Forum

Outcomes of competition policy reform

The previous issue of ACCC Journal included a chapter from a paper originally prepared as Treasury's submission to the Senate Select Committee on the Socio-economic Consequences of National Competition Policy of the 38th Parliament. However, the 38th Parliament ceased before the paper could be formally received as a submission. The paper, titled The socio-economic consequences of National Competition Policy, was published on the Treasury's website, dated November 1998.

The following was originally prepared as the Commission's submission to the same committee. Because the 38th Parliament ceased before the paper could be formally received by that committee, the Commission has revised it as a discussion paper.

Australian consumers benefit when goods and services are supplied as efficiently as possible at the lowest possible prices. Such outcomes will occur when there is sufficient competition within markets. Competition is the main instrument of efficiency. It does not harm the consumer. The consumer is harmed by its absence. Where there is insufficient competition, prices are likely to be higher and service quality lower than would be the case in a more competitive environment.

The ACCC and competition law

The Australian Competition and Consumer Commission was formed in 1995 by the merger of the Trade Practices Commission (TPC) and the Prices Surveillance Authority (PSA). Its role is to apply the Trade Practices Act and the Prices Surveillance Act to improve competition and efficiency in markets for the benefit of consumers and business, especially small business. It focuses on the abuse of market power, unfair prices and consumer protection, and attempts to ensure that all consumers, households, small and big businesses, and governments receive the benefits from being supplied by competitive markets. It also attempts to ensure that sellers receive the benefits of competition between buyers for the goods and services they supply to markets.

Price fixing

The promotion of competitive markets by the Commission brings direct benefits to Australian consumers. One of the major areas of activity of the Commission is to attack business cartels which push up prices and decrease the quality of service. Such activities are inefficient and add to costs which are ultimately passed on to consumers in the form of higher prices. In recent years the Commission has taken action against firms in a number of major industries for engaging in price fixing. The major express freight companies had penalties of over $15 million imposed after they admitted agreeing not to poach parcel express customers from each other and charging identical prices for their services (see case studies later in this paper). The major manufacturers of premixed concrete have been fined on more than one occasion after admitting to fixing prices in Melbourne and in Brisbane. Substantial penalties were imposed on the participants.

In 1996 a number of Tasmanian frozen food wholesalers were fined more than $1.5 million for fixing prices of frozen foods supplied to restaurants, hotels and convenience stores. Besides damaging consumers, such price fixing can jeopardise the livelihood of many small businesses which themselves operate in highly competitive markets. Large buyers may be able to negotiate cheaper prices but small

restaurants and stores do not have that power and rely on competition between suppliers to keep prices competitive. When those suppliers collude on price, it is the smaller customers who are most disadvantaged.

In a case with similar detrimental effects on small business, a number of car rental companies operating out of Alice Springs were also fined around $1.5 million for price fixing. This price fixing had added hundreds of dollars to tourists' costs and damaged other tourism related industries in the area.

The Commission has also taken action against firms engaged in resale price maintenance. This is the practice whereby suppliers specify a minimum price to a reseller, limiting opportunities for price competition in the particular market. The Commission has recently concluded action against the major bread baker, George Weston (trading as Tip Top bread) for price fixing and resale price maintenance of bread in Ferntree Gully and Albury. The company admitted that it had attempted to stop a retailer discounting bread prices. In a related matter, the Commission is currently taking action against the Woolworths subsidiary, Safeway, after Tip Top alleged that Safeway had pressured it to undertake the action. Such activity, if unchallenged by the Commission, will damage not only consumers who will have to pay higher prices, but also the small retailers who compete against major firms such as Woolworths.

It is rare that price fixing does anything other than hurt consumers and other businesses. However, the Commission is willing to allow some price fixing agreements if the participants can show the public benefits from such behaviour. The Qantas/British Airways agreement discussed later in this paper provides such an example.

In some industries where there may be the potential for a monopolist to charge excessive prices, the Commission has used its powers under the Prices Surveillance Act to ensure that consumers and users of the monopoly services are not disadvantaged. For example, the Commission administers a CPI minus X price cap for aeronautical services at major leased federal airports. This formula ensures that productivity gains in this monopoly sector are passed on in the form of lower prices.

Abuse of market power

Under s. 46 of the Trade Practices Act the Commission takes action against firms which misuse their market power. It is this section of the Act which is designed to protect small business from illegal anti-competitive behaviour of their larger rivals. The Commission currently has three major cases in this area.

The Commission has recently taken legal action against Simsmetal Ltd, alleging that the company attempted on two occasions to make an anti-competitive agreement with one of its competitors in South Australia. Both attempts were refused by its competitor and the Commission alleges that Simsmetal then used its market power to damage its competitor by paying extremely high prices to acquire scrap metal which would have otherwise gone to its competitor, in order to force the smaller firm from the market.

Action has been taken against Boral alleging that Boral companies used their market power to reduce the price of a range of concrete blocks to eliminate or damage a competitor in the Melbourne market.

The Commission has settled a case against a government agency, The Commonwealth Bureau of Meteorology. The Commission alleged that the Bureau had taken advantage of its market power to prevent competition in the market for specialised weather services. (This case is discussed in detail later in this paper.) The Bureau agreed to provide direct access to its weather data to another firm to allow that firm to provide specialised weather forecasting services to users such as agriculture, tourism, maritime and aviation services.

Mergers

The Commission also tries to prevent the unnecessary increases in the concentration of market power which may occur when firms acquire their competitors. Laws which prohibit agreements between competitors may have limited effectiveness if the firms could achieve the same outcomes via cross shareholdings.

Highly concentrated market structures whereby a few firms dominate the market are more likely to exhibit anti-competitive behaviour than

those markets where market power is more evenly distributed. Australia has no laws which would allow the breaking up of dominant firms in a market as do some other countries, so it is important that Australian competition policy be vigilant in assessing the impact of mergers on competition and efficiency.

The Commission attempts to weigh the efficiency benefits which can come from a merger against the consequent loss of competition. Sometimes in smaller economies such as Australia, the efficiencies of large size can be achieved only through acquisition. The Commission does not necessarily oppose such mergers. Between 1993–94 and 1996–97 the Commission did not oppose more than 400 merger proposals, opposing only 37, of which 11 were subsequently resolved.

