The undertakings included the provision of greater access to terminals and the sale of distribution and retail sites. As they become established, imports will generate new competition, and this is likely to flow through to retailing in country as well as city areas as importers or their independent wholesalers seek market access. Product will also be available at their terminals to buyers, including those from the country. In these circumstances, the Commission is of the view that prices oversight can be entirely removed from this industry.

To a degree, petrol prices are generally higher in the country than in the city because of some legitimately higher costs, including the costs of freight. However, higher prices also often reflect a lack of competition. In addition, there are usually too many service stations in country towns, providing a limited range of products and services, which adopt a 'live and let live' strategy of applying high margins to cover low volumes. However, in cases where there is an

independent brand presence in country locations, retail prices are relatively lower.

The Commission has recommended the deregulation of the four oil majors during 1997. However, it believes that this should not occur until additional adjustments take place in the industry, including the further development of independents and imports as viable and competitive forces, and while the Commission investigates the oil majors' horizontal refinery exchange agreements, borrow and loan arrangements and joint terminalling agreements.

The Commission found that there were some risks associated with a possible move to a regulated terminal gate pricing system for a transitional period before full deregulation. However, in the longer term it considers that such a system will develop as a natural consequence of independents making product available at their terminals.

During the transition period, the Commission intends to keep a number of matters under close review for potential anti-competitive effects, including restrictions on entry to terminals or depots, multi-site franchising and tied agreements. The Commission will also review changes in the competitive environment, including developments in the independent importation, distribution and retailing of petroleum products. In particular, there will be limited monitoring of retail prices during the transition to a more competitive market, especially in areas displaying high notional margins. The Commission supports monitoring by motoring bodies and is prepared to assist them in developing programs for country areas. As allegations of collusion, price fixing and unconscionable conduct were raised during the inquiry, the Commission intends to intensify its investigations in these areas.

Copies of the report are available for \$20.00 from Commission offices.

## ACCC backs increased cinema competition

In a submission to a committee advising the Victorian Government on cinema-based entertainment facility developments, the Commission said the current Australian cinema industry is dominated by Hoyts, Village and Greater Union. Village and Greater Union have extensive cross-ownership links in both cinema exhibition and film distribution and are engaged in cinema joint ventures.

The advisory committee is specifically examining the multiplex proposal in Melbourne by a US-based company, Reading. The Commission strongly supports the entry of a major new competitor into the industry. In the Commission's view, this would benefit consumers by providing diversity of choice in price, service and quality.

Competition between the major exhibitors has been limited and concentration of ownership is high. An inquiry by the former Prices Surveillance Authority concluded that most of the price competition came from the small operators rather than the major national groups. The major exhibitors tended to charge the same prices and offer identical discounts for particular groups of customers and times of attendance.

The Commission is concerned that barriers to entry for new competition may be inadvertently raised by State planning policy. The recent price cut by major exhibitors needed to be seen in the context of the proposed entry by a new player. Price cutting to prevent or deter entry may provide short-term benefit to consumers but, should it deter entry and allow prices to return to their original level, the benefit would be short-lived.

To increase competition, the Commission would encourage the implementation of planning policies consistent with general

competition principles. The planning guidelines should not be able to be used as a legal mechanism by incumbent firms to prevent new firms from entering the market and providing customers with alternative services.

## New publications

### Revised merger guidelines

After a comprehensive review, on 16 July 1996 the Commission issued revised guidelines on how it assesses mergers.

The revised guidelines reflect the Commission's experience in assessing over 500 mergers since publication of the draft in November 1992, just before the merger 'test' was changed from 'dominance' to 'substantial lessening of competition'.

While the revised guidelines contain little change in the core analytical approach adopted in 1992, they do reflect some changes in the application of the guidelines in the light of experience. In particular, there is greater recognition of the role of merger law in deregulating sectors of the economy and the increased exposure of Australian business to global markets.

Other features include:

- greater emphasis on the relevance of efficiency considerations under s. 50;
- adoption of an indicative position of not opposing mergers where a sustained and competitive level of imports exceeds 10 per cent of the market;
- a review of other less direct impacts of internationalisation of trade and commerce on domestic competition to see whether any further general revisions should be made to the guidelines;
- adoption of the Industry Commission's suggestion to consider the implications of liberalising the market share thresholds

below which mergers will not be scrutinised. In the (many) cases where mergers are notified but fall below the existing thresholds (and possibly those suggested by the IC) there will be a fast track review process;

- detailed guidance on the Commission's approach to accepting and enforcing s. 87B undertakings;
- discussion of the circumstances in which the Trade Practices Act will apply to overseas transactions and partial share acquisitions;
- discussion of the extension of the Act to mergers in the non-corporate sector and the removal of State powers to exempt mergers; and
- clarification and further discussion of the Commission's approach to efficiency factors in the authorisation process.

Copies of the revised guidelines are available for \$15.00 from all Commission offices.

## Local government and the Trade Practices Act

The possible impact on local government of the extended reach of the Trade Practices Act is the subject of the latest guide published by the Commission.

The Commission is aware that some councils have viewed the reform of competition policy and the extension of the Act to local councils nervously. The guide notes, however, that the Act is a positive force for local government — it can be made to work for the sector to protect it from anti-competitive conduct in the markets in which it operates.

The Commission consulted with the Australian Local Government Association in the preparation of this guide. The ALGA is organising the progressive distribution of the guide directly to councils.

The guide is available free from all Commission offices.

