



Sitesh Bhojani, ACCC Commissioner since 1995, oversees activities in the health sector. Here he answers some of the most frequently asked questions about the ACCC and the health sector:

## Q & A with Sitesh Bhojani, ACCC Commissioner

### Q. What is the role of the ACCC in the health sector?

A. For most sectors, including health, the ACCC's major role is to ensure compliance by businesses with the requirements of the Trade Practices Act. In some other sectors, for example telecommunications, it also has a significant regulatory role.

### Q. How does competition between businesses help consumers get better quality products or lower prices?

A. Customer choice is a powerful incentive for the suppliers of any goods or services to keep their quality high and prices low. By ignoring what customers want or by not keeping prices competitive a business will lose its competitive place in the marketplace.

### Q. Is it true you have said the ACCC will vigorously enforce compliance with Australia's competition and consumer protection laws?

A. Yes, we will pursue compliance without fear or favour.

### Q. What's the benefit of these laws being vigorously enforced?

A. Commonwealth, state and territory parliaments have passed these laws to prohibit businesses from engaging in specified anti-competitive or unfair trading practices—in the public interest and to protect consumers. While some businesses may have modified their behaviour on learning about their legal obligations others may not.

Vigorous enforcement encourages businesses to respond to what consumers want rather than doing cosy deals among themselves for their own benefit, or unlawfully using their market power—which is all ultimately to the detriment of consumers. In short, it helps clarify how the law applies; stops, prevents and deters unlawful conduct and/or provides redress for victims of the unlawful conduct.

Let me give you two examples. The breaking up of price fixing cartels gets rid of artificial arrangements between competitors to increase or maintain prices. And legal action for false, misleading or deceptive conduct can provide benefits ranging from protecting the public from consumer fraud in trade or commerce to ensuring there is an acceptable standard for commercial conduct in the public interest.

### Q. When the ACCC takes legal action what are its objectives?

A. Broadly they can be summarised as follows:

- to establish that there has been unlawful conduct (including clarifying the law or establishing precedent)
- to stop the unlawful conduct
- to seek compensation/restitution for victims of the conduct
- to undo the effects of the contravention

- to prevent/deter future contraventions (repetition by the same person or first contravention by someone else)
- to punish the wrongdoer.

The details are dealt with case by case.

### Q. How else does the ACCC try to achieve compliance with Australia's competition and consumer protection laws?

A. By major educational efforts to help people understand their rights and obligations. For example, we issue guidelines and other publications for specific sectors, and we give presentations at conferences, seminars or association meetings. Other examples include the competing fairly forums that are broadcast to hundreds of regional and rural communities, and our small business, and rural/regional outreach programs.

### Q. In your view how can consumers of health and medical services best be protected?

A. I think there are three elements. First, when consumers are fully informed. Second, when medical practitioners and other healthcare professionals maintain professional and ethical standards (that is, they strive for excellence in their professional and personal dealings). Third, when effective laws exist to provide quick and effective remedies for consumers who become victims of those occasional instances when professionals breach their legal obligations.

### Q. Isn't the application of competition and consumer protection laws inconsistent with the ethical obligations professionals have towards their clients or patients?

A. In my view ethical obligations are not about prescriptive rules and regulation nor are they about

complying with the law (that is, legal obligations). Ethics is really about achieving something much higher than obeying the law—it is about pursuing excellence. As such I don't believe there is any conflict between a professional's ethical obligations and compliance with the competition and consumer protection laws (that is, a professional's legal obligations).

**Q. What about the fiduciary obligations professionals have towards their clients or patients?**

A. In Australia there are certain relationships that the law recognises as fiduciary relationships. These are relationships of trustee and beneficiary, agent and principal, solicitor and client, employee and employer, director and company, and partners. However, it cannot properly be said that a relationship between any professional and a client is a 'fiduciary relationship'.

There is probably nothing about the fiduciary relationship between a professional and a patient or client that requires a professional to engage in price fixing with competitors; or to engage in a misuse of market power; or to engage in exclusive dealing, resale price maintenance or other conduct prohibited by competition laws.

In the Australian context there is also a further response when something that is anti-competitive is really for the patient's or client's benefit—that is, for the public's benefit as distinct from being a private benefit for the doctors/lawyers etc. The Parliament has set up a mechanism that allows that type of conduct to continue with immunity from court action, namely, through authorisation. That is, if professionals can demonstrate that the public benefit of that conduct outweighs its anti-competitive detriment they can obtain immunity from court action for that conduct.

**Q. Are there any exceptions?**

A. The exception is misuse of market power.

**Q. What is 'authorisation'?**

A. The decision to grant or not grant authorisation is a balancing exercise between public benefits and anti-competitive detriment.

Authorisation is a public process. The Trade Practices Act requires submissions to be made publicly available. They are placed on a public register located in Canberra and may be also placed on the ACCC's website. The ACCC has to issue both draft and final decisions in writing.

**Q. What public benefits does the ACCC recognise for the purposes of the authorisation process?**

A. Public benefit is not defined in the Act, but the ACCC considers that the concept is capable of wide interpretation. It supports the Trade Practices Tribunal's view that public benefit may constitute 'anything of value to the community generally, any contribution to the aims pursued by the society'.

Consistent with this broad interpretation, over the years the ACCC has recognised benefits which can be characterised as non-economic such as safety, public health and ethical obligations.

**Q. Does the ACCC have the final say on what is public benefit for authorisations?**

A. No. The ACCC's decisions can be appealed to the Australian Competition Tribunal which is independent to the ACCC and the government. It is headed by a Federal Court judge.

**Q. What is the ACCC's role regarding mergers of businesses in the health sector?**

A. It's to ensure that the structure of various markets in the health sector remains competitive. That is, we don't end up with such a concentration of firms through mergers that there is a substantial lessening of competition.

**Q. Do you think advertising of professional services should be allowed?**

A. In general, yes I do. For two broad reasons. First, advertising that is honest and accurate and doesn't leave out material relevant to the message can be very useful in helping consumers to understand the services to be provided or the professionals who provide these services. The advertisements could also provoke thoughts on issues for

consumers which they can follow up and discuss with practitioners during the consultations.

Secondly, I think it's important to recognise that some people in the community may find it useful to receive and understand information presented visually, or in small bits, or outside consultations. Provided the information is honest and accurate and helps consumers to question practitioners during consultations, I am in favour of allowing professionals wider opportunities to communicate directly with consumers through advertising.

**Q. Advertising isn't going to change the fact that professional practitioners will always know more than consumers about the services to be provided, is it?**

A. Professionals will always know more about the service to be provided—just as telecommunications experts will always know more than consumers about telecommunication services or motor mechanics will know more about repairing cars.

The point of addressing the information imbalance is not to try to make the consumer a professional. The aim is to ensure they have sufficient knowledge to help them understand their professional or health or legal or other problem; the services to be provided; and to have confidence in their adviser. That is, to reduce the extent of paternalism in the supply of services and to minimise the potential for consumers to make wrong choices which risk their financial, psychological and physical welfare. Consumers are entitled to make well-informed decisions.