The Commission has opposed no mergers where there is significant competition from imports. Where Australian firms have argued that they need to merge to acquire a size and scale sufficient to compete on world markets, the Commission has not opposed such mergers provided that there was the potential for foreign firms to compete effectively in the domestic market.

As deregulation and privatisation of government enterprises proceeds, the Commission will ensure that the benefits of deregulation are not lost by a wave of anti-competitive mergers. For example, deregulation and privatisation in the Victorian electricity generation and distribution industry has been facilitated by breaking the former vertically integrated monopoly into a number of smaller competing units. Should a wave of vertical and/or horizontal mergers occur and the industry regroup into something approximating its former structure, many of the benefits of the reform process may be lost.

Consumer protection

At times it is necessary to provide specialised and specific remedies to practices of firms which harm consumers. The Commission has been particularly active in taking action against companies which engage in misleading and deceptive conduct. A settlement with AMP over misleading and deceptive representations in certain AMP insurance policies delivered more than $50 million to consumers affected. Telstra has agreed to provide up to $45 million in refunds to 1.5 million customers following action by the Commission.

Action has also been taken to protect disadvantaged consumers. The Commission took action over the sales of Collier encyclopaedias to mainly Aboriginal communities in the Northern Territory, alleging unconscionable and misleading and deceptive conduct and the making of false representations. The companies concerned agreed to stop the conduct and reimburse consumers.

Damages of more than $1 million were awarded to seven families following Commission action against a number of home construction companies. The Commission alleged unconscionable conduct on the part of the companies. A construction price within the prospective client's budget was offered and then, once the client was committed, the contract price was greatly increased, which led to the families paying much more for construction of their homes than they had expected.

The Commission continues to take action on a regular basis against companies involved in pyramid selling. Despite the widespread publicity regarding the risk and illegality of such selling, consumers are still being caught by such scams.

Small business

Numerous actions by the Commission have been undertaken to assist small business. The strengthening of the unconscionable conduct provisions of the Trade Practices Act have enabled the Commission to provide protection to small business equal to that provided to consumers. While it is often thought that the major beneficiary of competition policy is the consumer, the Commission devotes considerable attention to protecting the competitive position of small business against anti-competitive behaviour of their larger rivals. The Commission is currently taking action against a major oil company and a shopping centre owner with regard to unconscionable conduct against small business.

In those instances where litigation is not possible the Commission has looked at alternative solutions to assist the position of small business. Some industries appear to have a larger number of disputes between the larger and the smaller industry players than would normally be expected. Examples include shopping centre owners and shopping centre tenants, oil companies and service stations, and film distributors and small cinema exhibitors.

In recent years the Commission has conducted inquiries into petrol retailing and cinema distribution and exhibition to examine the competitive problems faced by small firms in those industries. A major problem for small business is that they may have insufficient access to information available to the larger players in the industry and may be unable to afford expensive legal remedies where there is a dispute.

The Commission has been active in promoting codes of conduct in those industries which suffer from a high degree of disputation between large and small firms. A franchising code has recently been established. A successful oil code has operated for some years but another form of the code is proposed. The cinema industry has recently agreed to a voluntary code of conduct and dispute settling mechanism after many years of conflict between the larger and smaller firms in the industry.

Rural and regional issues

The Commission has been particularly concerned to ensure that the rural industry receives the benefits of competition policy. In a general sense, competition policy will benefit the rural sector in a number of ways. Inputs into rural production are likely to be more competitively priced and this should lower costs overall, improving international competitiveness. If cost savings are passed on to consumers in the form of lower prices, rural producers should be able to expect increased demand for their output.

Of course, the application of trade practices legislation to areas previously exempt will involve some change in the way in which some rural enterprises do business. Competition between producers in many rural industries has traditionally been regulated by a statutory marketing authority or some other arrangement exempt from the Trade Practices Act.

For many rural producers the adjustment involved in moving from a highly regulated environment where often prices were fixed, market quotas were allocated and entry restricted, to open competition, will be substantial. The Commission has recognised that many smaller agricultural producers may have to deal with large buyers who have considerable market power. The Commission's authorisation procedures (discussed later in this paper) will assist producers in their negotiations with their more powerful customers. The Commission has already dealt with a number of industries seeking assistance in the adjustment process. For example, chicken growers have received authorisation of agreements with chicken processors which will assist them in their negotiations with large chicken processors. A case study is included later in this paper.

The Commission has been running seminars in conjunction with local chambers of commerce to explain to rural businesses how competition policy may affect the way in which they conduct their business and how they can benefit from the changes.

Future directions

The Commission has been very active in implementing its new powers. Since gaining responsibility for competition in telecommunications the Commission has taken action which provides entrants with access to telecommunications network infrastructure. Commission decisions on data services are creating an environment to reduce prices in services vital to business but also to government and education. Telephone number portability will facilitate further competition.

For people in country Australia, it is often lack of competition rather than too much competition that is the source of many concerns. One of the most important cases in competition policy history, Queensland Wire, had very significant principles but was, at its immediate level, about competition in rural industries. BHP refused to supply fence posts to a small Queensland business that was

competing with BHP in retailing wire fences to BHP and could not do so without supplying posts at the same time. The success of *Queensland Wire* promoted competition in a most important rural industry.

Commission action has facilitated new competition in petrol retailing in certain country centres and prices have fallen. Of course competition has other consequences. Less efficient firms may not be able to survive. But all purchasers of petrol would benefit from the cheaper prices that competition brings.

The Commission has a responsibility to ensure that all Australian consumers and small businesses are protected from anti-competitive behaviour of large and dominant firms. In the absence of competition there is monopoly. Monopoly will not provide Australian consumers anywhere, city or country, with the benefits of lower prices, better service and innovation. In the latter part of this paper are specific examples of how the Commission's actions in enforcing competition policy have provided benefits to consumers and business.

Role of ACCC and relevant legislation

Competition policy is an instrument used to achieve particular objectives. The processes established to promote competition recognise that economic efficiency is not the only goal. In introducing the *Competition Policy Reform Act 1995*, the then Assistant Treasurer said:

> Explicit recognition is given to those broader elements of the public interest... not only to competition and efficiency considerations, but to all the other policy objectives which Governments must balance in making policy decisions, such as ecologically sustainable development, social welfare and equity considerations, community service obligations and the interests of the consumers.