## News for business — retailers' warranties rights

The Commission has published a News for Business leaflet called 'Warranties — retailers have rights too' to address confusion over the difference between voluntary warranties and the statutory warranties and refunds provided by the Trade Practices Act.

Many manufacturers and retailers have been refusing to refund purchase prices on defective goods, charging for freight on returned goods or refusing to replace goods where consumers have valid claims.

Consumers have warranty rights under the Act whether or not manufacturers or retailers choose to provide their own warranty or guarantee. These rights cannot be limited in any way. Moreover, it is illegal to mislead consumers about them.

However, retailers also have rights under the Act — the Act puts the responsibility for faults in manufacture or design onto manufacturers, and on importers and owners of brand names who are not the original manufacturers.

The leaflet sets out, in plain English, the statutory rights of consumers as well as retailers' rights and obligations under the Trade Practices Act with regard to warranties. It is available free from Commission offices.

## News for business — fruit juice labelling

The Commission continues to receive complaints about misleading marketing of fruit juice and fruit drink products.

Terms such as 'fresh' and 'squeezed daily' have been used in a misleading way, for example in the marketing of orange juice.

Misleading claims in the marketing and promotion of juices may breach both the Trade Practices Act and the Food Standards Code. Heavy penalties apply for such breaches.

The Commission's News for Business leaflet on fruit juice labelling provides important information for manufacturers and suppliers of fruit juice to assist them in complying with the Act and the Code.

It is available free from Commission offices.

## Air fares update

Average air fares on domestic routes fell by 2.4 per cent during the March quarter this year, according to the Commission's latest price monitoring. In real terms, the decrease was 2.8 per cent.

The Commission's update on air fares for the March quarter shows the fall in average fares was recorded despite a 1.5 per cent rise in standard economy fares and a rise of 4 percentage points on the premium for business class. The business class fares are now 29 per cent higher than standard economy fares.

The decline in average air fares is a seasonal factor, largely reflecting the higher proportion of people flying on discount fares during the March quarter.

The update also shows the number of passengers flying during the quarter rose by 1.4 per cent. Normally passenger numbers carried in this quarter are lower than in the December quarter. The reversal can be attributed to the increases in domestic capacity over the past year.

The latest air fares monitoring quarterly report is available free from Commission offices.

## Launch of AAMI charter

On 1 July 1996 Commission Chairman Professor Fels launched the new Australian Associated Motor Insurers' (AAMI) consumer charter.

The charter was hailed as the first consumer charter in the private non-utility sector in Australia. According to Professor Fels, it was

also the first time a charter had been used as one of the principal weapons of competition in the marketplace. He described the charter as a 'manifestation of the convergence of consumer protection and competition'.

He noted that the insurance industry had been subject to various forms of government intervention including:

- the setting up of the general insurance complaints panel;
- the 1985 Trade Practices Commission guide for the insurance industry;
- the passing of the Insurance Contracts Act;
- the Trade Practices Commission's report on consumer credit insurance; and
- directives from the Insurance and Superannuation Commission.

Professor Fels said the charter was a self-regulatory device which might mean that the company would be less likely to attract regulatory attention.

He described the essential features of an effective charter as:

- a commitment to provide clear information about the company's products, not only through its printed promotional material but also via telephone and email;
- service standards that are clearly defined and measurable;
- redress if standards are not met;
- a visible, accessible and responsive complaints handling mechanism;
- an ongoing consultative process with consumers and other interested parties about the standards; and
- a unique, rigorous public accountability mechanism by means of an annual independent audit of compliance with the charter.

Professor Fels noted that contributions to the development of the charter had come from every level of the company. He said this was essential to ensuring commitment to the implementation of the service standards.

He also praised the consultative approach taken by AAMI in developing the charter, which included using focus groups to get 'grass roots' contributions and feedback to proposed standards and seeking comments from the consumer movement and regulators.

In terms of seizing the benefits offered by the global market, Professor Fels advised it was important for companies to offer consumers some basic safeguards. Otherwise, consumers were likely to turn their backs on the global market, turn to local producers and markets, and demand regulatory intervention.

## Launch of Association of Compliance Professionals

On 1 July 1996, Commission Chairman Professor Allan Fels launched the Association of Compliance Professionals of Australia.

The ACPA was formed to:

- create an industry-wide network of compliance professionals both in industry and government;
- encourage best practices in compliance through the promotion of ideas, expertise and opinions relevant to compliance issues; and
- liaise and establish dialogue with relevant regulators.

In launching the ACPA, Professor Fels said that corporate Australia needed to develop a 'culture of compliance'. Effective and long-lasting compliance was not only about using 'state of the art' communication techniques but also

about changing the very culture of the way a company conducted its business.

Despite the irreversible momentum toward a more competitive economy, some recent cases investigated by the Commission had indicated that there was still a culture among some Australian managers that hankered for the 'old way' of doing business, ways which stifled competition through market sharing, price fixing and other anti-competitive conduct.

He said that if Australia was to be competitive as a nation this mindset had to be eradicated and replaced with one that accepted that the way to be competitive was to be customer focused, to have adequate and continuous investment in research and development, to ensure that there was adequate investment in plant and other income producing assets, to ensure that the firm was operating efficiently, to employ 'ideas' people, and to develop products which were innovative and which represented value for money to consumers.

Along with the emergence of a compliance profession, Professor Fels said there was a need for continual improvement of cost-effective compliance systems. The effective compliance system of the future would involve the integration of legislative and ethical principles in the very fabric of the way a corporation did business. Compliance would be built into management practices, not just an 'add on'.