

## 2. fair trading for business

In Australia credit can be attributed to competition policy and law in generating a substantial boost to both productivity and household incomes.



### prevent price fixing and market sharing

Businesses must not lessen competition by agreeing to share markets, restrict the supply of goods or actual prices. Suppliers, manufacturers and wholesalers cannot specify a minimum price below which goods and services cannot be resold.

- ▶ Warner and Universal Music withdrawing music CDs from parallel importers—penalties set at more than \$1 million
  - ▶ vitamin companies agreeing to put up costs—fined \$26 million
- ▶ electrical transformer cartel rigging contracts—penalties of \$16 million
- ▶ Colgate toothpaste, Palmolive detergent and Ajax cleaner prices restricted at cut price outlets—penalties set at \$500 000
- ▶ Pioneer, CSR Concrete—penalties exceeding \$20 million

[www.accc.gov.au/fs\\_compliance.html](http://www.accc.gov.au/fs_compliance.html)

### restrict the misuse of market power

An organisation cannot use a substantial degree of market power to eliminate or damage a competitor, prevent entry into the market or deter competitive conduct. The acquisition or possession of substantial market power is not legally prohibited.

- ▶ Sony PlayStation restricted games
- ▶ Commonwealth Bank, Westpac, Australian and New Zealand Banking Group cash processing
- ▶ Westfield shopping centre's initial lease negotiations
- ▶ Maritime Union of Australia harassment and secondary boycotts—penalties and costs totalling \$210 000
- ▶ TNT, Ansett Transport, Mayne Nickless freight transport—penalties exceeding \$16 million

[www.accc.gov.au/fs\\_compliance.html](http://www.accc.gov.au/fs_compliance.html)

### protect the interests of small business

Bigger businesses cannot use their power to take unfair advantage of smaller or less powerful business. This is called unconscionable conduct. The ACCC small business program provides specialised information and guidance for small business about their rights and obligations in areas such as franchising and helps them identify unconscionable conduct. The Best and Fairest compliance manual was published to assist small business.

- ▶ Cheap as Chips franchise—\$82 000 paid in compensation to franchisees
- ▶ Simply No-Knead judged as conducting unreasonable and unfair behaviour against five franchisees

[www.accc.gov.au/smallbus/smallbus.htm](http://www.accc.gov.au/smallbus/smallbus.htm)

'We stress for small business their rights in protecting themselves against oppressive competitive behaviour by big business.'

Allan Fels

## assess mergers, asset sales, joint ventures

Businesses cannot accumulate market power that could lead to anti-competitive conduct, but mergers are the inevitable result of a properly functioning market economy. The ACCC opposes only about 5 per cent of proposed mergers.

- ▶ BHP and Billiton
  - ▶ Woolworths and Franklins
  - ▶ Compaq and Hewlett Packard
  - ▶ Foxtel and Optus pay television
  - ▶ Suncorp Metway and GIO
  - ▶ Gillette and Wilkinson
  - ▶ Australian Pharmaceutical Industries and Sigma\*
- [www.accc.gov.au/merger/mergbac3.htm](http://www.accc.gov.au/merger/mergbac3.htm)

## allow anti-competitive conduct in the public interest

Competition may not always be in the public interest. The law allows the ACCC to authorise anti-competitive conduct if it is satisfied that the public benefit outweighs any detriment. This authorisation protects people or businesses from legal action for breaches of many of the competition provisions of the Trade Practices Act.

- ▶ Royal Australasian College of Surgeons surgical training program and role in determining whether overseas-trained surgeons may practise in Australia
  - ▶ banks agreement to remove fees they charge each other as part of the EFTPOS system
- [www.accc.gov.au/adjudication/newadjud1.htm](http://www.accc.gov.au/adjudication/newadjud1.htm)

## ensure compliance by the professions

The Trade Practices Act now covers anti-competitive actions by professionals such as doctors, lawyers and accountants.

- ▶ price fixing and primary boycott breaches by Australian Medical Association (Western Australia branch) and two officers—penalties and costs of \$285 000
  - ▶ Rockhampton obstetricians' boycott of 'no gap' billing \$97 000 repaid to patients
  - ▶ Berwick Springs doctor attempts to induce boycott of bulk billing and after-hours medical services at medical centre
- [www.accc.gov.au/speeches/fs-speeches.htm](http://www.accc.gov.au/speeches/fs-speeches.htm)

## improve compliance through education and information

Material produced to reduce the need for enforcement includes sector guides for small business, franchising, health, rural producers, travel and tourism, telecommunications standards as well as guides on exports, access, country of origin, advertising and selling, warranties and refunds.