The Trade Practices Act and the Prices Surveillance Act strongly promote social justice and equity. These concerns are most visible in the Parts of the Acts dealing with consumer protection and fair trading. Legitimate consumer concerns relating to matters such as country of origin descriptions and environment 'friendly' labelling are dealt with by the Commission as part of wider social concerns. Commission activities in this area also include work on behalf of Aboriginal people in remote communities and job seekers exploited by misleading 'employment' advertising.

Social justice issues may appear to be less visible in the Commission's enforcement of Part IV of the Trade Practices Act, that dealing with restrictive trade practices. However, the enforcement by the Commission of prohibitions on anti-competitive behaviour such as price fixing, collusive tendering and misuse of market power provides direct and identifiable benefits to Australian consumers. Such enforcement contributes to lower prices and enhanced consumer spending and welfare.

The Prices Surveillance Act complements the Trade Practices Act in social justice objectives. It gives the Commission the ability to prevent organisations with significant market power from using such power to the detriment of Australian consumers through charging excessive prices. Monopoly pricing can have the effect of worsening income distribution. Commission action against individuals and organisations attempting to engage in such behaviour improves the welfare of Australia's poorer consumers.

In the enforcement of its legislative responsibilities the Commission has long emphasised approaches which will improve market efficiency and consequent consumer welfare rather than seek monetary penalties for breaches of competition law. While monetary penalties may have a strong deterrent effect, the Commission has focused on its ability, enhanced by amendments to the Trade Practices Act in 1993, to enforce undertakings designed to improve efficiency in the future. Consumer welfare may be best increased by instituting procedures to ensure that competition is promoted rather than by seeking penalties for past behaviour. The approach of the Commission is often to obtain undertakings which will promote competition in the future from organisations which have breached competition law. Examples of this approach are described in the next section of this paper.

The Commission has specific objectives in its enforcement of the restrictive trade practices and consumer protection provisions of the Trade Practices Act. The first of these is to stop the conduct which is damaging consumer

welfare. Other objectives include the prevention of such conduct in the future and the provision of compensation for those adversely affected. In some circumstances the Commission will seek to have the Courts impose penalties. Penalties act as a deterrent to companies contemplating engaging in similar conduct.

In its Annual Report the Commission identifies those industries and practices which generate the largest number of complaints. In 1996–97, telecommunications services generated the largest number of pursued complaints, representing 12 per cent of pursued complaints. Domestic appliance retailing was second, followed by advertising services, personal services, travel agency services, banks, automotive and fuel and clothing retailing.

Misleading or deceptive advertising was the major conduct issue. Other conduct issues which generated considerable concerns were exclusive dealing third line forcing, misrepresentations regarding price or quality, pyramid selling and agreements lessening competition.

The ACCC's implementation of authorisation

Nowhere are the principles of social justice and public interest more visible in Commission actions than in the use of the authorisation provisions.

The Trade Practices Act recognises that some of the objectives of Australian social and economic policy may not always be secured by the operation of competitive markets and the vigorous prosecution of anti-competitive behaviour. It is possible that exemptions to the anti-competitive provisions of the Trade Practices Act may assist the achievement of community goals which differ from those of economic efficiency.

Authorisation and notification procedures under the Trade Practices Act provide such exemptions. The Commission adjudicates on applications for exemptions under the Trade Practices Act. Authorisation provides protection from action by any party, including the Commission. Authorisation can be initiated only by the parties to the conduct. Third parties cannot apply for authorisation.

The Trade Practices Act allows the Commission to grant authorisation in relation to:

- making or giving effect to an arrangement where any provision of such an arrangement substantially lessens competition;
- covenants affecting competition;
- primary boycotts;
- secondary boycotts;
- anti-competitive exclusive dealing;
- exclusive dealing involving third line forcing;
- resale price maintenance; and
- mergers leading to, or likely to lead to, substantial lessening of competition.

Exclusive dealing can be notified. Notification provides similar protections to authorisation. It is not possible to authorise conduct which involves the misuse of market power.

The ability to gain exemption from legal proceedings for behaviour which would otherwise be in breach of the Trade Practices Act is a substantial incentive for firms to seek authorisation and may provide a significant competitive advantage over rivals. Consequently authorisation is granted only where there are benefits to the public from the conduct for which authorisation is sought and any detriments which result from the conduct are outweighed by the benefits.

Given that parties seeking authorisation are required to show public benefit, the authorisation processes are highly transparent and public. It is up to the applicant to show to the Commission that there is public benefit and that such benefit is greater than all detriment, including that caused by lessening of competition. Consistent with the high degree of transparency in the process of authorisation, it is possible for interested parties to have the Commission's decision reviewed by the Australian Competition Tribunal.

The authorisation tests

The Commission is required to apply public benefit and public detriment tests when assessing applications for authorisation.

There are three variations in the authorisation test:

- The general test (ss 90(6), (7)) is that the Commission be satisfied that in all the circumstances the conduct would, or would be likely to, result in a benefit to the public and that the benefit would outweigh the detriment to the public constituted by any lessening of competition resulting from the conduct.

This applies to:

- conduct which restricts dealings or affects competition other than those involving primary and secondary boycotts; and
- exclusive dealing conduct other than third line forcing.
- The second test (s. 90(8)) is that the Commission be satisfied that in all the circumstances there is such a benefit to the public that the conduct should be allowed. This test applies to primary and secondary boycotts and third line forcing.
- The third test (ss 90(9), (9A)) is for mergers. In addition to meeting the second test it also requires the Commission to have regard to the following in determining what amounts to public benefits:
- a significant increase in the real value of exports; and
- a significant substitution of domestic products for imported goods.

Public benefit

The Commission is required to have regard to all circumstances which relate to public benefit. Public benefit is not defined by the Trade Practices Act. In *QCMA and Defiance Holdings* (1976) ATPR 40-012, the then Trade Practices Tribunal raised the issue of private benefit versus public benefit. It noted that the then Trade Practices Commission had claimed that benefits had to be to the public and not just to those applying for authorisation or some other limited group.

The Tribunal took a wider approach and stated:

> This [public benefit] we see as anything of value to the community generally, any contribution to the aims pursued by the society including as one of its principal elements (in the context of trade practices legislation) the achievement of the economic goals of efficiency and progress. If this conception is adopted, it is clear that it could be possible to argue in some cases that a benefit to the members or employees of the corporations involved served some acknowledged end of public policy even though no immediate or direct benefit to others was demonstrable.

