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# Guidance and information

## Trade Practices Act submission

The Commission presented its submission to the Trade Practices Review on 2 July 2002. Key recommendations are:

- introducing criminal sanctions, including jail for up to seven years, for the most serious breaches of the competition provisions of the Act
- improving the effectiveness of the misuse of market power provisions of the Act by incorporating an 'effects test' to supplement the existing purpose test
- introducing a notification process for small business collective bargaining, modelled on the current notification process for exclusive dealing
- making no change to the already effective merger provisions and processes for merger review.

### Criminal sanctions

The Commission proposes that, at the discretion of the court, individual executives and employees of Australia's largest businesses would face jail sentences of up to seven years if the courts found them to have been personally involved in anti-competitive behaviour such as collusion. As well, the maximum penalties would be lifted from the current \$10 million for a corporation to include penalties of up to three times the value of any commercial gain from collusion or, if it cannot be estimated, 10 per cent of the corporation's turnover.

It suggests that only large companies that satisfied two of the following three criteria should be liable for criminal penalties:

- gross revenue in excess of \$100 million
- gross asset value in excess of \$30 million
- more than 100 employees.

Commission Chairman, Professor Allan Fels, said:

The fear of possible jail sentences is a far more effective deterrent for big business than fines. An enforcement regime based purely on civil remedies is inappropriate having regard to the nature and effects of hard-core collusion.

### Misuse of market power (s. 46)

The Commission proposes to bring Australia's anti-monopoly laws into line with North America and Europe by making it unlawful for powerful firms to take advantage of their power illegitimately if the effect is to damage competition.

### Collective bargaining

The Commission sees a need to address small business concerns about collective bargaining and related concerns with the authorisation process. Its proposal is for a notification process that would be faster, less expensive and simpler than the current method. It would be restricted to small business dealing with large businesses if it can be established such businesses have substantial market power, similar to the notification process for exclusive dealing.

### Mergers

The Commission does not see the need to significantly change the merger law or the informal clearance process for merger assessment. Merger statistics show that while the number of mergers examined has been steadily rising, the number initially opposed is small—averaging between 4 and 5 per cent. Of these, many have been resolved through the use of court enforceable undertakings. In effect, fewer than 2 per cent of mergers have been opposed between 1999–2000 and 2000–01.

### Procedures

The ACCC submission provides a detailed outline of its procedures, decision-making processes and areas of accountability and argues that the existing legal

framework and processes are appropriately balanced and that it conducts its activities in an open, fair and accountable manner.

The full submission is available from the ACCC website at <<http://www.accc.gov.au>>.

## ACCC commissioners

### Retirement of Commissioner Rod Shogren

Rod Shogren retired from the Commission on 26 April 2002 after five years as a Commissioner. He initially served as the nominated Commissioner for Telecommunications. He later also became the nominated Commissioner for Energy having responsibilities for both gas and electricity and sometimes served as Acting Chairman.

Commission Chairman, Professor Allan Fels, commented that:

Rod made an outstanding contribution to the Commission. He was responsible for the introduction and consolidation of the telecommunications regulatory system that was introduced on 1 July 1997. When Allan Asher [former Deputy Chairman] departed he then took over energy and as with telecommunications performed his tasks with distinction.

The Commission at the time was probably the only Commission in the world which combined competition law and public utilities regulation. It also was unusual in having an explicit access law. Getting these areas off the ground and then having them operate soundly and sensibly was an important achievement.

Rod's contributions are widely recognised both inside and outside the Commission. Rod also made a substantial contribution as a Commissioner taking an interest in nearly every activity of the Commission as witnessed by his attendance and contributions at the enforcement committee meetings and his interest in section 46 cases.

### Commissioner David Cousins leaving ACCC

Commissioner David Cousins left the Commission on 14 June 2002 to take up the position of Director of Consumer and Business Affairs and Deputy Secretary, Department of Justice in Victoria.

On announcing Dr Cousins' appointment Professor Allan Fels, Commission Chairman, commented:

I would like to congratulate him on his appointment although I am sorry that this means he will not seek renewal as a Commissioner.

David has made a great contribution to our work including the all important work on the GST.

The position David will occupy is an important one. It will obviously somewhat reduce the travel burden and intrusion on his family life. I congratulate him on his appointment.

### Comments on retiring Commissioners by the Treasurer, the Hon. Peter Costello (excerpted from his press release of 12 June 2002)

I would also like to express the Government's appreciation to the two Commissioners whose terms are ending. Mr Rod Shogren finished his term as a Commissioner on 29 April 2002, while Dr David Cousins' term is set to finish on 14 June 2002. Neither Commissioner has sought reappointment.

