good for farmers and sent a strong message to corporate Australia.

The Commission recently succeeded in litigation against Channels 7, 9 and Golden West Network in breaking up exclusive dealing arrangements which were effectively preventing people in rural Western Australia and the Northern Territory from receiving TV programs that would have been transmitted by new second commercial licences.

The Commission took action some time ago in relation to resale price maintenance and price fixing by ICI in relation to fertilisers. The Reef Distributing case involved misleading conduct in relation to the supply of fertiliser to many farmers. When I visit country areas I do not find people arguing for a weaker Trade Practices Act. If anything, they usually want it stronger.

In many respects the problem I find in country areas is not competition, but the lack of it. It is the lack of competition that causes high prices. Petrol is an example. For years, country people have been very unhappy about high fuel prices, which have been caused not by high transport costs but by lack of competition. Now, following the undertakings in the Ampol-Caltex case, Woolworths and some others are entering country towns, and petrol prices are falling by several cents a litre or more. This is competition at work in country towns, but small service station owners face the threat of closure in some cases. This shows the complications of competition policy — simplistic views of its role are rarely adequate.

Turning to banks, there is a major concern about rural bank closures. Suppose the Treasurer relaxed his prohibition on key bank mergers, and suppose the Commission ignored the merger law, suppose we had no competition policy. Do you think there would be more or less bank branches? I would suggest that if the four pillars policy is seen as part of competition policy it is arguably helping to keep branches in country areas. In other words, competition policy, in some respects, may be helping to overcome certain problems in country areas.

One area of contention concerns the future of statutory marketing bodies. This is more a matter for legislative review.

The Commission has been eminently reasonable in granting authorisations to chicken processors, wine and grape growers, egg farmers, and has accepted tobacco grower arrangements after early difficulties.

The opposite of competition is monopoly.

A recent study by Professors Creedy and Dixon of the University of Melbourne published in *Economica*,[3] a leading international journal, demonstrates empirically that most monopolies in Australia have adverse effects on income distribution.

Monopoly is no more a friend of the poor than is competition a friend of the privileged.

Conclusion

To conclude, the Commission has a role to defend consumers, small business, rural Australia, and others from unfair prices, the abuse of market power, and the violation of consumer rights.

It has a strong, valuable Act — its role is to enforce it properly, now and in the years ahead.

The AMA and chiropractic: a trade practices viewpoint

The Trade Practices Act and the AMA

The State and Territory Competition Policy Reform Acts of 1995 applied the competitive conduct rules to Australian professions, including the medical profession, for the first time. The competitive conduct rules are basically the prohibitions on restrictive trading practices contained in Part IV of the Trade Practices Act. As the medical profession was effectively sheltered from the operation of the Trade Practices Act until the Reform Acts of 1995, the profession was able to engage in a number of activities that would have been prohibited in other commercial operations. The Reform Acts placed professions and professional associations such as the Australian Medical Association (AMA) in a position where they had to re-evaluate past practices to ensure they complied with the law. The purpose of this

3 Creedy, John and Dixon, Robert, 1998, 'The relative burden of monopoly on households with different incomes', Economica, 65, pp. 285–93. This study partly funded by the ACCC.

article is to look at the AMA's historic approach to chiropractic and to outline its position with respect to chiropractic since the Competition Policy Reform Acts of 1995.

The competitive conduct rules prohibit a number of anti-competitive practices, including primary and secondary boycotts (ss 4D, 45, and 45D of the Act). In simple terms, a primary boycott occurs when a number of competitors agree to restrict the supply of goods or services by them to particular persons or classes of person, or to restrict the acquisition of goods or services by them from particular persons or classes of person. Again, in very simple terms, a secondary boycott occurs where one person in concert with another takes action to restrict the supply of goods or services by a third person to a fourth person. The phrase 'one person in concert with another' can mean an association such as the AMA. The competitive conduct rules also prohibit persons entering into contracts, arrangements or understandings that have the purpose or likely effect of substantially lessening competition.

What the Trade Practices Act is really saying is that competitors must be very careful not to collude or take joint action which is anti-competitive. That has always placed the onus on industry associations not to make decisions that are anti-competitive, and now that the 'competitive conduct rules' apply to professions, the same onus is placed upon professional associations. To express the point plainly, one member of an association may make a unilateral decision not to deal with someone, unless the reason for the refusal to deal was itself a breach of the Act, but a joint decision by competitors not to deal with someone, whether or not it is made through an industry association, is far more likely to breach the Act.