The Tribunal has also taken a broad view of the term 'the public'. In *Re Howard Smith Industries Pty Ltd* (1977) 28 FLR 385, it stated:

> The term 'the public' is wider than simply consumers. Economies of scale and considerable cost saving in supply of goods and services may constitute a substantial benefit to the public even though the cost saving is not passed on through lower prices.
>
> A benefit to shareholders through higher dividends may amount to a benefit to the public, but might be given less weight because the benefit is not spread widely throughout the community.

The Commission listed in Re ACI Operations Pty Ltd (1991) ATPR (Com) 50-108 the following matters which, in its opinion, could constitute public benefits:

- economic development, such as encouragement of research and capital investment;
- fostering business efficiency, particularly where it results in improved international competitiveness;
- industrial rationalisation, resulting in more efficient allocation of resources and in lower or contained unit production costs;
- expansion of employment or prevention of unemployment in efficient industries;
- employment growth in particular regions;
- industrial harmony;

- assistance to efficient small business, such as guidance on costing and pricing or marketing initiatives which promote competitiveness;
- improvement in the quality or safety of goods and services and expansion of consumer choice;
- supply of better information to consumers and businesses to permit informed choices in their dealings;
- promotion of equitable dealings in the market;
- promotion of industry cost savings, resulting in contained or lower prices at all levels of the supply chain;
- development of import replacements;
- growth in export markets; and
- steps to protect the environment.

The Commission has shown considerable flexibility in its application of a public benefit test in authorisation decisions. In the following case studies, consumer benefit from the application of competition policy has been significant.

Case studies

TNT Australia Pty Ltd, Ansett Transport Industries (Operations) Pty Ltd and Mayne Nickless Ltd

It is perhaps in the enforcement of the price fixing provisions of the Trade Practices Act that direct price benefits to consumers from competition policy are most visible.

In late 1992 the Commission took court proceedings against TNT, Ansett and Mayne Nickless alleging that the companies had formed an arrangement to fix prices and regulate market shares in the express freight market.

In July 1994 TNT and Ansett withdrew their defences. Following deliberation, the Court ordered that TNT pay a penalty of over $4 million, that Ansett pay a penalty of $900 000 and that various executives in both companies pay fines of up to $75 000.

Mayne Nickless continued to defend the allegations but in December 1994 withdrew their defences. The Court ordered that Mayne Nickless pay a penalty of $6 000 000 and seven of their former and then current executives pay penalties of up to $75 000.

Pioneer Concrete (Qld) Pty Ltd and ors

The Trade Practices Commission took action against Pioneer Concrete Qld Pty Ltd, Boral Resources (Qld) Pty Ltd and CSR Ltd for alleged price fixing activities in the Brisbane, Gold Coast and Toowoomba pre-mixed concrete market.

The various concrete companies held regular meetings, the main purpose of which was to allocate available work amongst the companies in accordance with pre-existing market shares and thereby avoid competing amongst themselves for available work. In addition they had an arrangement or understanding to increase the base price of concrete in the Brisbane market.

In December 1995 the Federal Court imposed penalties of $6.6 million on each of the three companies and penalties of up to $100 000 on individuals within the companies.

A number of smaller companies and individuals associated with these companies were also required to pay penalties for their part in the price fixing and market rigging.

Carlton & United Breweries and ors

The Trade Practices Commission took action against Carlton & United Breweries (CUB) for misuse of market power. The Managing Director of CUB indicated to South Australian Breweries (SAB) that CUB was concerned about SAB supplying generic beer to supermarkets. CUB informed SAB that it would review its purchases of beer cans from an SAB subsidiary. CUB then advised the beer can subsidiary of SAB that it had decided to reduce substantially its purchases of beer can from the SAB subsidiary.

The Commission took action against CUB alleging that CUB had misused its market power. CUB conceded that it had a substantial degree of power in the market for beer in

Australia and took advantage of that power for the purpose of deterring SAB from selling and supplying the low price generic beer. Penalties were imposed on CUB.

Commonwealth Bureau of Meteorology

In December 1995 the Commission took action against the Commonwealth Bureau of Meteorology (BOM) under s. 46 of the Trade Practices Act alleging that BOM had misused its market power.

The Commission alleged that BOM had taken advantage of its market power to prevent competition in the market for specialised weather services. In particular, the Commission alleged that BOM refused to supply information to the Meteorological Service of New Zealand Limited (MetService). In addition to supplying meteorological services to the New Zealand Government, MetService also produces specialised weather maps for newspapers. In 1994 MetService introduced its specialised service into Australia and sought data direct from BOM.

BOM declined to provide data to MetService and then progressively extended the provision of free specialised services to newspapers who had been approached by MetService.

The Commission alleged that the refusal to supply MetService and the changed practice of specialised services was done by BOM to disadvantage a potential rival and in contravention of s. 46 of the Trade Practices Act.

Following discussions and court appointed mediation, a settlement was achieved which promoted the public interest. BOM agreed to provide direct access to an Australian subsidiary of MetService. The agreement will promote and facilitate competition in the market for specialised weather services. It provides a framework which is applicable to all commercial and industry sectors requiring specialised services including off-shore drilling operations, telephone services, agriculture, tourism, mining, building and construction, insurance, maritime and aviation.

The settlement is typical of the Commission's approach to such matters where the public interest is best served by getting an outcome which promotes competition (and in this instance promotes a diversity of service offerings) rather than seek penalties.

Seven Network and Golden West Network Pty Limited

The Commission brought proceedings against the Seven Network, the Nine Network, Golden West network and others in relation to a series of long term program supply agreements. The agreements were between:

- Territory Television (a Nine subsidiary and the operator of the sole television station in Darwin) and Amalgamated Television Services (a Seven subsidiary) for the exclusive supply of Seven programming to Territory Television; and
- Golden West (the operator of the sole commercial television station in regional WA) and Nine for the exclusive supply of Nine programming to Golden West.

The Commission alleged that these agreements were part of an overall market-sharing agreement between Seven and Nine not to pursue their interest in acquiring a second commercial television licence for Darwin and regional WA respectively.