Both Mr Shogren and Dr Cousins have made important contributions to the work of the ACCC. Mr Shogren was appointed as a full-time member of the ACCC in May 1997. Since that time Mr Shogren has contributed to a number of initiatives at the ACCC, including playing an important role in relation to regulatory arrangements for competition and economic regulation of telecommunications.

Dr Cousins served with distinction the ACCC, its predecessor the Trade Practices Commission and the Prices Surveillance Authority over a thirteen year period. In recent times Dr Cousins has played a significant role in the ACCC's transitional pricing oversight as Commissioner with special responsibility for the GST.

I wish to take this opportunity to congratulate Dr Cousins and Mr Shogren on their exemplary service, and wish them well in their chosen future undertakings.

### New Commissioner

The Treasurer has announced that Ms Jennifer McNeill has been appointed as a Commissioner of the ACCC for a term of five years. Ms McNeill was a national partner in the firm of Blake Dawson Waldron until this appointment. Ms McNeill's practice has focused on litigation and advice work for Commonwealth departments, statutory authorities and industry associations. She has worked on various trade practices matters primarily consumer protection ones.

Ms McNeill will start with the Commission on 22 July 2002. While details of her role as a Commissioner are yet to be finalised, she will be primarily contributing to the Commission's enforcement work.

## Regulators cooperate to improve privacy compliance

On 12 March 2002 Commission Chairman, Professor Allan Fels, and the Federal Privacy Commissioner, Mr Malcolm Crompton, signed a memorandum of understanding to facilitate cooperation and coordination between the Commission and the Office of the Federal Privacy Commissioner.

The MOU provides a framework for cooperation when the responsibilities of the FPC and the Commission overlap. This will allow them to help each other with enforcement activities, investigations and litigation, training and education. Changes in 2001 to the *Privacy Act 1998* require much of the private sector to uphold uniform standards for the protection of personal information. The standards interact with some of the existing fair trading rules.

Commission Chairman, Professor Allan Fels, commented that:

Our organisations will work together to ensure that privacy statements issued by companies to comply with the Privacy Act are not misleading or deceptive.

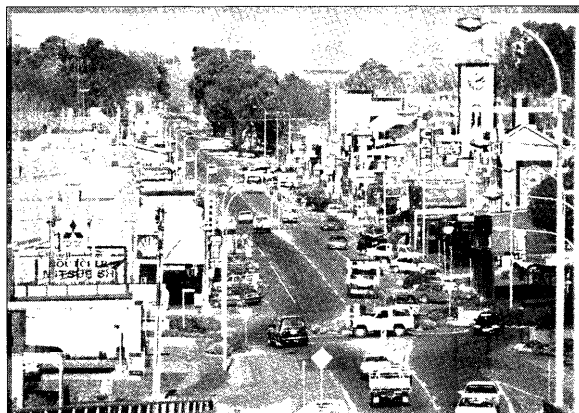
We need to work together, to share knowledge and resources, particularly in relation to the developing areas of e-commerce and Internet issues. As part of the process, we may work together with the ACCC's Competing Fairly Forum. Later this year we may also consider a joint Internet sweep day targeting on-line compliance.

Federal Privacy Commissioner, Malcolm Crompton said:

We are very conscious of the need for consistency of approach in any potential overlapping areas of responsibility.

The compliance framework has to make sense for businesses and consumers and it must be efficient. By working closely with the ACCC, we expect to get privacy information out to more consumers and to get a clearer insight about privacy practices and privacy concerns.

The memorandum of understanding is available at <[http://www.privacy.gov.au/publications/mou03\\_02.pdf](http://www.privacy.gov.au/publications/mou03_02.pdf)>.



## Spotlight on regional Australia

The national launch of the Commission's rural and regional program took place on 19 March 2002 in Bendigo. The program was launched by Commission Chairman, Professor Allan Fels, and Minister for Regional Services, Territories and Local Government, Mr Wilson Tuckey. They were joined by representatives from local government, business and consumer groups as well as other interested parties.

The Commission's Rural and Regional Program is addressing the concerns of business people and consumers outside major metropolitan centres. Small businesses in rural and regional Australia are especially vulnerable to the problems caused by excessive market concentration, lack of information or misuse of bargaining power.

The program will help rural industries understand their rights and obligations under the Trade Practices Act.