The American Medical Association and chiropractors

The following is an extract from the judgment of Getzendanner J of the USA District Court in the case of *Wilk v American Medical Association*,[4] dated September 1987. The extract provides a brief but pointed account of the facts of the case. It is pertinent to include this extract in this article because of apparent parallels between the actions of the American Medical Association in its dealings with the chiropractic profession and the Australian Medical Association in its dealings with the chiropractic profession.

> In the early 1960s, the AMA decided to contain and eliminate chiropractic as a profession. In 1963 the AMA's Committee on Quackery was formed. The committee worked aggressively — both overtly and covertly — to eliminate chiropractic. One of the principal means used by the AMA to achieve its goal was to make it unethical for medical physicians to professionally associate with chiropractors. Under Principle 3 of the AMA's Principles of Medical Ethics, it was unethical for a physician to associate with an 'unscientific practitioner', and in 1966 the AMA's House of Delegates passed a resolution calling chiropractic an unscientific cult. To complete the circle, in 1967 the AMA's Judicial Council issued an opinion under Principle 3 holding that it was unethical for a physician to associate professionally with chiropractors.
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> The AMA's purpose was to prevent medical physicians from referring patients to chiropractors and accepting referrals of patients from chiropractors, to prevent chiropractors from obtaining access to hospital diagnostic services and membership on hospital medical staffs, to prevent medical physicians from teaching at chiropractic colleges or engaging in any joint research, and to prevent any cooperation between the two groups in the delivery of health care services.
>
> The AMA believed that the boycott worked — that chiropractic would have achieved greater gains in the absence of the boycott. Since no medical physician would want to be considered unethical by his peers, the success of the boycott is not surprising. However, chiropractic achieved licensing in all 50 states during the existence of the Committee on Quackery.
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> The Committee on Quackery was disbanded in 1975 and some of the committee's activities became publicly known. Several lawsuits were filed by or on behalf of chiropractors and this case was filed in 1976.

4 See Chester A. Wilk et al v American Medical Association, et al, (1987) 2 Trade Cases 67,721, US District Court, Northern District of Illinios, Eastern Division, Civil Action No. 76 C 3777.

Change in AMA position on chiropractic

In 1977, the AMA began to change its position on chiropractic. The AMA's Judicial Council adopted new opinions under which medical physicians could refer patients to chiropractors, but there was still the proviso that the medical physician should be confident that the services to be provided on referral would be performed in accordance with accepted scientific standards. In 1979, the AMA's House of Delegates adopted Report UU which said that not everything that a chiropractor may do is without therapeutic value, but it stopped short of saying that such things were based on scientific standards. It was not until 1980 that the AMA revised its Principles of Medical Ethics to eliminate Principle 3. Until Principle 3 was formally eliminated, there was considerable ambiguity about the AMA's position. The ethics code adopted in 1980 provided that a medical physician 'shall be free to choose whom to serve, with whom to associate, and the environment in which to provide medical services'.

The AMA settled three chiropractic lawsuits by stipulating and agreeing that under the current opinions of the Judicial Council a physician may, without fear of discipline or sanction by the AMA, refer a patient to a duly licensed chiropractor when he believes that referral may benefit the patient. The AMA confirmed that a physician may also choose to accept or to decline patients sent to him by a duly licensed chiropractor. Finally, the AMA confirmed that a physician may teach at a chiropractic college or seminar. These settlements were entered into in 1978, 1980, and 1986.

The AMA's present position on chiropractic, as stated to the court, is that it is ethical for a medical physician to professionally associate with chiropractors provided the physician believes that such association is in the best interest of his patient. This position has not previously been communicated by the AMA to its members.

Antitrust laws

Under the Sherman Act, every combination or conspiracy in restraint of trade is illegal. The court has held that the conduct of the AMA and its members constituted a conspiracy in restraint of trade based on the following facts: the purpose of the boycott was to eliminate chiropractic; chiropractors are in competition with some medical physicians; the boycott had substantial anti-competitive effects; there were no pro-competitive effects of the boycott; and the plaintiffs were injured as a result of the conduct. These facts add up to a violation of the Sherman Act.

In this case, however, the court allowed the defendants the opportunity to establish a 'patient care defence' which has the following elements: (1) that they genuinely entertained a concern for what they perceive as scientific method in the care of each person with whom they have entered into a doctor–patient relationship; (2) that this concern is objectively reasonable; (3) that this concern has been the dominant motivating factor in the defendants' promulgation of Principle 3 and in the conduct intended to implement it; and (4) that this concern for scientific method in patient care could not have been adequately satisfied in a manner less restrictive of competition.