The Commission alleged that the purpose and likely effect of these three agreements was to hinder or prevent potential entrants from acquiring any second commercial television licences for Darwin and regional WA, and that they breached the Trade Practices Act provisions dealing with exclusive dealing and arrangements affecting competition.

Following the institution of proceedings, Seven terminated its exclusive program supply agreement with Territory Television. Telecasters Australia Limited (a Network Ten affiliate in regional Queensland and northern New South Wales) subsequently acquired the second licence for Darwin and entered into an agreement with Seven for the exclusive supply of Seven programs to Telecasters for its Darwin operations.

The Australian Broadcasting Authority invited applications for a new commercial television broadcasting licence for remote and regional WA, with the same licence area as that covered

by Golden West. Seven gave undertakings to the Commission to supply to the new licensee all or some of its programs (except for those programs it is legally contracted to supply to Golden West on a short term basis). Golden West undertook not to interfere with, or frustrate the performance of, Seven's undertaking to supply the new licensee. It also undertook not to object to Nine supplying its programs to the new licensee if Golden West does not intend to broadcast those programs itself.

The Commission subsequently discontinued its Federal Court proceedings against Seven, Golden West and related parties. Settlement was also reached with the Nine Network whereby Nine undertook to terminate its program supply agreement with Seven in Darwin.

In this instance the application of an active competition policy eliminated monopoly power and increased consumer choice while at the same time putting downward pressure on media advertising rates.

Regulation of petroleum products

The Commonwealth and State/Territory Governments have a long history of involvement with the petroleum industry. Price intervention and regulation, legislation influencing the structure of the industry, and general competition policy have been applied to the industry for almost 60 years. Much of the intervention has been related to concerns about the effectiveness of competition in the industry. Such concerns have been reinforced in recent years by apparent higher prices in non-metropolitan areas where competition is generally weakest.

The ACCC and its predecessors, the TPC and the PSA, have had a substantial involvement in the regulation of the industry. Under the Prices Surveillance Act, the major oil companies were required to notify the ACCC and its predecessor, the PSA, of proposals to increase prices. Price capping arrangements were developed which regulated wholesale petrol prices. Action under the Trade Practices Act has also been a feature of the industry. Since 1974 the TPC and the ACCC have been involved in 18 instances of litigation under Part IV of the Trade Practices Act.

In 1996 the ACCC published its report on the Inquiry into the Petroleum Products Declaration. The inquiry was in response to requests in 1993 by the then Assistant Treasurer, the Hon. George Gear MP, for the Commission to examine competition in the industry. The inquiry was extended following the change of government. The Treasurer, the Hon. Peter Costello MP, directed the inquiry to be related to the prices and competitive conditions under which petrol and distillate are supplied, prices surveillance of petroleum products and alternatives to prices surveillance, and regional price variation issues.

The Commission's inquiry concluded that the four oil majors — Australian Petroleum Pty Ltd (trading as Ampol), BP Australia Limited, Mobil Oil Australia Limited and the Shell Company of Australia Limited — have substantial market power in relation to petroleum products.

This market power is derived from high concentration levels, barriers to entry and a large number of vertical and horizontal arrangements between the various industry players, which have had the effect of limiting the competitive impact of independent operators and imports.

Over the past two decades there has been a substantial increase in market concentration. The number of major companies has fallen from nine to four. The increased market shares of the four remaining major companies have developed largely through mergers and acquisitions rather than a growth in market share based on superior performance. Barriers to entry are high and it is unlikely that there will be any significant new entry in the future, while imports have historically posed little threat to the major firms.

It was the Commission's view at the time of the inquiry that such a structure was likely to lead to a situation where the major players recognised that the costs of competition are likely to be high and there are likely to be benefits from coordinated behaviour.

The structural factors in the market detrimental to competition have led the Commission to take legal action against various industry participants to force more competitive outcomes. The focus of action has typically been on proscribed pricing conduct involving

resale price maintenance by the oil companies, price fixing by resellers, and price fixing by oil companies.

The TPC/ACCC has successfully taken action against Caltex, BP and Ampol for resale price maintenance and has taken action against a number of resellers for price fixing. In late 1996 it took action against Shell on behalf of a family-run franchisee alleging unconscionable conduct and false and misleading representations.

Prices oversight. In its 1996 inquiry the Commission concluded that prices oversight could be removed from the industry once the industry structure became more competitive. In particular it argued that as independent operators become more able to access product and as imports increase, the market power of the four major oil companies will be diminished to a level sufficient to eliminate regulation. The Government has subsequently announced a deregulation of the industry.

One of the most important developments which has led to the deregulation of the industry and consequent fall in petrol prices in particular areas has been the lowering of barriers to imports. TPC/ACCC activities have had a significant impact on competition from imports.

In March 1995 the TPC decided to allow Ampol and Caltex to merge their refining and marketing interests in Australia. The TPC had taken the view that the proposed merger was likely to have the effect of substantially lessening competition, and thereby contravening s. 50 of the Trade Practices Act. The companies then agreed to legally enforceable undertakings designed to improve the competitive position of independents in the industry.

The undertakings offered by the companies and accepted by the TPC included:

- the sale by Ampol/Caltex of large oil terminals which would allow the import, storage and distribution of petrol supplies to independent wholesalers and retailers;
- the offer to supply at least one billion litres of petrol per annum on reasonable commercial terms to independent wholesalers, distributors, and retailers;
- the sale of a significant number of Ampol/Caltex owned distributors to independents;
- the sale of a number of distribution depots throughout Australia, which would enhance regional competition and ensure supplies to independent retailers;
- the sale of a number of retail sites where price competition has been very limited (these sites were largely non-metropolitan);
- the release of restrictive covenants on former independents which had left the industry. This would enable the re-entry of those vendors contributing to continued fuel discounting;
- any retail sites and depots sold by the parties surplus to requirements would not have restrictions placed on their use and may be available as service station sites;
- guaranteed direct access by independents with supply agreements to Ampol/Caltex terminal facilities throughout Australia; and
- the honouring of all existing supply agreements.

The effect of the Commission intervention is now being seen in a more competitive market structure which has led to price decreases for consumers in certain locations.