[www.accc.gov.au/pubs/frontpage.htm](http://www.accc.gov.au/pubs/frontpage.htm)

\* merger opposed

## assess certification trade marks

Certification trade marks certify that goods or services are of a particular standard; for example that a good is of a particular quality, made in a particular place or of a particular material. IP Australia (intellectual property) first assesses certification trade marks to ensure that they do not conflict with existing trade marks. If IP Australia approves an application, the ACCC then assesses whether the certification trade mark might restrict competition or deceive consumers.

[www.accc.gov.au/adjudication/certification/certification.html](http://www.accc.gov.au/adjudication/certification/certification.html)

## maintain information registers

Registers available to business include: anti-competitive conduct, prices surveillance, trade marks, undertakings, authorisations, notifications, mergers and acquisitions, investigations, access to services, consumer protection, product safety, telecommunications.

[www.accc.gov.au/pubreg/pubreg/htm](http://www.accc.gov.au/pubreg/pubreg/htm)

## HOW WE DO IT

### prevent price fixing and market sharing

#### vitamins

The ACCC's investigation into the cartel arrangements of Roche Vitamins Australia, BASF Australia and Aventis Animal Nutrition vitamin manufacturers followed the announcement by the US Department of Justice of similar proceedings taking place in the United States. Under the US leniency policy no action was taken against Aventis (then known as Rhone-Poulenc Animal Nutrition) after the company admitted involvement in the cartel. The other two companies were heavily fined for their part in sharing the market and fixing the prices for the supply of animal vitamins A and E.

In Australia, Aventis approached the ACCC with a similar admission of involvement. Collusion of the companies had involved meetings and telephone conversations during which agreements were reached on prices for the vitamins. No other Australian vitamin company was involved.

The three companies, who shared 90 per cent of the market, cooperated with the ACCC's investigation over a period of 18 months

which led to court proceedings before Justice Lindgren in the Federal Court. The cooperation of the companies avoided a long and costly trial.

The ACCC and the companies reached agreement on penalties to be recommended to the court of \$15 million for Roche, \$7.5 million for BASF, and \$3.5 million for Aventis. Both the \$15 million penalty against Roche and the combined \$26 million penalties are the highest ever in the history of trade practices proceedings in Australia.

Since the successful conclusion of this case the ACCC pursued its investigation of the global price fixing of vitamin C. The ACCC has obtained leave of the Federal Court to serve proceedings on F Hoffman–La Roche, BASF AG, and Roche Hong Kong located in Switzerland, Germany and Hong Kong.

'One of the things big business hates and fears most is publicity it doesn't control. All large companies spend millions each year ensuring that everything said and written about them is controlled and nice.'

Alan Kohler, Australian Financial Review

**electrical transformers**

The ACCC received an email from an anonymous source dubbed the 'dibber-dobber' who, when contacted, named another person working in the electric transformer industry willing to give full details of cartel arrangements operating within the industry. Confronted with insider information, the five companies involved, ABB Power Transformers, Schneider Electric (Australia), Wilson Transformer Company, Alstom Australia and AW Tyree Transformers, agreed to cooperate with the ACCC and provided full reports of their involvement.

Secret meetings had apparently taken place between senior executives in hotel rooms, airport lounges and even one of their homes to rig the outcomes of multi-million dollar contracts. Allegedly they colluded in competing for tenders, exchanging detailed pricing information and agreeing to fix prices and share customers. The companies agreed which would submit the lowest bid for particular tenders.

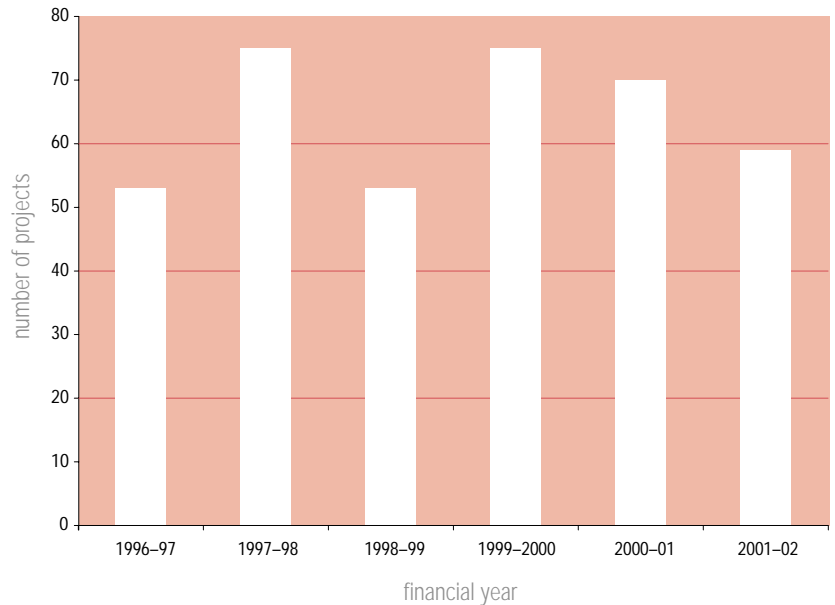
The case involved both power and distribution transformers. The annual value of these transformers is about \$160 million. The unlawful conduct by the companies directly disadvantaged efficient small businesses, producers, businesses and eventually families in regional areas.