The court concluded that the AMA had a genuine concern for scientific methods in patient care, and that this concern was the dominant factor motivating the AMA's conduct. However, the AMA failed to establish that throughout the entire period of the boycott, from 1966 to 1980, this concern was objectively reasonable. The court reached that conclusion on the basis of extensive testimony from both witnesses for the plaintiffs and the AMA that some forms of chiropractic treatment are effective and the fact that the AMA recognized that chiropractic began to change in the early 1970s. Since the boycott was not formally over until Principle 3 was eliminated in 1980, the court found that the AMA was unable to establish that during the entire period of the conspiracy its position was objectively reasonable. Finally, the court ruled that the AMA's concern for scientific method in patient care could have been adequately satisfied in a manner less restrictive of competition and that a nationwide conspiracy to eliminate a licensed profession was not justified by the concern for scientific method. On the basis of these findings, the court concluded that the AMA had failed to establish the patient care defence.

None of the court's findings constituted a judicial endorsement of chiropractic. All of the parties to the case, including the plaintiffs and the AMA, agreed that chiropractic treatment of diseases such as diabetes, high blood pressure, cancer, heart disease and infectious disease is not proper, and that the historic theory of chiropractic, that there is a single cause and cure of disease, was wrong. There was disagreement between the parties as to whether chiropractors should engage in diagnosis. There was evidence that the chiropractic theory of subluxations was unscientific, and evidence that some chiropractors engaged in unscientific practices. The court did not reach the question of whether chiropractic theory was in fact scientific. However, the evidence in the case was that some forms of chiropractic manipulation of the spine and joints were therapeutic. AMA witnesses, including the present Chairman of the Board of Trustees of the AMA, testified that some forms of treatment by chiropractors, including manipulation, can be therapeutic in the treatment of conditions such as back pain syndrome.

The Court injuncted the American Medical Association in the following terms:

> The AMA, its officers, agents and employees, and all persons who act in active concert with any of them and who receive actual notice of this order are hereby permanently enjoined from restricting, regulating or impeding, or aiding and abetting others from restricting, regulating or

> impeding, the freedom of any AMA member or any institution or hospital to make an individual decision as to whether or not that AMA member, institution, or hospital shall professionally associate with chiropractors, chiropractic students, or chiropractic institutions.

It was also recognised that the injunction would be ineffective unless members of the association were advised of both the existence of the injunction and the reasons behind it. It was necessary for members to be told that they were free to associate professionally with chiropractors if they wished. Accordingly, the association was ordered to send a copy of the court order to each AMA member and employee. In addition, the permanent injunction was published in the journal of the American Medical Association.

The Australian Medical Association and chiropractors

In 1977 the Federal Assembly of the Australian Medical Association passed a resolution which stated:

> The Australian Medical Association does not recognise any exclusive dogma such as homoeopathy, osteopathy, chiropractic and naturopathy. It is unethical for doctors to associate professionally with practitioners of such dogmas.

By adopting that resolution the AMA was effectively boycotting chiropractors (and others). By declaring it unethical for doctors to associate with chiropractors, no member of the AMA could associate with chiropractors and remain a member of the association.

In 1981 the above resolution was rescinded and replaced with the following resolution:

> The Australian Medical Association does not recognise any exclusive dogma such as homoeopathy, osteopathy, chiropractic and naturopathy or any other practices which are not based on sound scientific principles.

That resolution removed the overt boycott on chiropractors, but it is not clear whether the general membership of the AMA appreciated the subtle difference. It is also apparent that the change in federal AMA policy did not immediately translate into a change at State level. Indeed, the Victorian Branch of the AMA kept in place rule 36 of the branch rules which stated:

> It is unethical for a member of the Victorian Branch of the Australian Medical Association to associate professionally with or refer patients to a practitioner of any exclusive dogma, such as ... chiropractic, ...[5].

In September 1992 the AMA published a booklet entitled *Chiropractic in Australia*. In this booklet the AMA quoted its formal statement of AMA policy as follows:

> The AMA maintains that a medical practitioner should at all times practice methods of treatment based on sound scientific principle, and accordingly does not recognise any exclusive dogma such as ... chiropractic ...[6]

Over the last few years the Commission has received many complaints regarding the 'boycott' of chiropractors by the AMA. It is alleged that, in essence, the AMA adopted the American Medical Association's stance on chiropractic and sought to stop its members associating in any way with chiropractors. In particular, these complaints allege that AMA policy prohibits:

- medical practitioners who are members of the AMA referring patients to chiropractors;
- medical practitioners who are members of the AMA sharing premises or practices with chiropractors;
- medical practitioners who are members of the AMA working alongside chiropractors in hospitals or other institutions where workplaces are shared by varied medical disciplines; and
- medical practitioners who are members of the AMA engaging in research work with chiropractors.