Country fuel prices. There are often substantial differences between retail petrol prices in major cities and those in country areas. The ACCC and its predecessors have undertaken extensive investigations of regional pricing. In 1994 the PSA published a pamphlet, *Understanding Petrol Price Changes,* to address the issue of city–country petrol pricing differentials. A number of government inquiries at the Federal and State/Territory levels have also examined regional petrol pricing.

The ACCC published a summary of the key causes of higher country petrol prices in its petroleum inquiry in 1996.

Some of the potential benefits expected from price deregulation and structural reforms resulting in increased competition at wholesale and retail levels have yet to be realised both in the capital cities and country areas.

Since the deregulation of prices surveillance under the Prices Surveillance Act in August 1998, BP, Caltex and Mobil have introduced terminal gate pricing. Sale at the terminals, however, is still low as many wholesalers and retailers do not have access to the terminals because of existing supply agreements. Some of the companies have not introduced genuine unbundled product at the terminal gate.

While there have been reductions in average retail petrol prices in the capital cities this has occurred in a period where there have been significant reductions in international prices, which are reflected in the import parity indicator. Taking into account some losses incurred in stock holdings purchased at higher prices, it appears that in most capital cities the benefits of lower world prices have been passed through to consumers.

In the country areas the full benefits of lower international prices have not been passed through to consumers, indicating that there is lack of competition in many country towns. Woolworths' entry, however, has brought about significant price reductions in some locations.

Authorisation

As noted above the authorisation processes of the Commission allow considerable flexibility in the enforcement of competition policy. The following are examples of the Commission's approach to evaluating the benefit to the public which may accrue from anti-competitive behaviour which would generally be in breach of the Trade Practices Act.

Steggles Limited and others

The Commission has shown a willingness to approve processes which assist industries to adjust to deregulation. In July 1997 Steggles Limited lodged an application for authorisation of arrangements which had the effect of substantially lessening competition within the meaning of s. 45 of the Trade Practices Act.

The application related to a proposal by Steggles to collectively negotiate contracts or arrangements with broiler chicken growers concerning the rates and conditions for the raising of broiler chickens by growers. The Commission found that a number of anti-competitive effects were likely to result from collective negotiations between Steggles and its contract growers. In particular, such arrangements which tend to engender agreements about prices are deemed by the Trade Practices Act to substantially lessen competition. Collective negotiations between Steggles and its growers may limit the ability of growers to switch from one processor to another and may reduce the likelihood of new entry in both growing and processing.

The Commission has authorised various schemes in several rural industries following deregulation. The Commission has been prepared to accept that there would be public benefit in mechanisms which facilitated the transition from a regulated to a deregulated environment as long as those seeking authorisation demonstrate a commitment to moving to operating within a deregulated market.

The Commission has taken the view that it is unreasonable to expect chicken growers to move immediately from a totally regulated system to one where each grower negotiates individually with the processing company. The processor, Steggles, has access to technical and financial information unavailable to any grower and has significant market strength in negotiations with any individual grower. A market in which there is potential for small participants to be treated inequitably is likely to operate less efficiently than one where bargaining strength is more equal.

In the early stages of deregulation, transactions costs associated with using the market may be high and collective bargaining may be a mechanism to reduce such costs. The costs associated with individual negotiations may be substantial and such costs may have to be passed on to consumers in the absence of authorisation. However, the Commission would still take the view that much of the cost saving from the collective bargaining should be considered to be a private benefit and expect therefore that some of the cost savings would be passed on to consumers in the form of lower prices. The intensity of price competition in chicken processing is probably sufficient that cost savings attributable to the authorisation would be passed through to consumers.

Steggles also claimed that the proposed arrangements would reduce the risk of

industrial disputation in the industry. The Commission has in previous authorisation matters considered that reduced risk of industrial disputes is a public benefit, and accepted the argument in this case. However, it also commented that harmonious relations between growers and processors could develop in the absence of collective bargaining.

The parties to the authorisation claimed that the proposed arrangements would enhance contract stability and grower investment. They claimed that the highly specialised nature of capital investment in growing sheds required contract stability to justify the investment. The Commission accepted that this may be the case but would not place great weight on it as essentially the benefits would be private and could also be obtained by individual contracts rather than collective negotiation.

Steggles argued also that collective negotiation with growers would facilitate technical development in the industry and more widespread compliance with relevant legislation such as environmental laws. The Commission, while accepting that such outcomes were desirable, did not accept that collective negotiation of contracts was any more likely to lead to these outcomes than individual negotiation and therefore did not accept these as public benefit.

The Commission concluded that, on balance, authorisation of the arrangements was likely to provide public benefit during a transition period despite the anti-competitive elements of the arrangements. In those industries experiencing adjustment complexities in the move to a deregulated environment, the Commission's authorisation processes may be used to assist small businesses and ultimately consumers and improve efficiency in the operation of the particular market.

ACI Operations Pty Ltd

The Commission has shown that it is willing to consider a wide range of issues relating to public benefit when it examines merger proposals.

In 1991 the Commission granted authorisation for ACI Operations Pty Ltd (ACI) to acquire the assets of the glass container business carried on by Glass Containers Pty Ltd and SCI Operations Pty Ltd (Smorgon).

At the time of the proposed acquisition ACI was Australia's largest glass container manufacturer, producing around 80 per cent of the glass containers manufactured in Australia. Smorgon operated a single glass manufacturing plant at Penrith NSW and produced the remaining 20 per cent of glass containers manufactured in Australia.

The Commission took the view that the acquisition, which would give ACI a monopoly in Australian glass container production, would likely breach s. 50 (the merger provisions) of the Trade Practices Act. After securing an interlocutory injunction in the Federal Court to prevent the acquisition, the Commission proposed to the merging parties that they seek authorisation.

A large number of interested parties provided submissions to the authorisation application. A wide range of issues relevant to public benefit were considered. They are examined below.

Industry rationalisation and scale and scope economies. ACI submitted that the market was too small to support two glass container manufacturers. It argued that the merger would enable it to achieve economies of scale from longer production runs and that savings from such economies would be passed on to consumers in the form of cheaper bottle prices. Two of ACI's major customers, Coca Cola Amatil and National Brewing, supported this argument claiming that benefits would be derived from reduced costs to users and from glass being kept competitive with cans in terms of cost.