Regional outreach officers have been appointed in Commission offices across Australia. They are visiting regional communities and building the regional network. The network is an important part of the program and includes state government agencies, local government, area consultative committees, business enterprise centres and chambers of commerce as well as other relevant bodies. These organisations use their contacts in business, the community and government to promote understanding of the Act and the role of the Commission. Regional network supporters will also provide businesses with better access to Commission resources such as guides, newsletters and journals.

The supporters will play a crucial role in ensuring the continued success of the Competing Fairly Forums, another Commission initiative for rural and regional Australia.

The most recent forum on 21 May 2002 was on 'prevention is better than cure' and how to avoid problems and resolve disputes (this will be reported in *ACCC Journal* no. 40).

The national launch of the program has been followed by some state launches. Commissioner, Mr John Martin, launched the NSW program in Tamworth on 23 April 2002.

In launching the Northern Territory rural and regional program on 26 April 2002 in Darwin with the Hon. Paul Henderson MLA, Minister for Business Industry and Resource Development, Commissioner David Cousins commented:

The ACCC has recently taken a number of important cases to protect small businesses in rural areas. Two of these in the Northern Territory have acted on allegations of unconscionable conduct and misleading and deceptive conduct. The rural and regional program will help small businesses identify and deal with problems before they get out of hand.

Other state launches will take place over the coming months.

For more information about the rural and regional program call the ACCC Infocentre on 1300 302 502 or visit the website <<http://www.accc.gov.au>>.

## Discussion paper on interconnection

On 4 April 2002 the Commission issued a discussion paper aimed at promoting awareness of issues surrounding interconnection in the IT and telecommunications sector.

*The Future of Interconnection Arrangements in Australian Telecommunications Networks* was written for the Commission by RMIT's Centre for International Research on Communication and Information Technologies (CIRCIT).

Commission Chairman, Professor Allan Fels, noted that:

... the importance of [interconnection arrangements] has markedly increased as different types of networks are required to interlink so as to provide seamless telecommunications services to consumers. Such interlinking is required between traditional networks, 'next generation' networks using broadband technology, and those networks using the Internet protocol for service delivery. Interconnection of these different types of networks is important in providing mobile, fixed and data services into the future.

The CIRCIT paper canvasses the issues and factors relevant to the interconnection of the various fixed, mobile, data, 'next generation' and Internet protocol networks with a view to promoting discussion about what needs to be resolved to ensure that Australia has an efficient, effective and dynamic information and communications service.

The paper was the subject of an industry seminar by the Australian Communications Industry Forum in May 2002.

The discussion paper is available at <<http://www.accc.gov.au/telco/fs-telecom.htm>> under 'what's new in telecommunications'.

## Product safety and other issues in e-commerce

In late 2001 the Commission received complaints about NSW-based bicycle importer and Internet retailer Easybuy.com.au Pty Ltd, which trades as Bikes Direct. It was claimed that the bicycles sold online were substantially cheaper than those sold in traditional outlets (when the bicycles being compared were not of a similar standard).

After the Commission investigated the reports it became concerned about the absence of information on the website on the bicycles' level of compliance with the mandatory consumer product safety. Bikes Direct subsequently tested their products and found some did not comply with the standard. Although none of the faults identified posed a risk of significant injury, a recall of the bikes was considered necessary.

It is the Commission's firm belief that 'prevention is better than cure'. This is especially so for product safety. Product recalls are costly for businesses and damage their reputation. Retailers should therefore ensure that the products they supply, whether through a shop or over the Internet, comply with all relevant standards in the first instance.

In addition to the product safety matter, investigations also found that the site's terms and conditions were of concern.

Some provisions of the Trade Practices Act imply various conditions and warranties into consumer contracts. These are designed to protect consumers involved in transactions. After investigating the website, the Commission identified terms and conditions that appeared to contract out the conditions and warranties enshrined in the Act. As such, these contract terms were void under s. 68 of

the Act. Therefore, they were also in breach of s. 53(g) that deals with false or misleading representations about, for example, warranties and guarantees.

It is essential for all retailers, especially those online, to be aware that they cannot disclaim or contract out the implied warranties of the Act. To do so is likely to breach the Act and may attract hefty penalties.

Bikes Direct has subsequently signed an enforceable undertaking with the Commission on product safety and the bicycle recall. This was a landmark action for the Commission as it encompassed both product safety issues and e-commerce.

The Commission makes no distinction between online and offline retailers when it comes to enforcing product safety and other aspects of the law. E-commerce is a new and dynamic form of doing business. Nevertheless, retailers must always remember that they have a duty to trade in a lawful manner and ensure that the products they sell are safe.