The Commission contacted the federal, State and Territory branches of the AMA to ascertain whether any of those bodies still had policies or engaged in practices that would have the above effect. All branches advised the Commission that they had no policy prohibiting or discouraging members from dealing with chiropractors. According to the AMA branches, individual members of the AMA are free to decide whether or not they form a professional association or alliance with chiropractors. It is

5 A.M.A. Victorian Branch News, May 1986, p. 2.

6 Chiropractic in Australia, AMA, September 1992, p.3.

noteworthy that this is in contrast to recent media stories quoting Victorian Branch President, Dr Gerald Segal, stating that it is unethical for AMA members to refer patients to chiropractors.[7]

The future

In view of AMA assurances that no policy or action of the AMA prevents or discourages members from dealing with chiropractors, general practitioners should now feel free to communicate professionally with chiropractors as each of them individually sees fit. If they wish to refer certain patients to chiropractors or establish a multi-disciplinary practice which includes chiropractors, they may do so. If they wish to share premises with chiropractors or to engage in research projects with chiropractors or on chiropractic, they may do so. The AMA will not seek to take action to discourage or prevent chiropractors working in public hospitals, or discourage the offering of courses or research through universities.

In addition, the AMA or its affiliates will not seek to exclude chiropractors from participating fully in the health care delivery system.

That is not to say that the AMA will automatically embrace chiropractic. As a vigorous professional association the AMA can be expected to market the services provided by its members aggressively, and to argue the efficacy of member services over alternative forms of health care. The AMA certainly retains the right to question all forms of health care and will remain a vigorous opponent of health services it believes are ineffective or dangerous.

However, individual members of the AMA, as practitioners in their own right, have the capacity, unfettered by the AMA, to guide patients on health care as they see fit.

The AMA has pointed out that there are some legal issues that medical practitioners need to consider when dealing with chiropractors. For example, if a medical practitioner refers a patient to another health care provider and the health care provider causes the patient some loss or injury, it is conceivable that the patient may take legal action against the referring medical practitioner, as well as the person who caused the injury. The same applies to chiropractors who refer to medical practitioners. This is a legal risk that all medical practitioners face when referring a patient to anyone; however, the risk to the medical practitioner is reduced somewhat if the health care provider maintains public liability insurance. All members of the Chiropractors Association of Australia are required to carry appropriate public liability insurance. These are the sorts of issues medical practitioners need to consider when establishing professional relationships with other health care providers.

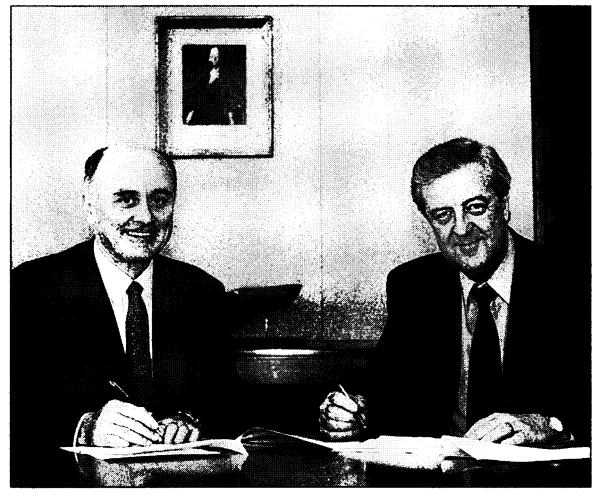
Alan Ducret

ACCC Regional Director, Brisbane

MOU with Reserve Bank of Australia

On 8 September 1998 the Commission and the Reserve Bank of Australia (RBA) released a memorandum of understanding covering their respective responsibilities for access and competition in the payments system.

Both the Commission and the RBA have legislative responsibilities for access and competition policy in the payments system. Both have a role in arbitration of disputes over access. The Commission has general responsibility for these issues under the Trade Practices Act. The Reserve Bank now has specific responsibilities under the Payment Systems (Regulation) Act 1998.



7 See 'Experts' back care battle', Sunday Herald Sun, 19 October 1997, p. 24.