The Commission's evaluation of this argument considered whether ACI would introduce changes in technology and consequent economies of scale. The Commission indicated that it expected that the technology would be introduced whether or not the acquisition went ahead. However, the Commission did accept that there would be a capital saving in ACI's acquisition of the Smorgon plant as compared to ACI building a new greenfields site. The Commission took a broad view of public benefit and accepted that this would represent a saving of resources from the point of view of the

community at large and thus did represent public rather than merely private benefit.

Preservation and enhancement of employment. ACI claimed that Smorgons had been decreasing employment at its site and that if the authorisation was denied, further job losses would occur. Job losses would also occur in associated industries such as recycling collection services.

A number of other submissions supported ACI including those of the Labor Council of NSW, Penrith City Council, The Australian Glassworkers' Union, and Carlton and United Breweries.

The Commission recognised that its decision would impact on employment, particularly in the Penrith region of NSW where the Smorgon plant was sited. However, while denial of authorisation would have definitely led to job losses in Penrith, it would have increased employment opportunities elsewhere when ACI established a new greenfields site. The Commission also took into account the fact that the Smorgon Penrith site might close before an ACI greenfields site was opened if authorisation was denied, thereby decreasing in the short run, job opportunities in glass making.

The Commission took the view that while there would probably be a decline in employment following the denial of authorisation, employment in the industry would also fall even if the authorisation was granted. Thus the crucial issue became whether the employment loss following the authorisation would be greater or less than the employment loss if the authorisation was refused.

An examination of the employment consequences of the authorisation could be broader than an examination of glass industry employment. For example, the proceeds of the asset sale might be used by Smorgon to invest in some other industry and expand employment there. However, while recognising the merit of such an argument, the Commission did not have the information to assess such highly speculative potential benefits.

The Commission concluded that authorisation of the acquisition would be likely to lead to a slightly smaller loss of jobs in the glass container industry. It also emphasised that authorisation would clearly benefit employment in the Penrith area and this benefit was given greater weight by the fact that alternative job opportunities were more limited in Penrith than in other areas such as the Sydney metropolitan area.

Skills and training. ACI argued that if authorisation was granted there would have to be a substantial increase in employee training at the Penrith site. The Commission accepted that there was public benefit from ACI's retraining of the Smorgon employees if authorisation was granted. It took the view that expenditure on training the existing workforce at the Smorgon site would be less than that required at a greenfields site, and that while this would be a cost saving to ACI, it was also a public benefit.

Effects on price. ACI argued that its glass containers competed with other forms of packaging, particularly cans. It claimed that the ability of beer and soft drink manufacturers to switch to alternative packaging was a major constraint on its pricing, and that ACI's major customers in the beverages industry had countervailing power given their substantial glass purchases.

Some of ACI's customers agreed with this view, but wine and food manufacturers and numerous smaller customers of ACI argued that their options were more limited as they did not have a range of non-glass substitutes available to them and importing bottles was non-economic. Further, a number of these customers argued that Smorgon's glass output was the only significant restraint on ACI's pricing.

The Commission's evaluation of these arguments concluded that the competitive restraint on ACI's pricing from other forms of packaging was limited and in the absence of other competitive restraints (such as imports) there would be certain glass products where ACI could set prices unconstrained by the threat of competition.

The Commission concluded that it was not satisfied that competitive pressures would force ACI to pass on the benefits from the scale and scope economies achieved from the acquisition to purchasers. However, it did acknowledge

that in the long term, ACI would need to continue to introduce new technology to increase productivity because of the threat of substitution from other packaging products, especially PET bottles and aluminium cans.

Conclusion. The Commission adopts an approach which attempts to weigh alternative scenarios in its authorisation determinations. In this instance for example, Smorgon indicated that it would eventually close its plant if the acquisition did not go ahead. Consequently any public benefit claimed by the parties to arise from the rationalisation of production capacity would occur regardless of whether ACI acquired Smorgon or Smorgon closed and ACI picked up Smorgon's market share. Therefore such benefits as claimed to occur from granting the authorisation should be given lesser weight as they would occur anyway.

In its assessment of employment issues the Commission took the view that public benefit should be considered from a broad perspective rather than considering only the regional consequences. Maintenance and/or enhancement of employment opportunities in one area should be balanced against loss of employment which might occur elsewhere as a consequence of the Commission's decision.

In this instance the Commission also identified short term public benefits which might arise from the authorisation. Specifically the Commission noted: avoidance of disruption of supply to small purchasers of glass, saving the community the costs of retraining glass workers whose skills would be otherwise lost, and saving to the community of some additional capital costs associated with a new greenfields site.

The Commission decided that there were some short term public benefits which would result from the acquisition, and these benefits, although small, outweighed the anti-competitive detriment. Thus a merger which led to a domestic monopoly was authorised as a consequence of a broad interpretation of public benefit.

Qantas/British Airways

The decision by the Commission in May 1995 to authorise a wide ranging agreement between Qantas (QF) and British Airways (BA) which included elements of price fixing was based on a detailed evaluation of how the public might benefit from anti-competitive arrangements otherwise in breach of competition policy and law.

QF and BA argued that competition on various routes between Australia, Asia and Europe was such that any agreement between QF and BA would not lead to a substantial lessening of competition. The Commission disagreed and found that BA was a major competitor to Qantas in terms of price and that the two airlines had the largest market shares on particular routes subject to the agreement. The Commission found that the arrangements between QF and BA would lessen competition.

Nevertheless, the Commission subsequently approved the arrangement and granted authorisation after a careful analysis of a wide range of public benefits alleged by the parties to flow from the agreement.

It was prepared to consider a very broad range of possible public benefits. It analysed these benefits under three broad categories: aviation industry benefits, consumer benefits and tourism industry benefits.

Aviation industry benefits. QF claimed that there were substantial benefits to the public from QF being part of a global alliance. It argued that it was a matter of national interest and public benefit that QF be able to participate in the global aviation industry rather than being a niche player. The Commonwealth supported the QF view and claimed that there were 'strong national interest reasons' to support authorisation.

The Commission agreed that there is public benefit in having a strong and efficient Australian international airline. It was also willing to accept the argument that linking QF to some form of global alliance would also benefit the public.