After lengthy negotiations with the ACCC one company accepted liability and agreed the penalty to be put to the court. All the others except ABB agreed liability but did not agree penalties.

Justice Finkelstein heard the case in the Federal Court in Melbourne. The judge declared the companies' actions unlawful and awarded penalties totalling about \$20 million and penalties of up to \$150 000 against individuals for their participation. The court indicated that the penalties would have been much higher were it not for the cooperation of the companies during the ACCC investigation. The case with ABB is still proceeding.

The penalties ordered by the court for the companies' managing directors are the highest individual penalties imposed by the court in the history of trade practices proceedings in Australia.

**investigations into cartels**



'There is a great danger of allowing too great an emphasis to be placed on the respectability of the offender and insufficient attention being given to the character of the offence. It is easy to forget that these individuals have a clear option whether or not to engage in unlawful activity, and have made the choice to do so.'

Justice Finkelstein

**THE LAW**

**parts of the Trade Practices Act relevant to the rights and obligations of business**

IV anti-competitive agreements, price fixing, boycotts, misuse of market power, exclusive dealing, restriction of trade, resale price maintenance that specifies a minimum price below which goods may not be resold, mergers or acquisitions that substantially lessen competition, exemptions, penalties and remedies

IVA taking unfair advantage in commercial and consumer transactions

IVB industry codes of practice

VII authorisation and notification, granting of immunity

**anti-competitive conduct is illegal for all businesses in Australia**

**enforcement**

Restrictive trade practices are not dealt with by the states but only by the ACCC. The ACCC supports industry self regulation, codes of conduct and standards. It also conducts merger and acquisition analysis. If mediation is unsuccessful then to enforce the restrictive trade practices provisions of the Trade Practices Act the ACCC can instigate:

- ▶ injunction orders
- ▶ enforceable undertakings
- ▶ divesting shares or assets of merged businesses
- ▶ damages
- ▶ variation to contracts
- ▶ corrective advertising
- ▶ community service orders

Breaches of anti-competitive conduct can be penalised by fines of up to \$10 million for companies and \$500 000 for individuals.

'Australian companies are all talk and little action when it comes to ensuring compliance with the laws regulating how they treat their customers, employees and competitors.'

Australian Financial Review 28 October 2002 commenting on Ernst and Young national compliance survey

## WHAT TO READ

**ACCC publications for business****the law**

- ▶ Trade Practices Act for: primary producers, retailers, service industries, real estate industry
- ▶ Small business and the Trade Practices Act: a practical guide for small business
- ▶ The Trade Practices Act and the ACCC—a small business overview
- ▶ Advertising, selling and the Trade Practices Act
- ▶ Country of origin claims and the Trade Practices Act
- ▶ Textile, clothing and footwear industries—country of origin guides
- ▶ Fair treatment: guide to the Trade Practices Act for the advertising or promotion of medical and health services
- ▶ Cooperation policy for enforcement matters
- ▶ Intervention in private proceedings
- ▶ ICPEN brochure—protecting consumers worldwide
- ▶ Straight talking—advertising, selling and the Trade Practices Act. (video)

**misleading, deceptive, unconscionable conduct**

- ▶ Competing fairly forum video and brochures
- ▶ Fair game or fair go—unconscionable conduct in business
- ▶ Guaranteed a loan for someone? Lost your house?
- ▶ Are you happy with your retail tenancy lease?
- ▶ Do you supply goods or services to major retail chains?

**small business**

- ▶ Storecharter: a service charter for stores serving remote and Indigenous communities
- ▶ Best and fairest: compliance training package
- ▶ Refusal to deal
- ▶ ACCC briefing
- ▶ News for business—unconscionable conduct

**franchising**

- ▶ The franchisee's guide to the franchising code of conduct
- ▶ Franchising code of conduct compliance manual
- ▶ Bought a franchise without enough information?