

ACCC hopes the law is strengthened

The ACCC recently presented its submission on the review of the competition provisions of the Trade Practices Act.

Its submission supports the introduction of jail sentences for hard-core, high-level collusion—an issue it has already flagged with the government.

In the United States, Canada and Britain, for example, collusive behaviour carries a very great risk of a jail sentence for the directors who go along with the cartel.

'The review provides a major opportunity for Australian law to come into line with best practices internationally,' the ACCC Chairman, Professor Allan Fels, said.

'More and more, Australian companies are looking to international trade for growth; it's only right that they work under similar law in their home country as that of overseas.'

Professor Fels pointed out that the Act contains compromises that were made with big business in an earlier era when governments were feeling their way with competition policy and when the political muscle of big business was greater.

He said the Act's limitations particularly affect consumers, including small business.

The ACCC will be looking to the review for changes that will assist this important area of the economy.'

Currently, the court can only award financial penalties against businesses for anti-competitive behaviour such as cartels and collusion.

Recently, in a case involving suppliers of power transformers and distribution transformers in Australia, the court ordered penalties of nearly \$15 million. The court also imposed substantial penalties against the managing directors of each of the corporations for their awareness of, and participation in, the covert and illegal conduct.

'Like in many covert price-fixing conspiracies, these companies and their senior executives from time to time abused the opportunity to meet with their competitors before or after industry association meetings', Professor Fels said.

'Secret meetings to rig the outcomes of multi-million dollar contracts took place in hotel rooms, airport lounges and even private residences in various parts of Australia.'

The customers affected by these illegal arrangements included many of the largest electricity transmission and distribution utilities across Australia.

Although these conspiracies were directed at the tender processes for power and distribution transformers, it is the Australian consumer who has ultimately paid the price.

The penalties ordered by the court against the companies' managing directors are equivalent to the highest individual penalties imposed by the court in the history of trade practices proceedings in Australia. In fact, they would have been higher but for the fact that the companies and their management cooperated substantially with the ACCC during its investigations.

But clearly the threat of monetary penalties does little to deter certain anti-competitive behaviour. The behaviour in the transformer cases from 1993–99 seems to have been completely unaffected by the publicity about penalties of \$21 million on building companies around 1995, and of \$15 million on freight express companies around 1993.

The ACCC has also submitted to the Trade Practices Act review that the law should be strengthened to better protect smaller companies against their bigger rivals misusing their market power.

The ACCC believes this can be done best through the introduction of an 'effect' test—that is, whether the misuse of market power had the effect of harming competition. This would complement the current test that ascertains whether the company concerned had an anti-competitive 'purpose'. Safeguards could be written into the Act to ensure genuine, pro-competitive behaviour is not affected by such a change.