Consumer benefits. The QF submission also claimed a number of quite specific public benefits which would be available on authorisation. These benefits were lower information costs and increased ease of planning, better flight coordination at hub airports, lower probability of lost luggage, improved frequent flyer program to earn

points, and increased stopover variety. The Commission closely examined these claims and placed considerable emphasis on whether such benefits were attributable to the proposed agreement or would occur as normal competitive responses. Nevertheless, the Commission was willing to accept that the public might benefit as a consequence.

Tourism benefits. QF and BA argued that there would be substantial benefits to Australian tourism from the arrangements in that QF would access BA's European marketing and distribution and BA would promote Australia to a greater extent. The Commission was willing to accept that arrangements which led to increased tourism would be a significant public benefit. However, the Commission had to weigh such claimed benefits against QF's decision to decrease the number of European destinations it was flying to, thereby having a potentially negative effect on tourism.

The Commission's evaluation concluded that there were public benefits but the anti-competitive impact of the price fixing arrangements between two major competitors outweighed the benefits. However, the Commission was still willing to authorise the arrangements if the airlines could provide some mechanism to ensure that consumers were not going to be disadvantaged by higher prices which could be achieved as a result of the price fixing.

Authorisation was ultimately granted when QF and BA agreed that they would exercise price restraint such that certain popular fares used by consumers would not increase in real terms in the following three years.

The outcome of the Commission's processes was that the companies were able to rationalise certain operations which improved their efficiency and there were benefits to consumers of airline services in the form of increased quality and stable prices.

Benefits from ACCC's application of competition law

The implementation of competition law by the Commission is part of a wider micro-economic reform agenda. Some of the benefits to consumers from Commission interventions and application of the Trade Practices Act will be influenced by the extent to which reforms are undertaken in jurisdictions beyond the direct responsibility of the Commission. Reforms in the transport, energy and communications sectors will provide greater competition in these sectors which provide significant inputs into most Australian industry.

The benefits to consumers from the Commission's enforcement of competition law in areas not previously exposed to competition will be seen in a variety of ways. Price competition is the most obvious example. For example, since deregulation of domestic airfares, average airfares have fallen in real terms by more than 20 per cent.

Competition provides benefit in ways other than price. Competition forces firms to improve efficiency. Even in those situations where prices do not fall, consumers are likely to benefit from the cost savings generated by the more efficient operation of businesses. Consumer preference for variety and added value provide opportunities for competition on non-price product dimensions. Such non-price competition might relate to expenditures on R&D and the rate of introduction of new products as well as sales promotion and advertising.

Benefits of authorisation

The Commission has taken a broad approach to the concept of public benefit such that it assesses efficiency from the perspective of society as a whole. In its authorisations of applications from a number of professional bodies, the Commission has accepted numerous 'non economic' public benefits that improve consumer welfare. While such benefits may not be reflected in lower consumer prices, there is still an increase in market efficiency.

Authorisation has been granted to a range of practices which have particularly benefited small business. The Commission has given authorisation to permit a number of trade associations to prepare and distribute schedules to assist members in calculating prices. It has allowed the Australian Road Transport Federation to negotiate contract rates and conditions with the Transport Workers Union. The authorisation procedures have allowed a number of joint ventures between competitors which resulted in production efficiencies and cost savings from economies of scale.

Authorisation has been given to cooperative buying schemes in the wool industry and the pharmacy industry. The pharmacy authorisation was particularly significant for small business, authorising members of the Pharmacy Guild of Australia to participate in a joint buying and advertising arrangement for pharmacy 'specials'.

The Commission has been strongly supportive of self-regulation schemes which promote competition and efficiency. Authorisation of codes of conduct has been given to a wide range of groups including furniture removers, mining consultants, and transmission rebuilders. Franchising, airlines' computer reservations systems, and proprietary medicines are further examples of industry based codes which have been authorised.

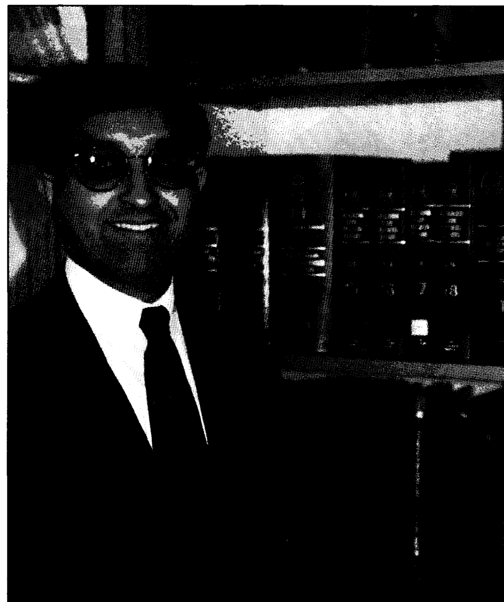
The authorisation processes of the Commission have recognised that primary producers are often in a special position. Authorisation was given to an agreement between the producers of oyster spats to impose a levy for research purposes and refuse to supply farmers who did not pay the levy. Authorisation was given to an industry committee to set annual recommended minimum prices for certain apples and pears sold for processing. Adelaide milk producers were granted authorisation in relation to a milk equalisation scheme.

The common philosophy behind this variety of circumstance is a recognition that some of the objectives of Australian society may not always be met by the operation of competitive markets.

Competition will invariably lead to winners and losers. Those firms unable or unwilling to respond to competitive pressures will not survive. But consumers will always be the beneficiaries of such outcomes. The Commission's processes are directed towards getting the 'best' outcomes for Australian consumers. Authorisation allows the broadest possible interpretation of what is best.

Unconscionable conduct — new boundaries for commercial dealings

Legislative amendments to the Trade Practices Act have redrawn the boundaries for what constitutes legally acceptable commercial conduct in Australia — particularly in commercial dealings between big business and small business. They have also introduced, amongst other things, a new Part IVB providing for industry codes of conduct to be prescribed under the Act and providing that a failure to comply with such a prescribed code is a breach. The following is an edited summary of a paper and presentation delivered by ACCC Commissioner Sitesh Bhojani on 4 November 1998 as part of a cooperative venture between the Commission and the Law Society of Western Australia to discuss implications of the new law.



ACCC Commissioner Sitesh Bhojani

In 1993 the Commonwealth Government introduced amendments to the Trade Practices Act covering the small business sector. Section 51AA was added. It prohibits a corporation engaging in 'conduct that is unconscionable within the meaning of the unwritten law, from time to time, of the States and Territories'.